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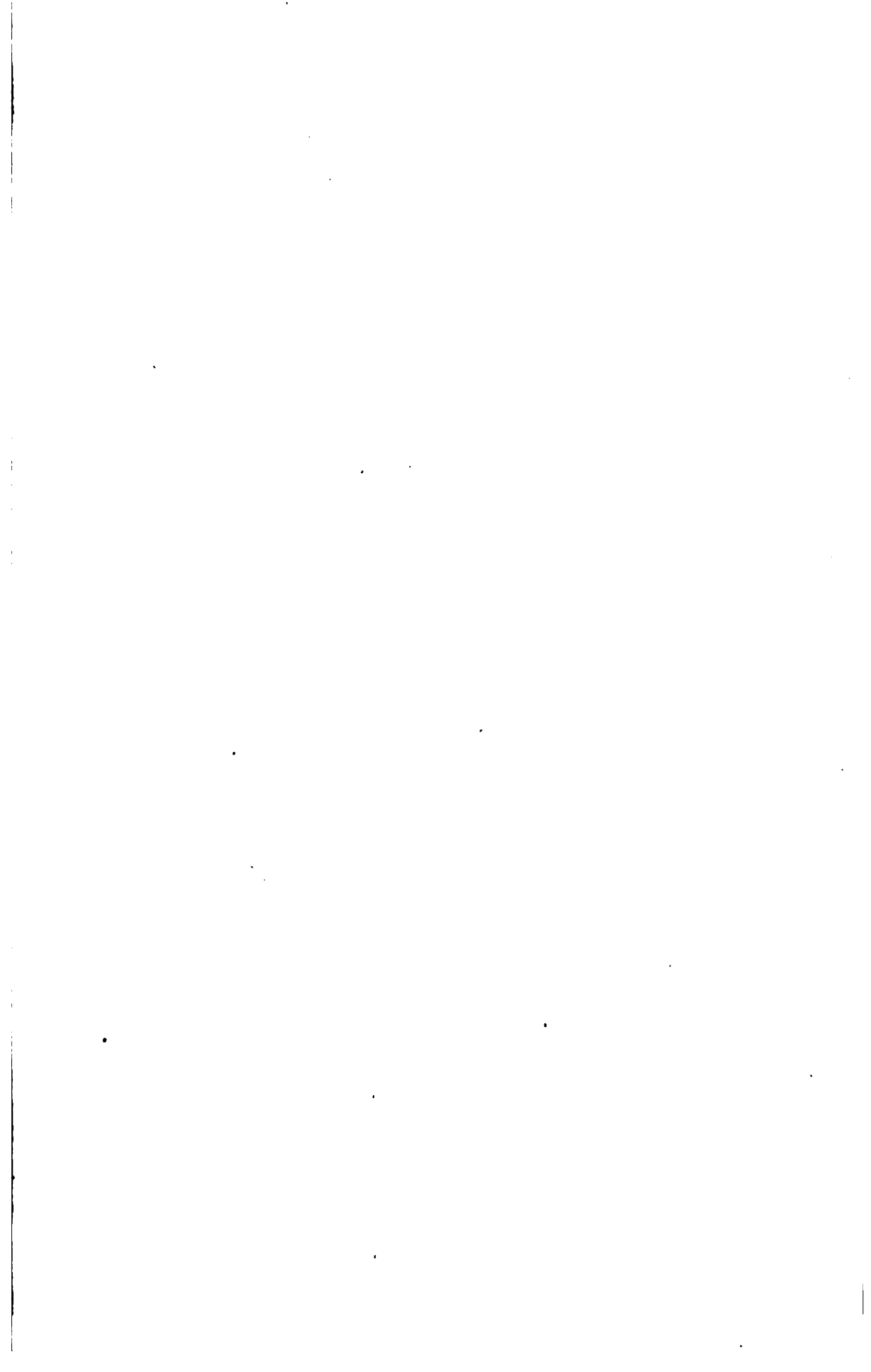
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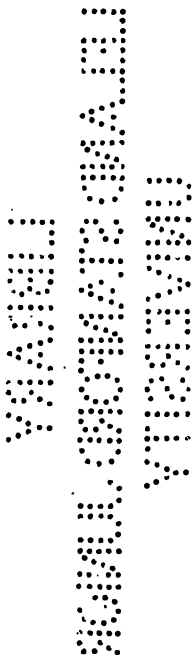
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CURRENT EVENTS.

PROFESSIONAL CRIMINALS—At the last meeting of the American Bar Association in August, 1885, the Committee on Jurisprudence and Law Reform, made a report on a resolution which seems to have been pending in that body since 1882, suggesting the proper principle which should control the treatment of habitual and professional criminals.

After noticing the French practice on this subject which requires that persons convicted of serious crimes should remain for life under police supervision; and the "ticket of leave" system of England initiated in 1840, the report discusses the whole subject with marked ability, and concludes by recommending the adoption of three resolutions. The first favors the enactment of laws in every State, for keeping a complete record of every person convicted of felony or grave misdemeanor, for publishing such records, and exchanging them for like publications in other States, together with a free use of the photographer's art in aid of the cause of justice. Second, the committee recommends that in every State laws should be enacted, sentencing all persons who have been twice convicted of felony or grave misdemeanor to police supervision for life, or a stated term of years, and to political disfranchisement. Third, that drafts of such laws should be carefully prepared under the auspices of the association with a view to their adoption by the several States.

These resolutions produced a spirited debate which resulted in a postponement of the whole subject until the next meeting of the association.

The report and resolutions were briefly noticed in this JOURNAL soon after the adjournment of the association,¹ and we recur to the subject now chiefly to draw the attention of the profession to it, as the time is now near at hand when it will be again called up in the association, and will, no doubt, elicit a very

exhaustive debate in that body. The line of legislation recommended by the committee seems so judicious and desirable, that we wonder, not a little, at the vehemence of the opposition manifested on the "skirmish line" of the preliminary debate—"so opposed to the teachings of Christianity, so inhuman," are very strong terms to apply to a proposition to enable officers of the law to "keep the run" of notorious and duly convicted malefactors. It is certainly not an outrage to require a person who has been pronounced by the law to be a suspicious or dangerous character, to report periodically at police headquarters and to give an account of himself, and, as in France, when he changes his residence, to do so only upon a passport, and upon his arrival at his destination, to pay the local authorities the compliment of a personal call. As to disfranchisement, we cannot see that it is either inhuman or unchristian to deny the felon the right to vote or hold office. There are so many men in the United States who are authorized, and generally ready and willing to do either, or both, that the country will probably survive even if the felon's name be stricken from the list.

The resolutions proposed by the committee appear to us well calculated to lead the minds of the profession, and of legislators, into a branch of jurisprudence which has been too much neglected: the prevention of crime. Except the peace warrant, the statutory destruction by officers of gambling implements, and of illicit distilleries, we cannot at this moment recall any cases in which the law acts upon the purely and literally preventive system. When the incorrigible rogue has served out his term in the State prison, he is at perfect liberty to resume the practice of his profession, without hindrance from the law, or serious molestation from its officers. He is not bound to give any account to any one of his coming and going, nothing can be done to prevent his committing another burglary whenever an eligible opportunity may be offered. The bully and *desperado* may be bound over to keep the peace after he has paid his fine or submitted to the imprisonment inflicted for his last fight, and no doubt thinks it an outrage that he can not be permitted to thrash any body for twelve long months; but against the burglar, expert and professional, as he is,

¹ 21 Cent. Law Journal, 241.

no such precaution, as the law stands, can be taken, and these resolutions are designed to furnish guards against theft and other crimes, equivalent, though not similar, to that furnished by the peace warrant against assault and battery. We can perceive no reasonable objection to this line of legislation. Burglary, shop-lifting, pocket-picking, forgery, counterfeiting, are, especially in our large cities, as distinctly professions as law, medicine, or divinity, and their practice being pernicious to the public welfare, it is not unreasonable that they should be subjected to judicious regulation. It is true that the felon's feelings might be hurt by the extra publicity given under laws of this character, to his exploits, and his "mug," but then he should be patriotic enough to suppress his chagrin in view of the public good. If his reformation is retarded by periodical or occasional contact or association with the minions of the law, it is greatly to be deplored, but then in nearly every case, reformation is a thing to be hoped for, rather than expected, and we cannot think that public security should be jeopardized for the sake of so problematic a benefit as the reformation of a thief or a burglar. Felons like other wild beasts cannot be tamed unless they are caught young, and these resolutions do not contemplate the application of the proposed statutes to cases of juvenile offenders, or to others who are not confirmed or professional criminals.

It is true that police surveillance implies a certain stigma, as well as a want of confidence in the probity of the party watched. In this point of view it is certainly objectionable—to him. We cannot see why it is so to any one else. The stigma is a continuing condition of the felon's case, it attaches upon his conviction and usually outlasts, by years, his term of penal servitude, and this, with, or without subsequent police surveillance.

The objections to this line of legislation seem to us destitute of any foundation in reason, humanity or public policy. It is the duty of the State to protect the lives and property of its citizens against crime by all expedient and practicable means, and if those means are in any respect inconvenient to the criminals, either before or during, or after the commission of the crime, so much the better for the people, and so much the worse for the criminals.

NOTES OF RECENT DECISIONS.

DEDICATION TO PUBLIC USES—AT COMMON LAW AND BY STATUTE—ACCEPTANCE OF DEDICATION — EFFECT OF SUBSEQUENTLY CREATED MUNICIPALITY.—In a recent case¹ in the Supreme Court of Illinois, the question was presented, what constitutes a dedication to public uses, and also several collateral questions relating to that subject. It appears that the Maywood Company, a private corporation, purchased a tract of over five hundred acres of land in the vicinity of Chicago, laid it out in lots, and proceeded to advertise it very vehemently as a suburban village in the highest degree desirable as residence property, and, indeed, for almost any other use. In its numerous and repeated publications, in pamphlet form and otherwise, the company assured the public that block No. 58, containing sixteen acres in the plan of the village, was devoted to public uses as a park, and by description and pictures gave a most flattering account of its present, and presumably prospective, attractions as a pleasure ground, enumerating and displaying lakes, bridges, grottoes, well-house, observatory, music stand, and other like attractions. The purchase of the company was made in 1869, and from that time to 1881 residents had used the park for public purposes. In October, 1881, the village was incorporated under the general incorporation law, and a month earlier the Maywood Company had made a trust deed to Botsford to secure certain bonds. This suit was brought in consequence of the refusal of the Maywood Company to transfer to the municipal authorities of the village of Maywood the control of the park, and to convey the title to it.

The court says: "The facts above recited indicate an intention, on the part of the Maywood Company, to dedicate block 58 (with the exception of the hotel and hotel grounds, covering the north 168 feet of the west 287.55 feet of said block) to the public for the purposes of a park. A dedication may be made by grant or other written instrument, or it may be evidenced by acts and declarations without writing. No particular form is requisite to the validity of a dedication. It is

¹ Maywood Company v. Village of Maywood, N. E. Repr., Vol. 6, 886.

merely a question of intention. A dedication may be made by a survey and plat alone, without any declaration, either oral or on the plat, when it is evident from the face of the plat that it was the intention of the proprietor to set apart certain grounds for the use of the public.² The difference between a statutory and common-law dedication is that one vests the legal title to the ground set apart for public purposes in the municipal corporation, in trust for the public, while the other leaves the legal title in the original owner, charged, however, with the same rights and interests in the public which it would have if the fee was in the corporation."³

Although during all the years that elapsed between the first announcement of the dedication to public uses, of the block (58), the legal title continued in the Maywood Company, it was from that time charged with a trust in favor of the public, for the use of the block as a public park. And during all that time the acceptance of the dedication by the public was indicated, as far as it could be, by the actual use of the park as a pleasure ground, and all those purposes of recreation for which public parks are laid out.⁴

The law in such a case as that under consideration, is, that when one sells lots with avowed reference to such an easement, privilege, or advantage, as the use of streets, public grounds, or other like inducements to a purchase, the easements, etc., so avowed, are, if within the control of the vendor, guaranteed by him, and are, in fact, appurtenant to the property conveyed to the vendee.⁵ And in such a case the vendor is estopped from revoking the dedication of such easements to public uses, and so are all persons claiming under him, who are affected by notice, actual or constructive, of the trust. And if there has been any such disavowal by the vendor of the trust in the easements to the benefit of which the vendee is entitled, equity will interpose. It is the province of

equity to prevent the perversion of trusts.⁶ For the rest, the essential part of a dedication of lands to public uses is the intention of the party to make the dedication; this may be evidenced by the most solemn legal instruments, or by the most ordinary of acts *in pais*. The intention, however, must be manifested in such a manner that there can be no controversy about it.

In Illinois there is a mode of dedication to public uses prescribed by statute. That mode was not pursued in the case under consideration, but the court held that the validity of the dedication was not impaired by that circumstance, that when there is a statutory dedication prior to the creation of a municipal body empowered to receive it, the fee remains in abeyance until such a corporation is formed, and then vests in the corporation as soon as it is created.⁷ If the dedication is a common law dedication, under such circumstances, the fee remains in the dedicators, subject to the uses for which it was dedicated, and upon the formation of a municipality, the uses of the public, vest in that municipality. And in an action to enforce such a trust, the individual beneficiaries of the trust have such an interest in it that they may be joined with the municipality.

⁶ City of Jacksonville v. Jacksonville, etc, Co. 67 Ill. 540.

⁷ Canal Trustees v. Haven, 11 Ill. 554.

SHARES OF STOCK — CREDITORS AND ASSIGNEES OF CERTIFICATES.

Considering the magnitude of the interests involved, no questions of greater importance can arise than those which affect the sale and transfer of shares of stock in incorporated companies. It is absolutely necessary for the security of such investments, that some certain and unvarying mode of transferring title to them should be firmly established and strictly adhered to, yet no such mode, obligatory alike in all cases, has been established. The judges have not agreed, either as to general principles of law relating to the subject, or as to the weight to be given to the considerations peculiar to each case.

It is proposed to discuss one of the many phases of the controversy, and examine as

² Godfrey v. City of Alton, 12 Ill. 80; Warren v. Town of Jacksonville, 15 Ill. 286; Waugh v. Leech, 28 Ill. 488; Smith v. Town of Flora, 64 Ill. 93.

³ Chicago, R. I. & P. R. Co. v. City of Joliet, 79 Ill., 25.

⁴ Smith v. Town of Flora, *supra*; Rees v. City of Chicago, 88 Ill. 322.

⁵ Zearing v. Raber, 74 Ill. 409.

far as is practicable in a brief space, this question; when does an assignment of stock in a corporation become effectual as to the creditors?

1811. The first case upon the subject is, *U. S. v. Vaughn*,¹ which decides that the assignment of the certificate transfers the title to the stock. It proceeds upon the theory that a share of stock is in the nature of a chose in action, that after the assignment of a chose in action, it is not attachable as the property of the assignor, and that the authorized by-law of a corporation requiring transfers of stock to be registered on its books, is for the protection of the company, and not for the benefit of the creditors of its stockholders.

1840. It is followed in *Commonwealth v. Watmough*.² In this case, counsel for the creditor urged that a sale of property unaccompanied by delivery, is void at common law, and that the proper mode of delivering shares of stock is to transfer them upon the books of the company, in conformity with its by-laws. The court overrule this suggestion on the ground, that as creditors have not access to the books of a corporation, such delivery would not avoid the fraud which it was the design of the common law to preclude.

1841. In *Fiske v. Carr*³ a different conclusion is reached, but it seems to be based upon a statute of Maine, expressly declaring that title to stock shall not pass unless the transfer be entered upon the books of the company.

1840. *Dutton v. Connecticut Bank*,⁴ and *Eastmah v. Fisk*,⁵ however, are directly in conflict with the Pennsylvania cases. They hold that a sale of shares of stock which is not recorded in conformity with the rules of the company, is fraudulent and void as to the creditors of the assignor, because the property is not delivered.

1855. In *Fisher v. Essex Bank*,⁶ Judge Shaw delivered an elaborate opinion to the same effect, placing however, the rights of

creditors, who attach before the transfer of stock is recorded, where the charter of the company provides that shares should be transferable only on the books of the company, on a somewhat different basis. The learned judge, while admitting that at common law a share of stock may be assigned without a transfer on the books, holds that such a provision of the charter overrides the common law. He meets the suggestion that the provision is for the protection of the corporation only, as follows: "If we may judge of the intended operation of an act of legislation from the useful and beneficial purposes it may tend to promote, we should construe such a provision as having a much broader scope. As a great amount of property in Massachusetts is held in shares of corporations, it is important that title to them be easily and certainly ascertained, that the mode of alienating and acquiring it be fixed and known, and that it may at any time be made available by process of law for the payment of debts of the owner. In no other way can these objects be so well accomplished as by a transfer at the bank. The law might have provided that the bearer of the certificate should be the owner, so that it might pass from hand to hand by mere manual delivery; but this would have been attended with almost inextricable difficulties. The shares could never be attached, for the officer could have no means of obtaining possession of the certificate, yet without it, shares might pass to innocent purchasers without notice. It is of great importance that this large amount of property should be attachable and liable to execution. This has long been the policy of this State, and it is provided that the attachment may be levied by leaving a written notice at the office of the company. It is necessary to fix some act and some point of time at which property vests in the vendee, and it will tend to the security of all parties to make this turning point consist in an act which, whilst it may be easily proved, does at the same time give notoriety to the transfer."

1856. This case is followed in *Boyd v. Cotton Mills*,⁷ and *Blanchard v. Gas Light Co.*,⁸ and is endorsed by Judge Redfield, of

¹ 3 Binn. 400, 1811.

² 6 Whart. 138, 1840.

³ 20 Me. 301, 1841; see also *Weston v. Mining Co.*, 5 Cal. 187-; 6 Cal. 425, 1856; 35 Cal. 653, 1868; 53 Cal. 428, 1879.

⁴ 13 Conn. 497, 1840.

⁵ 9 N. H. 182, 1843.

⁶ 5 Gray, 371, 1855.

⁷ 7 Gray, 408, 1856.

⁸ 12 Gray, 215, 1858.

Vermont.⁹ In both of these cases, however, the charter provided only that shares might be transferred by writing, recorded by a clerk of the company in a book to be kept for that purpose.

1860. Two years later the Supreme Court of New Jersey,¹⁰ made a ruling contrary to the Massachusetts decision, and held that even where the charter declares that shares shall be transferable only on the books of the company, the holder of a certificate has a better right than a creditor attaching before the assignment is entered upon the books. In their opinion the charter provision is intended for the protection of the corporation, and does not affect the law of sales. The Supreme Court of Connecticut decided in the same year¹¹ that a sale of shares, which is not recorded according to the rules of the corporation, is fraudulent and void as to subsequent attaching creditors, and, in 1862, the Circuit Court of the United States¹² held that where the certificate recites that shares are transferable on the books of a company, title does not pass until the transfer is actually recorded, without regard to the provisions of the charter or by-laws, and the Supreme Court of Massachusetts rendered a decision affirming its earlier cases.¹³

1868. Finney's Appeal,¹⁴ a Pennsylvania case, follows *Commonwealth v. Watmough*, in deciding against the right of the attaching creditor where the certificate has been assigned prior to the attachment.

1871. In 1871 the Supreme Court of New Hampshire¹⁵ held that even in the absence of any rule or regulation on the subject, a sale without entry on the books is void as to creditors under the general policy of law relating to fraudulent conveyances.

1873. In 1873 a New York court¹⁶ held that a transfer of the certificate was sufficient delivery of the stock within the reason of said law, notwithstanding a provision of the charter of the company requiring transfers to be registered, and expressly declaring

that no transfer should be valid until recorded.

1879. The last case was indorsed by the Supreme Court of Louisiana, six years later,¹⁷ but in the same year in which this opinion was delivered, the Supreme Court of Illinois rendered a directly contrary decision, resting upon the reasoning of the New England cases, and condemning the New York and New Jersey cases.¹⁸

1880. To add to the confusion, in 1880 the Massachusetts judges established what seems to be an exception to the rule laid down in *Fisher v. Essex Bank*.¹⁹ They decide that in the absence of an express provision of law invalidating unrecorded transfers, the holder of the certificate has a better right than the attaching creditor where the by-laws of the company require transfers to be registered, whereas Judge Shaw intimates that such a case might come within the rule announced by him.

1881. This last opinion is followed by a decision of Judge Lowell, criticising *Fisher v. Essex Bank*, and the Illinois cases, and going to an extreme length in favor of certificate holders. He affirms that certificates are quasi negotiable instruments, and that one who holds them is to be preferred not only to a creditor of the assignor, but to a subsequent assignee on the books of the company. He adopts the principles of law announced in *U. S. v. Vaughn*, as to the relative rights of assignees, of choses in action, and creditors of the assignor.²⁰ In the same year the Supreme Court of Wisconsin made a decision

¹⁷ *Griedlander v. Slaughter House Co.*, 31 La. An. 525; see also *State v. N. O. & C. R. R.*, 30 La. An. 308, 1878.

¹⁸ *People's Bank v. Gridley*, 91 Ill. 457, affirmed 99 Ill. 360.

¹⁹ *Cory v. Music Hall Ass.*, and *Dickinson v. Cent. Nat. Bk.*, 129 Mass. 437, see also *Sibbey v. Quincy Nat. Bank*, 133 Mass. 515, 1882. Judge Shaw intimated that where the charter authorized a by-law on the subject, such a by-law might have the force of a charter provision, and none of the decisions following Judge Shaw base the conclusion on the peculiar provision of the charter in *Fisher v. Essex Bank*; see provisions of charters in cases cited under notes 7, 8, 9, 12, 15, 18. Moreover the cases against the right of the attaching creditor are not made to depend on the absence of any such provision, except the two, first cited in this note. Others disregard the most positive provisions of charters on the ground that they are intended for the protection of the corporation only, notes 10, 16, 17, 20.

²⁰ *Continental Bank v. Elliot Bank*, 7 Fed. Rep. 800, 1883.

⁹ 1 Am. Railway Cases, 126, 1870.

¹⁰ *Bank v. McElrath*, 18 N. J. Eq. 26, 1860.

¹¹ *Shipman v. Aetna Ins. Co.*, 29 Conn. 253, 1860.

¹² *Williams v. Mechanic's Bank*, 5 Blatch. 60, 1862.

¹³ *Rock v. Nichols*, 3 Allen, 342, 1862.

¹⁴ 56 Pa. St. 308, 1868.

¹⁵ *Scripture v. Scapstone Co.*, 50 N. H. 583, 1871.

¹⁶ *Smith v. Am. Coal Co.*, 7 Lans. 317, 1873.

quite contrary to Judge Lowell's, both in reasoning and conclusion.²¹

1883. Finally, in 1883, the Circuit Court of the United States affirmed the opinion of Judge Lowell.²²

Besides these cases, directly in point, many others are cited, which contain dicta on the subject. For example, an opinion of Judge Story²³ is frequently referred to as establishing the principle, that charter provisions requiring transfers of stock to be registered, are for the benefit of the company only, yet in the case cited he expressly disclaims any opinion on this point,²⁴ and in a subsequent decision uses the following significant language: "No person, therefore, can transfer the legal title to any shares except by a transfer according to the rules of the bank, of which the purchaser is bound to take notice."²⁵ Judge Miller, of the U. S. Supreme Court, in a case where the rights of creditors were not involved,²⁶ used very strong language as to the character and effect of certificates, which has often been cited to strengthen an opinion against creditors, but Mr. Justice Field, of the same court, in a later decision says: "Entry of the transfer on the books of the company is necessary to protect the seller against subsequent liability as a stockholder, and perhaps also, to protect the purchaser against the proceedings of the creditors of the seller."²⁷

Enough has been said to exhibit the hopeless confusion that has for a long time prevailed upon the subject. *Melius est petere fontes quam sectari rivulos.*

We believe that the question under consideration, in its ultimate analysis, must resolve itself into an inquiry whether or not the failure of the assignee of a certificate to register the transfer on the books of the company in

conformity with its rules, is such evidence of fraud, actual or constructive, as will invalidate the sale.²⁸

An unquestioned rule relating to the delivery of personal property has not yet been established. The obligation of a vendee to the creditors of the vendor depends upon the circumstances of each case. Mr. Bump, in his work on Fraudulent Conveyances says: "The history of the law respecting the rights of creditors, in relation to the property of debtors, sold, assigned, or mortgaged, but remaining in the possession or under the control of said debtors, presents a perpetual struggle between a general rule of policy on the one side, designed to cut off the possibility of fraudulent or collusive sales, and on the other side, the obvious hardship of numerous particular cases, where the innocent and even benevolent intention of parties was manifest and the presumption of fraud appeared oppressive."²⁹ He declares that to the general presumption of fraud under such circumstances, twenty-four exceptions at least have been made.³⁰ We are not prepared to canvass the cases upon this subject. It may safely be asserted, however, that a presumption of fraud arises wherever the consequences of neglect to take possession of property purchased, may be to injure third parties, and that this presumption becomes conclusive whenever such injury is the probable or inevitable consequence of such neglect. The rule is based upon well recognized principles of policy, and is designed to preclude the possibility of fraud. The kind of delivery required, manifestly depends upon the character of the property; but it must in all cases be such as will best observe the policy above declared.³¹

²¹ Application of Thos. Murphy, 51 Wis. 522, 1881.

²² Scott v. Pequonnoek Bank, 15 Fed. Rep. 500, 1883.

²³ U. S. v. Cutts, 1 Sumner, 138, 1832.

²⁴ At page 150.

²⁵ Union Bank v. Laird, 2 Wheat. 390, 1817.

²⁶ Bank v. Lanier, 11 Wall. 369, 1871.

²⁷ Johnson v. Laffin, 103 U. S. 800, 1881, see also Merchant's Nat. Bank v. Richards, 6 Mo. App. 454, 1879, where both Corporation and purchaser at sale had notice of the certificate, and a presumption of fraud could not have arisen, 58 Cal. 600; 9 Mo. 154; 13 Mo. App. 199; 20 Mo. 385; 52 Mo. 379; 6 Cent. L. J. 124; 10 Ala. 82; 53 Ga. 532; 46 N. Y. 329; 11 S. C. 520; 39 Gratt. 502; 11 Wall. 69; 9 Pick. 202; 11 Wend. 627; 22 Wend. 352; 10 Ind. 502; 8 Pick. 90; 20 Wend. 91; 34 N. Y. 30; 6 Hill, 627.

²⁸ Lowell on The Transfer of Stock, 103; Colt v Ives, 21 Conn. — 29 Conn. 245; 10 Pick. 454; Weston v. Bear River Co., 6 Cal. 425; 35 Cal. 653.

²⁹ Bump Fraud. Con., ch. 5.

³⁰ Id. page 62 and note.

³¹ Lord Coke, Twyne's Case, 3 Coke, 80; Lord Bacon quoted, Dearle v. Hall, 3 Russ. 1; Lord Mansfield, Cadogan v. Kennett, Cowp. 432; Lord Harkwicke, Ry. all v. Rolle, 1 Atk. 165; Lord Eldon, Dearle v. Hall, and Loveridge v. Cooper, 3 Russ. 1 & 38; Buller J. Edwards v. Harben, 2 T. R. 587; Lord Lyndhurst Foster v. Cockerell, 9 Bling. N. R. 332; Pothier Contracts, Cushman Ed. 201 C. 2, 20; Domat. P. P. I. b. 1 T. 2 § 1 Arts. 9, 11; Berj. on Sales § 675, n. d; Bump. Fraud Convs, 177; Hamilton v. Russell, 1 Cranch. 309; 32 P. F. S. 451; 9 Pick. 349, 4 Camp. 251; 1 Taunt. 458; 2 Camp. 243; 7 Taunt. 288; 17 Mass. 113; 2 C. P. L. R. 525.

In the light of these principles we think the conclusion inevitable, that shares of stock must, like other personal property, be delivered at the time of sale or within a reasonable time, thereafter, and that a transfer on the books, in conformity with the rules of the company, is the mode of delivery best calculated to defeat the evils which delivery was designed to preclude. Delivery of the certificate will not answer the purpose. A certificate of stock is not a negotiable instrument; it has none of the attributes of such instruments. After its assignment, the title of the holder may be defeated in a variety of ways, and even at the time of the assignment the assignor may have had nothing to dispose of, notwithstanding his possession of the certificate.³² A purchaser of shares of stock therefore, may not rely upon such security. If he wishes to protect himself against all contingencies, he must register the transfer, in no other way can all risks be avoided. Moreover, until the transfer is entered upon the books of the company, the purchaser is not entitled to vote or receive dividends, or share in any of the benefits of the association; his vendor may still enjoy these benefits. On the other hand, by failing to register, he escapes the responsibilities which attach to membership. He cannot be sued by the creditors of the corporation, or held for assessments. If a man neglects to do what is necessary for his protection, or what he is expected to do under the circumstances, the presumption fairly arises that his omission is fraudulent in fact; if the effect of such neglect is to injure others, it is fraudulent in law. For this reason it has always been held that one who purchases stock from one who appears on the books to be the owner, is to be preferred to the holder of the certificate.³³ Why should not the creditor of the stockholder of record receive the same protection? The same presumption of fraud arises, the same opportunity for fraud exists. A man indebted, wishing to avoid payment, can readily transfer his certificate and thereby avoid responsibility; nothing could be easier.

³² See cases collated 22 Cent. Law Journal, 269.

³³ *Cady v. Potter*, 55 Barb. 463, 1869; *N. Y. R. R. v. Schuyler*, 34 N. Y. 79, 1865; *Greenleaf v. Ludington*, 15 Wis. 568; *Black v. Zacherie*, 3 How. 483, 512; *Boatmans Ins. Co. v. Alfe*, 48 Mo. 137; *dictum contra*, 15 Fed. Rep. 500.

And not only may the stock thereby be removed from the reach of the assignor's creditors, but it may be placed beyond the reach of the assignee's creditors. It has been held that the interests of a holder of a certificate, whose name does not appear on the books of the company, cannot be reached by attachment or execution.³⁴ Surely the courts should be reluctant to provide such facilities for the commission of fraud as would grow out of the rule declared by many of the judges. Proof of actual fraud is notoriously difficult. It was to avoid this difficulty that the rule requiring delivery was originally established. In addition to these reasons, founded upon policy, a strong and positive argument may be drawn from certain acts of legislation, why a rules which requires transfers of stock to be entered upon the books of the corporation should be established. As pointed out by Judge Shaw, most of the States have enacted laws providing that shares of stock shall be levied on by notice to the proper officer of the company. These acts furnish strong evidence of a legislative intent to subject property of this nature to the payment of debts. In no other way can this purpose be accomplished, except by declaring unrecorded transfers to be void. If the certificates are made negotiable, or even *quasi* negotiable, the enormous property represented by these instruments is practically placed beyond the reach of creditors. This great evil should, if possible, be avoided. It can be avoided by making the books conclusive evidence of ownership. If such a rule would embarrass speculation, and make stock jobbing more difficult, it has the merit of affording the amplest security to honest investment. Finally, we believe that the rule should not be made to depend upon the special provisions of corporate charters. Although men are presumed to know these provisions, as a matter of fact, they are usually ignorant of them. Whether the charter or by-laws or certificates provide that transfers should be registered, the reasons for the rule still exist. It is founded upon principles of policy, strong alike in all cases, and should

³⁴ *Lippit v. Wood Paper Co.*, 1 N. Y. 118; *Beckwith v. Burrough*, 13 R. I. 298; *Language of Judge Shaw*, 5 Gray. 371.

not be made to depend on slight or trivial circumstances.³⁵ ISAAC H. LIONBERGER.
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³⁵ See also *Brock v. Ratton*, 1 U. C. C. P. 222; *Hammerstone v. Chase*, 2 Y. & C. 209; *Broadhurst v. Varley*, 12 C. B. N. S. 212; *Watts v. Porter*, 23, L. J. Rep. Q. R. 346; *Shropshire U. R. & C. Co. v. Reg.*, 7 I. R. H. I. C. S. 496.

DELIVERY OF DEEDS.

Necessity of Delivery.—A delivery is essential to give effect to a deed,¹ whether it be a conveyance founded upon a valuable consideration, or a mere voluntary conveyance.² Thus a deed takes effect from the time of the delivery, and not from the time of the date³ though the date is presumptively the true time of its execution and delivery.⁴ And without a delivery on the part of the grantor, which act is the consummation of the conveyance⁵ all the preceding formalities are unavailable to impart validity to it as a solemn instrument of title.⁶ Nor can a valid deed once delivered be defeated by any subsequent act,⁷ unless by virtue of a condition in the deed itself.⁸ But the deed of a corporation need not be delivered, since the corporate seal gives perfection to the instrument without further ceremony.⁹ And so title by

patent from the United States is title by record¹⁰ and the delivery of the instrument to the patentee is not essential to pass the title.¹¹

Acceptance.—A complete delivery of a deed requires its acceptance by the grantee,¹² but such acceptance is always presumed,¹³ if the deed is found in the grantee's hands.¹⁴

Yet under the rule that to constitute delivery of a deed there must not only be delivery by the grantor, but an acceptance by the grantee, there is no valid delivery where the minds of the parties seem never to have met upon the subject of the execution and delivery of a deed by a wife of her lands in settlement of her husband's defalcation as cashier of a bank;¹⁵ as when neither before nor after the discovery of the deficit in the accounts of the cashier was there any meeting of the Board of Directors of the bank to consider the accounts; and at no time during the individual transactions of some of the directors with the cashier in relation to his accounts with the bank, or the possession of the deed by one of the Directors, did the Board of Directors at a regular meeting by resolution or otherwise authorize a settlement with the cashier upon the basis of a conveyance to the bank by his wife of her separate real estate.¹⁶

When the question is as to whether a deed was delivered and accepted, and there is evi-

¹ *Bank v. Ballhace*, 3 W. C. Rep. 140; S. C. 4 Pac. Rep. 106.

² *Jones v. Jones*, 9 Conn. 111; 16 Am. Dec. 35; *Stiles v. Brown*, 16 Vt. 563; *Fisher v. Hall* 41 N. Y. 421, 422; *Critchfield v. Critchfield*, 24 Pa. St. 100; *Rutledge v. Montgomery*, 30 Ga. 641; *Armstrong v. Stovall*, 26 Miss. 275; *Younge v. Gallbeau*, 3 Wall 641.

³ *Egeny v. Woodward*, 56 Me. 45; *Harrison v. Phillips Academy*, 12 Mass. 455; *Jackson v. Bard*, 4 Johns, 230; *Harman v. Oberdorper*, 33 Gratt (Va.) 497; *Hood v. Brown*, 2 Ohio 287; *Nay v. Mograin* 24 Kan. 75. But see *Smith v. Porter* 10 Gray 67; *Elsev v. Metcalf*, 1 Denio, 323.

⁴ *Jackson v. Bard*, 4 Johns 280.

⁵ *Boone Real Prop.* 295. (Summary of principles governing delivery of deeds. *Hulick v. Scovill*, 4 Gilm. (Ill.) 59; quoted *Hibbard v. Smith*, 4 Pac. Rep. 480.)

⁶ *Goddard's Case*, 2 Rep. 4 b; *Brown v. Brown* 66, Me. 316; *Fisher v. Beckworth*, 30 Wis. 55; *Younge v. Gallbeau*, 3 Wall 641. (Until delivery of a conveyance with intent that it shall operate as a deed, it does not take effect and such intent may be a question of fact, to be ascertained from all the circumstances; *Hibbard v. Smith*, 4 Pac. Rep. 473.

⁷ See citations contained in succeeding note.

⁸ 2 Wash. Real Prop. 577; *Hawkstand v. Gatchell*, Cro. Eliz. 835; and see *Prutsmann v. Baker*, 30 Wis. 644; 11 Am. Rep. 592.

⁹ See *Derby Canal Co. v. Wilmot*, 9 East 360; *Boone Corp.* 54.

¹⁰ *United States v. Schurz*, 102 U. S. 378, 397.

¹¹ *United States v. Schurz*, 102 U. S. 378, 397; *Boone Real Prop.* 295.

¹² *Ward v. Winslow*, 4 Pick 518; *Stewart v. Redditt*, 3 Md. 67; *Corner v. Baldwin*, 16 Minn. 172; *Best v. Brown*, 25 Hun. 223. Compare *Commons v. Jackson*, 10 Bush Ky. 424. (The assent of the grantee is a necessary element to the delivery of a deed whether the delivery be actual or constructive. *Hibbard v. Smith*, 4 Pac. Rep. 473.

¹³ See citations contained in next note.

¹⁴ *Chandler v. Temple*, 4 Cush. 235; *Jones v. Swayze*, 42 N. J. L. 279; *Newlin v. Beard*, 6 W. Va. 110; *Southern Life Ins. Co. v. Cole*, 4 Fla. 359; *Boone Real Prop.* 295; and see *Little v. Ginson*, 39 N. H. 501; *Morris v. Henderson*, 37 Miss. 501; *Goodwin v. Ward*, C. Baxt. (Tenn.) 107; *Roberts v. Swearingen*, 8 Neb. 363. (Greater presumption of acceptance in favor of infants; *Rivard v. Walker*, 39 Ill. 413.)

¹⁵ *Bank of Healdsburg v. Ballhace*, 3 W. C. Rep. 140; S. C. 4 Pac. Rep. 106.

¹⁶ *Bank of Healdsburg v. Ballhace*, 3 W. C. Rep. 140; S. C. 4 Pac. Rep. 106. Distinguishing *Crowley v. Genesee Manufg. Co.* 55 Cal. 275; *McKiernan v. Lenzen*, 56 Cal. 61; *Seeley v. San Jose etc. Co.*, 59 Cal. 23; *Shaver v. Bear River etc. Co.*, 10 Cal. 400, Citing *Gachwiles v. Willis*, 33 Cal. 11; *Blen v. Bear River Co.*, 20 Cal. 602.

dence showing that the grantor had the deed recorded, and the entire course of conduct of the grantee indicates an acceptance, a finding and judgment that there was a delivery and acceptance will not be interfered with, although there may be evidence to the contrary.¹⁷

Requisites of Delivery.—No set formulary of words or acts is necessary to a valid delivery;¹⁸ but it may be done by acts or words, or by both combined;¹⁹ by the grantor himself,²⁰ or by another by the grantor's precedent or assent subsequent;²¹ and it may be made to the grantee personally,²² or to another authorized by the grantee to accept it,²³ or to a stranger with a subsequent ratification.²⁴ And it is immaterial, although the deed does not reach the grantee until after the death of the grantor,²⁵ if it was previously left with a third person for his use.²⁶ But to constitute delivery good for any purpose, the grantor must divest himself of all power and dominion over the deed;²⁷ and it is with reluctance that the courts will uphold a deed executed by the grantor, but retained in his possession²⁸ to take effect after his death.²⁹

¹⁷ *Vaughan v. Godman*, 3 N. E. Rep. 257.

¹⁸ *Thoroughgoods' Case* 9 Rep. 136; *Hatch v. Bates*, 54 Me. 139; *Mills v. Gore*, 20 Pick. 36; *Verplanch v. Steny*, 12 Johns. 536; 7 Am. Dec. 348.

¹⁹ *Brown v. Brown*, 66 Me. 316; *Warren v. Sweet*, 81 N. H. 332; *McClure v. Colclough*, 17 Ala. 89; *Burkholder v. Casad*, 47 Ind. 418.

²⁰ See citations given in next note.

²¹ *Brown v. Brown*, 66 Me. 316; *Foster v. Mansfield*, 3 Met. 412; *March v. Austin*, 1 Allen 238; *Mather v. Cortias*, 103 Mass. 568; *Hathaway v. Payne*, 84 N. Y. 93; *Fisher v. Hall*, 41 Id. 416; *Stephens v. Rinehart*, 72 Pa. St. 434; *Duncan v. Pope*, 47 Ga. 445; *Morgan v. Hazelhurst Lodge*, 53 Miss. 674; *Stone v. Duvall*, 77 Ill. 475; *Doe v. Knight*, 5 Barn & C. 671.

²² See succeeding citations to this portion of sentence.

²³ *Hatch v. Bates*, 54 Me. 136; *Stilwell v. Hubbard*, 20 Wend. 44; *Eckman v. Eckman*, 55 Pa. St. 269; *Cin. etc. R. R. Co. v. Iliff*, 13 Ohio St. 235.

²⁴ *Turner v. Whidden*, 22 Me. 121; *Brown v. Brown*, 66 Id. 316; *Fisher v. Hall*, 41 N. Y. 423; *Chamberlain v. Woodward*, 22 Hun. 440.

²⁵ *Boone Real Prop.* 295.

²⁶ *Foster v. Mansfield*, 3 Met. 412; *Goodell v. Pierce*, 2 Hill 659; *Thatcher v. St. Andrews Church*, 37 Mich. 264; *McLean v. Nelson*, 1 Jones L. (No. Car.) 396; *Compare Fisher v. Hall*, 41 N. Y. 416; *Prutsman v. Baker*, 30 Wis. 644; 11 Am. Rep. 592.

²⁷ *Young v. Gallbeau*, 3 Wall. 641; *Parmellee v. Simpson*, 5 Id. 81; *Tlebens v. Jacobs*, 31 Conn. 428; *Oliver v. Stone*, 24 Ga. 63.

²⁸ *Boone Real Prop.* 295.

²⁹ See *Patterson v. Snell*, 67 Me. 559; *Sluntieff v. Francis*, 118 Mass. 154; *Jones v. Jones*, 6 Conn. 111; 16 Am. Dec. 35; *Ruckman v. Ruckman*, 32 N. J. Eq. 226; *Davis v. Williams*, 57 Miss. 843; *Mitchell v. Ryan*, 3 Ohio St. 382; *Huey v. Huey*, 65 Mo. 689; *Walker v.*

Parting with Control, etc.—The term "delivery" implies a parting with the possession, and a surrender of authority over the deed by the grantor at that time, either absolutely or conditionally;³⁰ absolutely if the effect of the deed is to be immediate, and the title is to pass at once to the grantee,³¹ but conditionally, if the operation of the deed is made dependent on the performance of some condition, or the happening of some subsequent event.³² And if the deed is subject to be recalled by the grantor, before delivery to the grantee, it is held to be no delivery on the part of the grantor,³³ although he should die without recalling it.³⁴

Delivery in Escrow.—Delivery to a stranger, for a third person, of an intended deed, of which delivery such third person is not informed, does not, by relation, when such third person accepts the deed, operate to defeat a right acquired under a judgment lien against the grantor between the time of delivery to the stranger and acceptance by the grantee.³⁵

Ineffective Delivery.—One of the essential requisites of a good deed is that it be delivered by the grantor or his attorney.³⁶ For a

Walker, 42 Ill. 311; *Stone v. Miller*, 16 Iowa 460; *Newton v. Bealer*, 41 Id. 334; *Burnett v. Burnett*, 40 Mich. 361.

³⁰ *Prutsman v. Baker*, 30 Wis. 644; 11 Am. Rep. 592; and see *Merrills v. Swift*, 18 Conn. 257; *Jones v. Swayze*, 42 N. J. L. 279; *Bary v. Anderson*, 22 Ind. 39.

³¹ *Boone Real Prop.* 295; and see 1 Bouv. L. Dict. tit. Delivery.

³² *Prutsman v. Baker*, 30 Wis. 644; 11 Am. Rep. 592; and see *Hagood v. Harley*, 8 Rich. (So. Car.) 825; *Kane v. Machin*, 17 Miss. 387; *Gibson v. Partee*, 2 Dev. & B. (No. Car.) 580; *Henrichson v. Hodgen*, 67 Ill. 179.

³³ *Cook v. Brown*, 34 N. H. 460; *Jacobs v. Alexander*, 19 Barb. 243; *Fitch v. Bunch*, 30 Cal. 213.

³⁴ *Brown v. Brown*, 66 Me. 316; *Prutsman v. Baker*, 30 Wis. 644; s. c. 11 Am. Rep. 592; *Boone Real Prop.* 295. But compare *Delden v. Carter*, 4 Day (Conn.) 66; s. c. 4 Am. Dec. 155; *Woodward v. Camp*, 22 Conn. 461; *Hathaway v. Payne*, 34 N. Y. 106.

³⁵ *Hibberd v. Smith*, 4 Pac. Rep. 473. Subject in general. *Harkreader v. Clayton*, 56 Miss. 383; s. c., 11 Am. Rep. 594; *State Bank v. Evans*, 3 Green (N. J.) 155; s. c. 28 Am. Dec. 400; *Miller v. Fletcher*, 27 Gratt (Va.) 403; s. c. 21 Am. Rep. 356; *Watkins v. Nash*, Law R. 20 Eq. Cas. 202; s. c. 13 Eng. Rep. 781; *Wheelwright v. Wheelwright*, 2 Mass. 454; S. C. 3 Am. Dec. 66; *Jackson v. Rowland*, 6 Wend. 666; s. c. 22 Am. Dec. 557; *Couch v. Meeker*, 2 Conn. 302; s. c. 7 Am. Rep. 274; *Chipman v. Tucker*, 38 Wis. 43; s. c. 20 Am. Rep. 1; *Patrick v. McCormick*, 10 Neb. 1; *Cotton v. Gregory*, Id. 125; *Andrews v. Farnham*, 29 Minn. 246.

³⁶ *Bank of Healdsburg v. Ballhace*, 3 W. C. Rep. 140; s. c. 4 Pac. Rep. 106. See subdivision on Necessity of Delivery.

deed taken effect only from its tradition or delivery;³⁷ and if it wants delivery it is void *ab initio*.³⁸ Delivery is either actual, *i. e.* by doing something and saying nothing, or else verbal, *i. e.* by saying something and doing nothing, or it may be by both.³⁹ And either of these may make a good delivery and perfect deed; for otherwise, albeit it be never so well sealed and written, yet is the deed of no force.⁴⁰ And though the party to whom it is made take it to himself, or happen to get it into his hands, yet will it do him no good, nor him that made it any hurt, until it be delivered.⁴¹ And a deed may be delivered by the party himself that doth make it, or by any other by his appointment or authority precedent, or assent or agreement subsequent for "*omnis ratihabitis mandato aequiparatus*."⁴² But until the deed of a married woman is acknowledged and certified according to the statute it has, as therein prescribed, no validity and is not in a condition to be delivered or accepted;⁴³ and a deed which is delivered in presence of a notary without such formalities, and is thereafter acknowledged and certified before him, is void.⁴⁴ Nor did a delivery take place when the notary handed the deed, as a completely executed document, to one of the directors of the bank to which it was to be given by the wife of a defaulting cashier, conveying her lands in satisfaction of his deficiency and in consideration of his restoration, where such director, on receiving it, promised not to deliver it until matters between the parties to it were arranged.⁴⁵

³⁷ See citations contained in next note.

³⁸ 2 Bl. Com. 308; Barr v. Schraeder, 32 Cal. 610. See further subdivisions on Necessity of Delivery.

³⁹ See subdivision on Requisites of Delivery.

⁴⁰ See subdivision on Necessity of Delivery.

⁴¹ 1 Shepp. Touchst. 57.

⁴² 1 Shepp. Touchst. 57; Bank of Healdsburg v. Ballhace, 3 W. C. Rep. 140; s. c. 4 Pac. 106.

⁴³ See Cal. Civil Code §§ 1186, 1187, 1191. "If a man seal and acknowledge before a mayor or other officer appointed for that purpose, a writing for a statute or recognizance, this acknowledgement before such officer shall not amount to a delivery of the deed, so as to make it a good obligation, if it happen not to be a good statute or recognizance." 1 Shepp. Touchst. 58.

⁴⁴ Bank of Healdsburg v. Ballhace, 3 W. C. Rep. 140; s. c. 4 Pac. Rep. 106.

⁴⁵ Bank of Healdsburg v. Ballhace, 3 W. C. Rep. 140; S. C. 4 Pac. Rep. 106. For the director thus became the depository of the deed and the agent for the wife, in which capacity he had no authority to deliver it unless he received instructions from her to that effect.

no such instructions were given to him,

Voluntary Conveyances to Infants.—The law presumes much more in favor of deeds in cases of voluntary settlements, especially to infants, than it does in ordinary cases of bargains and sale;⁴⁶ and because of the great confidence presumed to exist between the parties, the same degree of formality is not required, but the presumption of law in such cases is in favor of delivery.⁴⁷

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and he recognized his position by afterwards returning the deed to his principal. *Ibid.* See Fitch v. Bunch, 30 Cal. 208.

⁴⁶ See cases next noted.

⁴⁷ Bryan v. Wash, 2 Gilm. (Ill.) 557; Walker v. Walker, 42 Ill. 311. See note to Vaughan v. Goodman, 3 N. E. Rep. 262; Masterson v. Check, 23 Ill. 72; Rivard v. Walker, 39 Ill. 413; Cecil v. Beaver, 28 Iowa 241; Spencer v. Carr, 45 N. Y. 410 Compare Ireland v. Geroughty, 15 Fed. Rep. 35.

CONSTITUTIONAL LAW—HABEAS CORPUS —JURISDICTION—RELATIVE JURISDICTION OF STATE AND FEDERAL COURTS—JUDICIAL DISCRETION.

EX PARTE WILLIAM L. ROYALL, No. 1, APPELLANT AND PLAINTIFF IN ERROR; EX PARTE WILLIAM L. ROYALL, No. 2, APPELLANT AND PLAINTIFF IN ERROR.

Supreme Court of the United States, March 1, 1886.

Habeas Corpus U. S. Courts Jurisdiction of—Prisoner under State Process.—The United States courts have jurisdiction to issue writs of habeas corpus in favor of persons restrained of their liberty under State process, or by any other authority when it is alleged under oath that they are held in custody in violation of the U. S. Constitution.

— U. S. Courts—State Courts—Jurisdiction.—Congress has power to authorize the United States Courts to issue the writ of habeas corpus in favor of persons held under State process, and to discharge them when restrained of their liberty in violation of the United States constitution, but the State courts cannot exercise the same power in the case of persons held under U. S. process.

— Prisoner under State Process—Discretion of Courts.—When a person is in custody under process from a State court having original jurisdiction, and it is claimed he is in custody in violation of the constitution, the U. S. Circuit Court has a discretion, whether it will discharge him in advance of his trial—that discretion to be subordinated to any special circumstances requiring immediate action. So after his trial, if he is convicted, it has a discretion, whether it shall discharge him by *habeas corpus*, or shall leave him to his writ of error from the highest court of the State.

Appeals from and in error to the Circuit Court

of the United States for the Eastern district of Virginia.

HARLAN, J. delivered the opinion of the court.

On the 29 day of May, 1885, William L. Royall filed two petitions in the Circuit Court of the United States for the Eastern District of Virginia, each verified by oath, and addressed to the judges of that court.

In one of them he represents, in substance, that he is a citizen of the United States; that, in June, 1884, as a representative of a citizen of New York—who was the owner of certain bonds issued by Virginia under the act approved March 30, 1871, entitled: "An act to provide for the funding and payment of the public debt"—he sold in the city of Richmond, to Richard W. Maury, for the sum of \$10.50 in current money, a genuine past-due coupon, cut from one of said bonds in petitioner's presence, and which he received from the owner, with instructions to sell it in that city for the best market price; that said coupon bears upon its face the contract of Virginia that it should be received in payment of all taxes, debts, and demands due that Commonwealth; that he acted in said matter without compensation; and, consequently, the transaction was a sale of the coupon by its owner.

The petition proceeds:

"That on the second day of June, 1884, the grand jury of the city of Richmond, Virginia, found an indictment against your petitioner for selling said coupon without a license. That the before-mentioned coupon is the only one that your petitioner has sold. That your petitioner was thereupon arrested and committed to the custody of N. M. Lee, sergeant of the city of Richmond, to be tried on said indictment, and that he will be prosecuted and tried on said indictment for selling said coupon without a license, under the provisions of section 65 of the act of March 15, 1884, relating to licenses generally, and the general provisions of the State law in respect to doing business without a license. That your petitioner had no license under the laws of Virginia to sell coupons. That the act of the General Assembly under which your petitioner was arrested, and is being prosecuted, requires any person who sells one or more of the said tax-receivable coupons issued by said State of Virginia to pay to said State, before said sale, a special license tax of \$1, 000, and, in addition thereto, a tax of twenty per cent. on the face value of each coupon sold.

"That said act does not require the seller of any other coupon, or the seller of anything else, to pay said tax, but it is directed exclusively against the sellers of such coupons. That your petitioner is being prosecuted under said act because he sold said coupon without having first paid to said State said special license tax, and without paying to her said special tax of twenty per cent. on the face value thereof. That said act of the General Assembly of Virginia is repugnant to section ten of article one of the constitution of the United States, and is therefore null and void. That if the said State

can refuse to pay the said coupons at maturity, and then tax the sale of them to tax-payers, she may thus indirectly repudiate them absolutely, and thus effectually destroy their value.

"That your petitioner has been on bail from the time he was arrested until now, but that his bail has now surrendered him, and he is at this time in the custody of the said N. M. Lee, sergeant of the city of Richmond, to be prosecuted and tried on said indictment. That he is held in violation of the Constitution of the United States, as he is advised."

In the other petition he represents, in substance, that, under the provisions of the before-mentioned act of 1871, Virginia issued her bonds, with interest coupons attached, and bearing upon their face a contract to receive them in payment of all taxes, debts, and demands due to that Commonwealth; that another act, approved January 14, 1882, provides that said coupons shall not be received in payment of taxes until after judgment rendered in a suit thereon according to its provisions; that the validity of the latter act was sustained in *Antoni v. Greenhow*, 107 U. S., upon the ground that it furnished tax-payers with a sufficient remedy to enforce said contract; that by the provisions of §§ 90 and 91 of chapter 450 of the laws of Virginia for the year 1883-84, it is provided that attorneys-at-law who have been licensed to practice law less than five years shall pay a license tax of fifteen dollars, and those licensed more than five years twenty-five dollars, and that such license shall entitle the attorney paying it to practice law in all the courts of the State; that it is further provided by said 91st section that no attorney shall bring any suit on said coupons under said act of January 14th, 1882, unless he pays, in addition to the above-mentioned license tax, a further special license tax of \$250; that petitioner had been licensed to practice law more than five years, and that in the month of April 1884, he paid twenty-five dollars, receiving a revenue license to practice law in all the courts of the State; but that he had not paid the additional special license tax provided for in said 91st section; that, under employment of a client who had tendered coupons, issued by Virginia under the act of March 30th, 1871, to the treasurer of Richmond city in payment of his taxes, and thereafter had paid his tax in money—the coupons having been received by that officer for identification and verification, and certified to the Hustings Court of the City of Richmond—he brought suit under the act of January 14th, 1882, to recover the money back after proving the genuineness of the coupons; that the grand jury of the city of Richmond thereupon found an indictment against him for bringing the suit without having paid the special license tax; that he brought it after he had paid his license tax above mentioned, and while he had a license to practice law until April 1885; that he was thereupon arrested by order of the Hustings Court of Richmond, committed to the custody of

N. M. Lee, sergeant of that city, and is about to be tried and punished under said indictment; that the act requiring him to pay a special license tax in addition to his general license tax is repugnant to § 10 of article 1 of the Constitution of the United States, and is, therefore, null and void; and that the act providing for punishing him for not paying the special license tax is likewise repugnant to the Constitution.

After stating, at some length, the grounds upon which he contends that the before mentioned acts are repugnant to the Constitution, the petitioner avers that he "is now in the custody of the said N. M. Lee, sergeant of the city of Richmond, under said indictment, and he is, therefore, restrained of his liberty in violation of the Constitution of the United States."

Each petition concludes with a prayer that the circuit court award a writ of *habeas corpus* directed to that officer, commanding him to produce the body of the petitioner before that court, together with the cause of his detention, and that he have judgment discharging him from custody.

In each case the petition was dismissed upon the ground that the circuit court was without jurisdiction to discharge the prisoner from prosecution.

These cases come here under the act of March 3, 1885, c. 353, which so amends § 764 of the Revised Statutes as to give this court jurisdiction, upon appeal, to review the final decision of the circuit courts of the United States in certain specified cases, including that of a writ of *habeas corpus* sued out in behalf of a person alleged to be restrained of his liberty in violation of the constitution. 23 Stat. 437.

The first question to be considered is, whether the circuit courts have jurisdiction on *habeas corpus* to discharge from custody one who is restrained of his liberty in violation of the national constitution, but who, at the time, is held under State process for trial on an indictment charging him with an offence against the laws of the State.

The statutory provisions which control the determination of this question are found in the following sections of the Revised Statutes:

"§ 751. The Supreme Court and the Circuit and District Courts shall have power to issue writs of *habeas corpus*."

"§ 752. The several justices and judges of the said courts, within their respective jurisdictions, shall have power to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of restraint of liberty."

"§ 753. The writ of *habeas corpus* shall in no case extend to a prisoner in jail, unless where he is in custody under or by color of the authority of the United States, or is committed for trial before some court thereof; or is in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process, or decree of a court or judge thereof; or is in custody in violation of the Constitution, or of a law or treaty of

the United States; or being a subject or citizen of a foreign State, and domiciled therein, is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection or exemption claimed under the commission, or order, or sanction of any foreign State, or under color thereof, the validity and effect whereof depend upon the law of nations; or unless it is necessary to bring the prisoner into court to testify."

"§ 754. Application for the writ of *habeas corpus* shall be made to the court, or justice, or judge authorized to issue the same, by complaint in writing, signed by the person for whose relief it is intended, setting forth the facts concerning the detention of the party restrained, in whose custody he is detained, and by virtue of what claim or authority, if known. The facts set forth in the complaint shall be verified by the oath of the person making the application."

"§ 755. The court, or justice, or judge to whom the application is made, shall forthwith award a writ of *habeas corpus*, unless it appear from the petition itself that the party is not entitled thereto. The writ shall be directed to the person in whose custody the party is detained."

"§ 761. The court, or justice, or judge shall proceed in a summary way to determine the facts of the case, by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice require."

It is further provided, that, pending the proceedings on *habeas corpus* in cases mentioned in sections 763 and 764—which include an application for the writ by a person alleged to be restrained of his liberty in violation of the Constitution of the United States—and, "until final judgment of discharge, any proceeding against the person so imprisoned or confined, or restrained of his liberty, in any State court, or by or under the authority of any State, for any matter so heard or determined, or in process of being heard and determined, under such writ of *habeas corpus*, shall be deemed null and void." § 766.

The grant to the Circuit Courts in § 751 of jurisdiction to issue writs of *habeas corpus*, is in language as broad as could well be employed. While it is attended by the general condition, necessarily implied, that the authority conferred must be exercised agreeably to the principles and usages of law, the only express limitation imposed is, that the privilege of the writ shall not be enjoyed by—or, rather, that the courts and the judicial officers named, shall not have power to award the writ to—any prisoner in jail, except in specified cases, one of them being where he is alleged to be held in custody in violation of the Constitution. The latter class of cases was first distinctly provided for by the act of February 5, 1867, c. 28, (14 Stat. 834), which declares that the several courts of the United States, and the several justices and judges thereof, within their respective jurisdictions, in addition to the authority then conferred by law, "shall have power to grant writs of *habeas*

corpus where any person may be restrained of his or her liberty in violation of the Constitution, or any treaty or law of the United States." Whether therefore, the appellant is a prisoner in jail within the meaning of § 753, or is restrained of his liberty by an officer of the law executing the process of a court of Virginia, in either case, it being alleged under oath that he is held in custody in violation of the Constitution, the Circuit Court has, by the express words of the statute, jurisdiction on *habeas corpus* to inquire into the cause for which he is restrained of his liberty, and to dispose of him "as law and justice require."

It may be suggested that the State court is competent to decide whether the petitioner is or is not illegally restrained of his liberty; that the appropriate time for the determination of that question is at the trial of the indictment; and that his detention for the purpose simply of securing his attendance at the trial, ought not to be deemed an improper exercise by that court of its power to hear and decide the case. The first of these propositions is undoubtedly sound; for, in *Robb v. Connolly*, 111 U. S. 637, it was held, upon full consideration, that "a State court of original jurisdiction, having the parties before it, may, consistently with existing Federal legislation, determine cases at law or in equity, arising under the Constitution and laws of the United States, or involving rights dependent upon such Constitution or laws;" and that "upon the State courts, equally with the courts of the Union, rests the obligation to guard, enforce, and protect every right granted or secured by the Constitution of the United States, and the laws made in pursuance thereof, whenever those rights are involved in any suit or proceeding before them." But with respect to the other propositions, it is clear, that, if the local statute under which Royall was indicted be repugnant to the Constitution, the prosecution against him has nothing upon which to rest, and the entire proceeding against him is a nullity. As was said in *Ex parte Siebold*, 100 U. S. 376. "An unconstitutional law is void, and is as no law. An offence created by it is no crime. A conviction under it is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment." So, in *Ex parte Yarborough*, 110 U. S. 654, it was said that if the statute prescribing the offence for which Yarborough and his associates were convicted was void, the court which tried them was without jurisdiction; and they were entitled to be discharged. It would seem—whether reference be had to the act of 1867, or to existing statutory provisions—that it was the purpose of Congress to invest the courts of the Union, and the justices and judges thereof, with power, upon writ of *habeas corpus*, to restore to liberty any person, within their respective jurisdictions, who is held in custody, by whatever authority, in violation of the Constitution or any law or treaty of the United States. The statute evidently contemplated that cases might arise when the power

thus conferred should be exercised, during the progress of proceedings instituted against the petitioner in a State court, or by or under authority of a State, on account of the very matter presented for determination by the writ of *habeas corpus*; for, care is taken to provide that any such proceedings, pending the hearing of the case, upon the writ, and until final judgment, and after the prisoner is discharged, shall be null and void. If such were not the clear implication of the statute, still, as it does not except from its operation cases in which the applicant for the writ is held in custody by the authority of a State, acting through its judiciary or by its officers, the court could not, against the positive language of Congress, declare any such exception, unless required to do so by the terms of the Constitution itself. But, as the judicial power of the nation extends to all cases arising under the Constitution, the laws and treaties of the United States; as the privilege of the writ of *habeas corpus* cannot be suspended unless when in cases of rebellion or invasion, the public safety may require; and as Congress has power to pass all laws necessary and proper to carry into execution the powers vested by the Constitution in the Government of the United States, or in any department or officer thereof; no doubt can exist as to the power of Congress thus to enlarge the jurisdiction of the courts of the Union and of their justices and judges. That the petitioner is held under the authority of a State cannot affect the question of the power or jurisdiction of the Circuit Court to inquire into the cause of his commitment and to discharge him, if he be restrained of his liberty in violation of the Constitution. The grand jurors who found the indictment, the court into which it was returned and by whose order he was arrested, and the officer who holds him in custody, are all, equally with individual citizens, under a duty, from the discharge of which the State could not release them, to respect and obey the supreme law of the land, "anything in the Constitution and laws of any State to the contrary notwithstanding." And that equal power does not belong to the courts and judges of the several States; that they cannot, under any authority conferred by the States, discharge from custody persons held by authority of the courts of the United States, or of commissioners of such courts, or by officers of the general government acting under its laws, results from the supremacy of the Constitution and laws of the United States. *Ableman v. Booth*, 21 How. 506; *Tarble's Case*, 13 Wall. 397; *Robb v. Connolly*, 111 U. S. 639.

We are, therefore, of opinion that the Circuit Court has jurisdiction upon writ of *habeas corpus* to inquire into the cause of appellant's commitment, and to discharge him, if he be held in custody in violation of the Constitution.

It remains, however, to be considered, whether the refusal of that court to issue the writ and to take the accused from the custody of the State of-

ficer can be sustained upon any other ground than the one upon which it proceeded. If it can be, the judgment will not be reversed because an insufficient reason may have been assigned for the dismissal of the petitions.

Undoubtedly the writ should be forthwith awarded, "unless it appears from the petition itself that the party is not entitled thereto;" and the case summarily heard and determined "as law and justice require." Such are the express requirements of the statute. If, however, it is apparent upon the petition, that the writ if issued ought not, on principles of law and justice, to result in the immediate discharge of the accused from custody, the court is not bound to award it as soon as the application is made. *Ex parte Watkins*, 3 Pet. 193, 201; *Ex parte Milligan*, 4 Wall. 3, 111. What law and justice may require, in a particular case, is often an embarrassing question to the court or to the judicial officer before whom the petitioner is brought. It is alleged in the petitions—neither one of which, however, is accompanied by a copy of the indictment in the State court, nor by any statement giving a reason why such a copy was not obtained—that the appellant is held in custody under process of a State court in which he stands indicted for an alleged offense against the laws of Virginia. It is stated in one case that he gave bail, but was subsequently surrendered by his sureties. But it is not alleged and it does not appear, in either case, that he is unable to give security for his appearance in the State court, or that reasonable bail is denied him, or that his trial will be unnecessarily delayed. The question as to the constitutionality of the law under which he is indicted must necessarily arise at his trial under the indictment, and it is one upon which, as we have seen, it is competent for the State court to pass. Under such circumstances, does the statute imperatively require the circuit court, by writ of *habeas corpus*, to wrest the petitioner from the custody of the State officers in advance of his trial in the State court? We are of opinion that while the circuit court has the power to do so, and may discharge the accused in advance of his trial if he is restrained of his liberty in violation of the National Constitution, it is not bound in every case to exercise such a power immediately upon application being made for the writ. We cannot suppose that Congress intended to compel those courts, by such means, to draw to themselves, in the first instance, the control of all criminal prosecutions commenced in State courts exercising authority within the same territorial limits, where the accused claims that he is held in custody in violation of the Constitution of the United States. The injunction to hear the case summarily, and thereupon "to dispose of the party as law and justice require" does not deprive the court of discretion as to the time and mode in which it will exert the powers conferred upon it. That discretion should be exercised in the light of the relations existing, under our system of government, between the judicial tribunals of the

Union and of the States, and in recognition of the fact that the public good requires that those relations be not disturbed by unnecessary conflict between courts equally bound to guard and protect rights secured by the Constitution. When the petitioner is in custody by State authority for an act done or omitted to be done in pursuance of a law of the United States, or of an order, process, or decree of a court or judge thereof; or where, being a subject or citizen of a foreign State, and domiciled therein, he is in custody, under like authority, for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, or order, or sanction of any foreign State, or under color thereof, the validity and effect whereof depend upon the law of nations; in such and like cases of urgency, involving the authority and operations of the general government, or the obligations of this country to, or its relations with, foreign nations, the courts of the United States have frequently interposed by writs of *habeas corpus* and discharged prisoners who were held in custody under State authority. So, also, when they are in the custody of a State officer, it may be necessary, by use of the writ, to bring them into a court of the United States to testify as witnesses. The present cases involve no such considerations. Nor do their circumstances, as detailed in the petitions, suggest any reason why the State court of original jurisdiction may not, without interference upon the part of the courts of the United States, pass upon the question which is raised as to the constitutionality of the statutes under which the appellant is indicted. The circuit court was not at liberty, under the circumstances disclosed, to presume that the decision of the State court would be otherwise than is required by the fundamental law of the land, or that it would disregard the settled principles of constitutional law announced by this court, upon which is clearly conferred the power to decide ultimately and finally all cases arising under the Constitution and laws of the United States. In *Taylor v. Carryl*, 20 How. 595, it was said to be a recognized portion of the duties of this court — and, we will add, of all other courts, National and State — "to give preference to such principles and methods of procedure as shall seem to conciliate the distinct and independent tribunals of the States and of the Union, so that they may co-operate as harmonious members of a judicial system co-extensive with the United States, and submitting to the paramount authority of the same Constitution, laws, and Federal obligations." And in *Covell v. Heyman*, 111 U. S. 182, it was declared "that the forbearance which courts of co-ordinate jurisdiction, administered under a single system, exercise towards each other, whereby conflicts are avoided, by avoiding interference with the process of the other, is a principle of comity, with, perhaps, no higher sanction than the utility which comes from concord; but between State courts and those

of the United States it is something more. It is a principal of right and of law, and, therefore, of necessity."

That these salutary principles may have full operation, and in harmony with what we suppose was the intention of Congress in the enactments in question, this court holds that where a person is in custody, under process from a State court of original jurisdiction, for an alleged offense against the laws of such State, and it is claimed that he is restrained of his liberty in violation of the Constitution of the United States, the circuit court has a discretion, whether it will discharge him, upon *habeas corpus*, in advance of his trial in the court in which he is indicted; that discretion, however, to be subordinated to any special circumstances requiring immediate action. When the State court shall have finally acted upon the case, the circuit court has still a discretion whether, under all the circumstances then existing, the accused, if convicted, shall be put to his writ of error from the highest court of the State, or whether it will proceed, by writ of *habeas corpus*, summarily to determine whether the petitioner is restrained of his liberty in violation of the Constitution of the United States. The latter was substantially the course adopted in *Ex parte Bridges*, 2 Woods, 428. The prisoner was indicted and convicted in one of the courts of Georgia for perjury committed in an examination before a United States commissioner under what is known as the Enforcement Act of congress. He was discharged upon *habeas corpus*, sued out before Mr. Justice Bradley, upon the ground that the State court had no jurisdiction of the case, the offense charged being one which, under the laws of the United States, was exclusively cognizable in the Federal courts. Adverting to the argument that where a defendant has been regularly indicted, tried, and convicted in a State court, his only remedy was to carry the judgment to the State court of last resort, and thence by writ of error to this court, he said: "This might be so if the proceeding in the State court was merely erroneous; but where it is void for want of jurisdiction, *habeas corpus* will lie, and may be issued by any court or judge invested with supervisory jurisdiction in such case. *Ex parte Lange*, 18 Wall. 163." It was further observed, in the same case, that while it might appear unseemly that a prisoner, after conviction in a State court, should be set at liberty by a single judge on *habeas corpus*, there was no escape from the act of 1867, which invested such judge with power to discharge when the prisoner was restrained of his liberty in violation of a law of the United States.

As it does not appear that the circuit court might not, in its discretion and consistently with law and justice, have denied the applications for the writ at the time they were made, we are of opinion that the judgment in each case must be affirmed, but without prejudice to the right of the petitioner to renew his applications to that court

at some future time, should the circumstances render it proper to do so.

Affirmed.

NOTE.—In its proper domain the national government is superior to the State governments, yet neither can intrude into the domain of the other, except where in cases of conflict of authority such intrusion may be necessary on the part of the national government to preserve its rightful supremacy.¹

For a long period of time Congress was very careful in its legislation to avoid all possibility of conflict between the National and State courts. The National courts were prohibited from issuing injunctions against proceedings in State courts, and it was decided, that they could not indirectly enjoin such proceedings by enjoining the litigants.² It was equally careful in *habeas corpus* proceedings, and allowed the writ to run in favor of prisoners in jail, only when they were held under or by color of the authority of the United States. Owing to the nullification proceedings of 1833, the writ was allowed to any person imprisoned for an act done or omitted in pursuance of a law of the United States or of an order of a U. S. court or of a judge thereof.

The Canadian troubles caused the act of 1842 to be passed extending the writ to aliens in prison, who claimed to have acted under the orders of their own government. The civil war was the cause of the act of 1867, extending the provisions of the writ to persons in custody in violation of the Constitution or of a law or treaty of the United States.³ The language of the act is very sweeping, and authorizes the discharge of a prisoner in custody of a State court or even serving out a sentence of such court. This power is permissible to the United States courts because of their superiority to the State courts, and for the same reason State courts cannot interfere by *habeas corpus* with the proceedings of the United States courts.⁴

Writ of Error—Correction of Errors.—The writ of *habeas corpus* was never intended to operate as an appeal or writ of error. On a writ of *habeas corpus* the court will only inquire, whether the court, under whose process the prisoner is held, had jurisdiction over the person or the cause, or whether there is some other matter rendering its proceeding void.⁵

Habeas Corpus—Nature of Proceedings.—Proceedings to enforce civil rights are civil proceedings, consequently a *habeas corpus* proceeding is a civil proceeding.⁶

When Writ not Allowed.—When the court, which holds the prisoner, has jurisdiction of the party and is charged with the trial of such cases, the prisoner will not be discharged because he has a good defense. He will be left to avail himself of his defense at his trial.⁷

Can a Court Refuse to Discharge the Prisoner if his Case Comes Under the Provisions of the Law.—The District and Circuit Courts of the United States seem to have considered themselves bound to discharge

¹ Tarble's Case, 18 Wall. 397.

² Haines v. Carpenter, 91 U. S. 254; Dial v. Reynold, 96 U. S. 340.

³ *Ex parte Bridges*, 2 Woods, 428.

⁴ Tarble's Case, *supra*; Ableman v. Booth, 21 How. 506.

⁵ *Ex parte Siebold*, 100 U. S. 371; *Ex parte Virginia*, Id. 339; *Ex parte Rowland*, 104 U. S. 604; *Ex parte Curtis*, 106 U. S. 371; *Ex parte Yarbrough*, 110 U. S. 651; *Ex parte Kenyon*, 6 Dill. 385; *Ex parte Watkins*, 3 Pet. 193; *Ex parte Lange*, 18 Wall. 163; *Ex parte Parks*, 3 Otto, 18; *Ex parte Reed*, 100 U. S. 556.

⁶ *Ex parte Tom Tong*, 108 U. S. 556.

⁷ *Ex parte Crouch*, 112 U. S. 178.

prisoners when their cases came under the provisions of the law; they seem not to have considered our dual form of government or the courtesy due to the State courts. They discharged the prisoners, whether held by preliminary commitment, or under sentence for contempt of court, or serving out their sentences under the judgment.⁸ In one case the prisoner was not discharged, but the court admitted that the legal points involved were doubtful, and the Supreme Court of the State had passed on the question, and had come to a different conclusion.⁹

The writ of *habeas corpus* is a high prerogative writ, and is considered a bulwark of our liberties. It was secured by magna charta, and the effort of the authorities to avoid issuing it, and to delay its enforcement, led to the act of Charles 1st on that subject, and to that of 81st Charles 2d, which has been called a new magna charta. The law says the court shall forthwith award the writ, shall proceed in a summary way to determine the facts, and "thereupon to dispose of the party as law and justice require." This evidently means that the decision shall be rendered as soon as practicable after the evidence is heard. What do law and justice require? That the prisoner shall be discharged, if the law covers his case. Justice is blind, and pays equal deference to the humblest as to the highest. Is it law or justice to hear the prisoner's case, and to admit he is wrongfully detained, and, with the power and command to act according to law and justice, to remand him with the statement that hereafter another tribunal will listen to his cause, and no doubt will do him justice; and, if not, then he may appeal to another tribunal, or possibly we will then discharge him ourselves.

By what reasoning does the court arrive at its conclusion? It says, "If it is apparent upon the petition that the writ, if issued, ought not, on principles of law and justice, to result in the immediate discharge of the accused from custody, the court is not bound to award it as soon as the application is made. *Ex parte Watkins*, 3 Pet. 193, 201; *Ex parte Milligan*, 4 Wall. 3, 111." We cannot find that inference in those cases. As we understand them, the facts all appeared by the petitions, so the court saved time by deciding the cases on the petitions, in one case deciding that the prisoner was not entitled to a discharge, and in the other that he was.

In the principal case the opinion says the court can exercise a discretion, and should try to avoid any clash with the State courts, and can conclude to leave the matter with the State court. The legislative branch of the government makes the laws, and is the arbiter in questions of courtesy. The courts must enforce the laws as they find them, and certainly this law is peremptory. It may be admitted, that it would be well for congress to alter the law. According to this decision the court is authorized to grant or refuse the writ at its pleasure, and no applicant can tell in advance, whether, with no dispute as to the facts, he will obtain it. An intimation is thrown out, that in important causes, or in international questions, it should be granted. The right to be discharged from illegal confinement by the writ of *habeas corpus*, in the case of even the humblest of our citizens, is not an unimportant matter, or else we have not read the history of the English peoples aright.

S. S. MERRILL.

⁸ Laundry Ordinance Case, 7 Sawy. 531; *In re Wong Yung Quy*, 6 Sawy. 237; *Ex parte Bridges*, 2 Woods, 428; *Ex parte Turner*, 3 Woods, 603; *In re Tie Loy*, 26 Fed. Rep. 611; *Ex parte Kenyon*, 5 Dill. 385; Electoral College of South Carolina, 1 Hughes, 571; *United States v. Jailer of Fayette Co.*, 2 Abb. U. S. 265; *Ex parte Jenkins*, 2 Wall. Jr. C. C. 521, 539; *Ex parte Robinson*, 6 McLean, 355; *United States v. Morris*, 2 Am. Law Reg. 348.

⁹ *In re Wo Lee*, 26 Fed. Rep. 471.

CONSTITUTIONAL LAW—OBLIGATIONS OF CONTRACTS—STATE POWER OF TAXATION—RELINQUISHMENT OF—

VICKSBURG, S. & P. R. CO. v. DENNIS.

Supreme Court of the United States, March 1. 1886.

1. CONSTITUTIONAL LAW—*Obligation of Contracts—State Statute Impairing—State Power of Taxation—Relinquishment—Presumptions—Exemption of Railroad Company—Statute—Effect of Words—Act of Former Officer—Controlling Effect upon Successor and upon the Force of the Statute.*—In determining whether a statute of a State impairs the obligation of a contract, the Supreme Court must decide for itself the existence and effect of the original contract, (although in the form of a statute), as well as whether its obligation has been impaired.

2. A State is never to be presumed to have relinquished its power of taxation unless its intention so to do is clearly expressed in language to that effect.

3. The words of a statute being that certain railroad property "shall be exempt from taxation for ten years after the completion of said road within the limits of this State," such words as distinctly exclude the time preceding the completion of the road as the time succeeding the 10 years after completion.

4. The omission of the taxing officers of a State to assess, in previous years, certain property cannot control the duty imposed by law upon their successors, or the power of the legislature, or the legal construction of the statute under which the exemption is claimed.

FIELD, MILLER, and BRADLEY, JJ., and WAITE, C. J., dissent.

In Error to the Supreme Court of the State of Louisiana.

E. M. Johnson, Geo. Hoadly, and Edw. Colston, for plaintiff in error. *John S. Young and Thos. O. Benton*, for defendant in error.

GRAY, J. The original suit was brought by the sheriff and *ex officio* collector of taxes of the parish of Madison, in the State of Louisiana, to recover the amount of taxes assessed, under general laws of the State, in 1877 and 1878 to the Vicksburg, Shreveport & Texas Railroad Company, and in 1880 to the Vicksburg, Shreveport & Pacific Railroad Company, upon 34 miles of railroad with fixtures and appurtenances, in that parish. The Vicksburg, Shreveport & Texas Railroad Company was incorporated on April 28, 1853, by a statute of Louisiana, to construct and maintain a railroad from a point in the Parish of Madison, on the Mississippi River opposite Vicksburg, westward by way of Monroe and Shreveport to the line of the State of Texas. Sec. 2 of that statute was as follows: "The capital stock of said company shall be exempt from taxation, and its road, fixtures, workshops, warehouses, vehicles of transportation, and other appurtenances shall be exempt from taxation for ten years after the completion of said road within the limits of this State." The eastern part of the railroad, from Vicksburg to Monroe, about 75 miles, was completed before January 1, 1861; and the western part, from Shreveport to the Texas line, about 25 miles, was completed before January

1, 1862; leaving the central part, from Monroe to Shreveport about 100 miles, uncompleted. The further construction of the road was prevented and suspended during the civil war, and much of the track, bridges, stations, and workshops was destroyed by the hostile armies. Soon after the return of peace, a holder of four out of a large number of bonds secured by a mortgage executed by the corporation on September 1, 1857, of its railroad property, and franchises, commenced a suit in the court of the State of Louisiana, and obtained a decree for the sale of the whole mortgaged property, and it was sold under that decree. Upon a suit afterwards brought by a very large number of the bondholders, in behalf of all, in the Circuit Court of the United States, that sale was, by a decree of this court, at October term, 1874, annulled as fraudulent and illegal, and the railroad, property, and franchises ordered to be sold for the benefit of the bondholders and other creditors of the corporation. *Jackson v. Ludeling*, 2 Wall. 616. On December 1, 1879, they were sold pursuant to this decree, and purchased by a committee of the bondholders, who on the next day organized themselves, with their associates, into a corporation under the general statute of Louisiana of March 8, 1877, by the name of the Vicksburg, Shreveport & Pacific Railroad Company, and now claimed to be entitled, under this statute, to all the rights, powers, privileges, and immunities of the Vicksburg, Shreveport & Texas Railroad Company, including its exemption from taxation. In 1881 and 1882 the new corporation made contracts for the competition of the railroad between Monroe and Shreveport, and began to complete it; but it has not yet been completed. The Supreme Court of Louisiana held that the provision of the statute of 1853, exempting the railroad, fixtures and appurtenances "from taxation for ten years after the completion of said road," did not relieve the old corporation from taxation before the road was completed, and therefore gave judgment for the plaintiff, without determining whether the new corporation had succeeded to the rights of the old one in this respect. *Dennis v. Vicksburg, S. & P. R. Co.*, 34 La. Ann. 954. A writ of error was sued out by the defendant, and allowed by the chief justice of that court, because there was drawn in question the validity of a statute of, or an authority exercised under the State, on the ground of its being repugnant to the Constitution of the United States, as impairing the obligation of contracts, and the decision was in favor of its validity.

In determining whether a statute of a State impairs the obligation of a contract, this court doubtless must decide for itself the existence and effect of the original contract (although in the form of a statute), as well as whether its obligation has been impaired. *Louisville & N. R. R. v. Palmes*, 109 U. S. 244, 256, 257; s. c., 3 Sup. Ct. Rep. 193, and cases cited; *Wright v. Nagle*, 101 U. S. 791,

794. But the construction given by the Supreme Court of Louisiana to the contract relied on in the present case accords, not only with its own decision in the earlier case of *Baton Rouge R. R. v. Kirkland*, 33 La. Ann. 622, but with the principles often affirmed by this court.

In the leading case of *Providence Bank v. Billings*, 4 Pet. 514, Chief Justice Marshall, speaking of a partial release of the power of taxation by a State in a charter to a corporation, said: "That the taxing power is of vital importance, that it is essential to the existence of government, are truths which it cannot be necessary to re-affirm." "As the whole community is interested in retaining it undiminished, that community has a right to insist that its abandonment ought not to be presumed, in a case in which the deliberate purpose of the State to abandon it does not appear." "We must look for the exemption in the language of the instrument; and if we do not find it there, it would be going very far to insert it by construction." 4 Pet. 561-563. In *Philadelphia & W. R. v. Maryland*, 10 How. 376, Chief Justice Taney said: "This court on several occasions has held that the taxing power of a State is never presumed to be relinquished, unless the intention to relinquish is declared in clear and unambiguous terms." 10 How. 393. In the subsequent decisions the same rule has been strictly upheld and constantly reaffirmed, in every variety of expression. It has been said that "neither the right of taxation, nor any other power of sovereignty, will be held by this court to have been surrendered, unless such surrender is expressed in terms too plain to be mistaken;" that exemption from taxation "should never be assumed unless the language used is too clear to admit of doubt;" that "nothing can be taken against the State by presumption or inference; the surrender, when claimed, must be shown by clear, unambiguous language, which will admit of no reasonable construction consistent with the reservation of the power; if a doubt arises as to the intent of the legislature, that doubt must be solved in favor of the State;" that a State "cannot by ambiguous language be deprived of this highest attribute of sovereignty;" that any contract of exemption "is to be rigidly scrutinized, and never permitted to extend, either in scope or duration, beyond what the terms of the concession clearly require;" and that such exemptions are regarded "as in derogation of the sovereign authority and of common right, and, therefore, not to be extended beyond the exact and express requirement of the grants, construed *strictissimi juris*." *Jefferson Branch Bank v. Skelly*, 1 Black, 436, 446; *Gilman v. Sheboygan*, 2 Black, 510, 513; *Delaware Railroad Tax*, 18 Wall. 206, 225, 226; *Hoge v. Railroad Co.*, 99 U. S. 348, 355; *Southwestern R. R. v. Wright*, 116 U. S. 231, 236; s. c. ante, 375; *Erie Ry. v. Pennsylvania*, 21 Wall. 492, 499; *Memphis Gas-Light Co. v. Shelby Taxing District*, 109 U. S. 398, 401; s. c. 3 Sup. Ct. Rep. 205; *Tucker v. Ferguson*, 22 Wall. 527,

575; *West Wisconsin Ry. v. Supervisors*, 93 U. S. 595, 597; *Memphis & L. R. R. v. Railroad Com'rs*, 112 U. S. 609, 617, 618; S. C. 5 Sup. Ct. Rep. 299.

It is argued, in support of this writ of error, that as the exemption from taxation of the capital stock was unqualified and perpetual, and began at the very moment of the creation of the corporation, the further exemption of the railroad and its appurtenances, conferred in the same section, was intended to begin at the same moment, although limited in duration to 10 years after the completion of the road; and that the legislature, while exempting the railroad from taxation for 10 years after its completion, could not have intended to subject it to taxation before its completion, and while its earnings were little or nothing. On the other hand, it is argued that the consideration of the exemption from taxation, as of all the franchises and privileges granted by the State to the corporation, was the undertaking of the corporation to prosecute to completion within a reasonable time the work of building the whole railroad from the Mississippi to the Texas line; that one reason for defining the exemption of the railroad and its appurtenances from taxation as "for ten years after the completion of said road," without including any time before its completion, was to secure a prompt execution of the work, and to prevent the corporation from defeating the principal object of the grant, and prolonging its own immunity from taxation, by postponing or omitting the completion of a portion of the road; and that the State had never allowed a similar exemption to take place except after a railroad had been entirely finished; and this argument is supported by the opinions of the supreme court of Louisiana in *State v. Morgan*, 28 La. Ann. 482, 491, and in the case at bar, 34 La. Ann. 954, 958.

Each of these arguments rests too much on inference and conjecture to afford a safe ground of decision, where the words of the statute creating the exemption are plain, definite and unambiguous. In their natural and their legal meaning, the words "for ten years after the completion of said road" as distinctly exclude the time preceding the completion of the road as the time succeeding the 10 years after its completion. If the legislature had intended to limit the end only, and not the beginning, of the exemption, its purpose could have been easily expressed by saying, "until," instead of "for," so as to read, "until ten years after the completion," leaving the exemption to begin immediately upon the granting of the charter. To hold that the words of exemption actually used by the legislature include the time before the completion of the road would be to insert by construction what is not to be found in the language of the contract; to presume an intention, which the legislature has not manifested in clear and unmistakable terms, to surrender the taxing power, and to go against the uniform current of the decisions of this court upon the subject, as shown by the cases above referred to.

The omission of the taxing officers of the State in previous years to assess this property cannot control the duty imposed by law upon their successors, or the power of the legislature, or the legal construction of the statute under which the exemption is claimed.

In the case of *Morgan v. Louisiana*, 93 U. S. 217, affirming the decision in 28 La. Ann. 482, neither this court nor the supreme court of Louisiana expressed any opinion upon the question now before us, because both courts held that the sale of the railroad in that case having taken place before the passage of the statute of 1877, whatever rights were conferred by a similar clause of exemption had not passed to the purchasers. Judgment affirmed.

FIELD, J., (dissenting.) I am obliged to dissent from the judgment in this case. I agree with the majority, in all that is said in the opinion, as to the construction of the statutes which are alleged to exempt from the taxing power of the State, property within its jurisdiction. Where there is a reasonable doubt as to their construction, whether or not they create the exemption, it should be solved in favor of the State. But here it does not seem to me there can be any such doubt. The statute in question declares that the capital stock of the company "shall be exempt from taxation; and its roads, fixtures, workshops, warehouses, vehicles of transportation and other appurtenances shall be exempt from taxation for ten years after the completion of said road within the State." This exemption was designed to aid the road, and was therefore much more needed during the construction than when completed. It seems like a perversion of the purpose of the statute to hold that it intended to impede by its burden the progress of the desired work, and relieve it of the burden only when finished. The enterprise is to be nursed, according to the majority, not in its infancy, but when successfully carried out and needs no support.

I am authorized to say that the Chief Justice, Mr. Justice MILLER, and Mr. Justice BRADLEY concur with me in this dissent.

NOTE.—In regard to the construction by the United States Supreme Court of a State statute which is alleged to be in violation of the Federal Constitution, as impairing the obligation of a contract, it is said, in *Louisville & C. R. R. v. Palmes*,¹ "In reaching a conclusion on that point, we decide for ourselves, independently of the decision of the State court, whether there is a contract, and whether its obligation is impaired; and if the decision of the question as to the existence of the alleged contract requires a construction of State Constitutions and laws, we are not necessarily governed by previous decisions of the State courts upon the same or similar points, except where they have been so firmly established as to constitute a rule of property; such has been the uniform and well settled doctrine of this court."² The same principle was held in *Wright*

¹ 109 U. S., 244.

² *Bank v. Knoop*, 16 How. 389.

v. Nagle,³ and to these authorities may now be added the principal case. But of course the converse of this proposition will not hold. For the rulings of the Supreme Federal Tribunal, on all constitutional questions of this character, are of paramount and binding force.

There is no lack of authority to support the doctrine that a state legislature may waive the right of taxation, in a particular instance, for a limited or unlimited period, and that if this intention is manifested in unequivocal terms, it constitutes a contract which must not be impaired by the subsequent levying of a tax.⁴ For example, where all the property of a corporation is by its charter exempted from taxation, a subsequent law exempting only such property as is in immediate use by institutions of that character, cannot apply to the corporation in question.⁵ Nevertheless, a contract of this kind is always to be construed, most strictly against the corporation and in favor of the State; every reasonable doubt is to be resolved in favor of the latter; and the legislature will never be understood to have waived the right of subjecting the property and franchises of the corporation to the imposition of taxes unless the intention to do so is expressed in the grant itself in language too plain and explicit to be mistaken. These statements are amply borne out by the reasoning of Mr. Justice Gray in the principal case, as well as by the long list of authorities which he cites. And the reason of this rule is based upon two considerations. First, as suggested by the learned justice, the power of taxation is one of the highest attributes of sovereignty, essential to the existence of government, and necessary to the welfare of the community; and therefore its relinquishment should never be presumed unless expressly declared. And in the second place, upon the familiar doctrine of the common law that the sovereign is never bound by a statute unless particularly named in it, and hence, by an easy deduction, that the powers and prerogatives of sovereignty are never to be abrogated or curtailed, except by explicit and unambiguous words of concession. Nor is this rule confined to the waiver of the right of taxation. It applies equally to all alleged restrictions upon the power of future legislatures. Thus, while it is well settled that the State may grant exclusive privileges to a corporation (unless forbidden by its own constitution), and thereby preclude itself from conferring similar franchises upon any other body within the specified limits or during the stipulated time,⁶ yet if the privileges granted to the corporation are not made exclusive by the clear and unmistakable language of the act, the State is not debarred from incorporating a second body for similar purposes, though the interest and profits of the first are thereby injuriously affected.⁷

Another line of cases presents a further view of the doctrine under consideration, viz: That there must be

a special consideration for the grant of an extraordinary privilege, like that of exemption from taxation; that if no bonus is paid by the corporation, no right surrendered to the public, no service or duty or additional obligation imposed upon the corporators as a consideration for it, it is no contract at all, but a mere spontaneous concession on the part of the legislature, and therefore revocable at will.⁸

It is to be observed that the fact that four judges dissented from the conclusion reached by the majority of the court, in the principal case, does not at all weaken the force of the decision as an authority for the principles of law therein laid down. The court was unanimous as to the rule of construction to be applied to the statute under consideration, but its members entertained different views as to the probable intention of the legislature in enacting it.

H. CAMPBELL BLACK.

³ Christ Church v. Philadelphia, 24 How. 300; Washington University v. Bowse, 42 Mo. 308; People v. Commissioners of Taxes, 47 N. Y. 501; Hospital v. Philadelphia, 24 Pa. St. 329.

WEEKLY DIGEST OF RECENT CASES.

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1. **ANNUITY.—Legacy—Trust—Trustee.**—There is no priority between annuitants and legatees when there is a deficiency of assets; both must abate alike, unless the testator has otherwise specifically provided. Trustees are to conduct themselves faithfully, and, in the exercise of a sound discretion, invest trust funds, not with a view of speculation, but rather to make a permanent disposition of the funds with a due regard for their probable income and safety. *Emery v. Batchelder*, S. C. Me., April 28, 1886, N. Eng. R., Vol. 2, 68.

2. **COMMON CARRIER.—Bill of Lading—Liability Beyond Terminus Unless Limited by Contract.**—"The rule is settled in this State," says Chief-Justice Stone, in delivering the opinion of the court, "that where a carrier receives goods consigned to a place beyond the terminus of his own route, without limiting his liability by express agreement, by the acceptance of the goods he assumes the duty and incurs the obligation to deliver them safely at the point of destination. *M. & G. R. R. Co. v. Copeland*, 63 Ala. 219. And this is the declared rule in a majority of the best considered cases. *Illinois Central R. R. Co. v. Copeland*, 24 Ind. 332; *Id. v. Johnson*, 34 Ill. 389; *Southern Express Co. v. Shea*, 38 Ga. 519; *Little v. Semple*, 8 Mo. 99; *Hill Manfg. Co. v. B. & L. R. R. Co.*, 104 Mass. 122; *Railroad Co. v. Pratt*, 22 Wall. 123; *Weed v. S. & S. R. R. Co.*, 19 Wend. 534; *Burtis v. B. & St. L. R. Co.*, 24 N. Y. 269; *Quinby v. Vanderbilt*, 17 N. Y. 315; *Lock Co. v. R. R. Co.*, 48 N.

³ 101 U. S., 791.

⁴ *Home of the Friendless v. Rouse*, 8 Wall. 430; *Delaware Railroad Tax*, 18 Wall. 206; *Asylum v. New Orleans*, 105 U. S. 388; *New Jersey v. Wilson*, 7 Cranch, 166; *Bank v. Knoop*, 17 How. 376; *Gordon v. Appeal Tax Court*, 3 How. 133; *Wilmington R. R. v. Reid*, 13 Wall. 266; *Humphrey v. Pegues*, 16 Wall. 249; *Farrington v. Tennessee*, 95 U. S. 689.

⁵ *University v. People*, 99 U. S. 309.

⁶ *West River Bridge v. Dix*, 6 How. 507; *Binghamton Bridge*, 3 Wall. 51; *Shorter v. Smith*, 9 Ga. 529; *Piscataqua Bridge v. N. H. Bridge*, 7 N. H. 35; *Castar v. Brush*, 23 Wend. 628; *California Telegraph Co. v. Alta Telegraph Co.*, 221 Cal. 398; *Bridge Co. v. Hoboken Land Co.*, 1 Beasley, 81; *Collins v. Sherman*, 31 Miss. 679.

⁷ *Turnpike Co. v. State*, 3 Wall. 210; *Shorter v. Smith*, 9 Ga. 517; *Collins v. Sherman*, 31 Miss. 679; *Fort Plain Co. v. Smith*, 30 N. Y. 44.

- H. 339; *Noyes v. R. R. Co.*, 27 Ver. 110; *Perkins v. R. R. Co.*, 47 Me. 573; *Carter v. Peck*, 4 Sneed, 203; *Mosher v. Southern Express Co.*, 38 Ga. 87." *Louisville & Nashville R. R. Co. v. Meyer*, S. C. of Ala., December Term, 1885-86.
3. ———. *Limitation of Liability Beyond Terminus—Requisites of Validity of.*—A common carrier may limit the stern liability imposed on him by the common law, by a special agreement brought home to the consignor, and acquiesced in by him, provided it does not attempt to excuse the want of proper care and diligence in himself or his agents, and is not otherwise unreasonable. The opinion of the court continues: "No man can, in such service, bargain for an immunity from the effects of a want of that degree of diligence the nature of the service demands. And to render such limitation of liability available as an excuse or defense, it must be shown to have been accepted or acquiesced in by the consignor. Courts scrutinize such asserted exceptions with a watchful eye. *Steele v. Townsend*, 37 Ala. 247; *S. & N. R. R. Co. v. Henlien*, 52 Ala. 606; *R. R. Co. v. Manfg. Co.*, 16 Wall. 318; *R. R. Co. v. Lockwood*, 17 Wall. 337; *Chouteaux v. Leech*, 18 Pa. St. 224; *F. & Mech. Bank v. C. Transp. Co.*, 56 Amer. Dec. 68, and note; note to *Cole v. Goodwin*, 32 Amer. Dec. 495-507; *Hutch. on Car.*, §§ 240, et seq.; *Angell on Car.*, §§ 220, et seq. *Ibid.*
4. ———. *What Insufficient to Charge Consignor with Notice of Limitation in Bill of Lading.*—When no bill of lading is delivered to the consignor on the receipt of the goods, but a printed form is filled up, leaving only a blank for the freight rate when ascertained, a sum of money being deposited by the consignor to pay the entire freight; and the bill of lading is then sent by mail to the consignor, never having been read over by him; this is not sufficient to charge him with notice of and acquiescence in a stipulation contained therein, limiting the liability of the carrier to losses occurring on his own line. *Ibid.*
5. CONSTITUTIONAL LAW.—*Municipal Corporations—Special Privileges.*—A statute enacted for the protection of a municipal corporation, if it relates to the exercise of a governmental power, is not unconstitutional because it does not also apply to persons or private corporations, or even to other municipal corporations. A municipal corporation, being a governmental agency, does not stand upon the same footing as to legislation as individuals or private corporations, save where it lays aside its sovereignty or public character, and acts in matters not governmental. A statute providing that no action for damages of any character whatever to either person or property shall be instituted or maintained against appellee, "unless such action be commenced within six months after the accrual of the cause of action," is held not to be unconstitutional in an action against the city to recover for injuries to property resulting from a street improvement. *Preston v. Louisville*, Ky. Ct. of E. & App., May 1, 1886, Ky. L. Rep., Vol. 7, 797.
6. CRIMINAL LAW.—*Self-Defense—Resisting Unlawful Arrest.*—The taking of human life is not justified by the fact that it is necessary to prevent an unlawful arrest. Such an arrest is but a trespass on the person and liberty of the citizen, and in resisting the arrest he is not justified in taking the life of the trespasser unless it is necessary to save his own life or to save his person from great bodily harm. *Creighton v. Commonwealth*, Ky. Ct. of E. & App., April 27, 1886, Ky. L. Rep., Vol. 7, 738.
7. ———. *Forgery—Person—Indictment—Plea in Abatement—Waiver.*—Where a forgery is committed after the death of the man whose name purports to be signed to the instrument, it is proper to charge that the intent was to defraud his estate, as the estate of a decedent is, in law, regarded as a person. It is not error to sustain a demurrer to a plea in abatement which is uncertain and defective because of an incomplete sentence. Where there is no plea, but a trial is had, the objection that there was a trial without a plea must be made in the trial court, or it will be deemed waived. *Billings v. State*, S. C. Ind., April 23, 1886, N. E. Rep., Vol. 6, 914.
8. DEED.—*Notice—Record—Mortgage.*—A grantee, under a conveyance, without knowledge of a prior, unrecorded conveyance, acquires a good title as against a tenant under such unrecorded deed; and whether his conveyance be in fee simple absolute or in mortgage, it entitles him to the possession of the demanded premises. The statute of 1883, chap. 223, § 14, has not the effect to convert a writ of entry into a bill in equity; demandant must still declare according to his legal title, and if an equitable defense is admissible at all, it is only when, if established, it would absolutely and unconditionally defeat the demandant's claim for possession under his title. *Sherman v. Galbraith*, S. J. C. Mass., April 1, 1886, N. Eng. R., Vol. 2, 89.
9. EQUITY.—*Injunction Remedy Cannot be Invoked to Enjoin Proceedings Void Ab Initio.*—Equity cannot be invoked to enjoin proceedings which are void *ab initio*, as where the petition alleges that the court, which rendered the judgment upon which execution issued, sought to be enjoined, had no jurisdiction; for such judgment is void, as well as the execution issued thereon, and the petitioner's remedy is ample and adequate at law, for suit will lie against the officer attempting to levy the execution as a trespasser, and the purchaser's pretended title would be valueless. 23 Mo. 443; 22 Id. 90; 44 Id. 500; High on Injunc., §§ 89 and 126; 2 Story Eq. Jur., § 896, and cases cited. *St. Louis, etc. R. Co. v. Reynolds*, S. C. Mo., June 7, 1886.
10. ESTATE.—*Fee Tail Special—Life Estate—Remainder.*—A husband conveyed land to a trustee for the benefit of his wife and the heirs of her body, born in wedlock with him. Subsequently, after the death of the trustee, the husband and wife transferred and assigned to B. the rents and profits arising, and to arise, from the land above conveyed, to secure a certain judgment debt held by B. against the husband. In an action by the wife's heirs for possession of lands, after her death: Held, that the deed to the trustee created an estate in fee-tail special. 2 Bl. Com. 114. The effect of § 5, p. 355, R. S. Mo. 1855, which abolished estates in fee tail, was to create in the wife a life estate only, with remainder in fee to her heirs, and upon the death of their mother the heirs became entitled to possession. The husband or wife could do no more than dispose of the life estate. The husband had no estate by curtesy, for such an estate is not an incident to a life estate. 12 Mo. 359. *Phillips v. Laforge*, S. C. Mo., June 7, 1886.
11. EVIDENCE.—*One Party to Transaction Dead—Testimony of Circumstances.*—Where one party

to a transaction is dead, thus rendering the other incompetent to testify, it is proper to resort to any testimony of circumstances having a tendency to shed light upon the transaction, as here reading in evidence a note made between the parties, and found among the papers of the deceased party. *Kinchelo v. Priest*, S. C. Mo., June 7, 1886.

12. **GUARDIAN AND WARD.—Liability on Bond.**—A guardian who accepts from his predecessor in the trust a note payable to such predecessor individually, is guilty of a breach of duty which renders him liable on his bond. *State, ex rel. v. Greensdale*, S. C. Ind., May 19, 1886, N. E. Rep., Vol. 6, 928.

13. **HUSBAND AND WIFE.—Warranty—Estoppel.**—Where a married woman is not liable by statute upon her covenants of warranty, her act of joining with her husband in a conveyance of his land will not estop her from asserting an after-acquired title in her own name, and acquired by her own means. Where appellant was in possession of land and the legal title was in him, he could not acquire a lien upon the land for taxes paid by him. *Snoddy v. Leavitt*, S. C. Ind., February 17, 1886, West. Rep., Vol. 3, 360.

14. **INSURANCE.—Life Insurance.**—A life insurance company cannot be charged as trustee in an action at law against a beneficiary named in a policy which had become a claim, and which was made payable to the assured, his executors, administrators and assigns, for the sole use and benefit of the beneficiary named. Upon the death of the assured, intestate, his administrator is the only person who could maintain an action at law against the company for the insurance under such a policy, where no assignment had been made. *Stove v. Phinney*, S. C. Me., May 17, 1886, N. Eng. R., Vol. 2, 74.

15. **LIEN OF DEED OF TRUST.—Payee of Note Cannot Discharge by Entering Satisfaction on Record Margin, when.**—The payee of a note secured by a deed of trust cannot, after he has assigned the note, discharge the property of the lien as between a bona fide purchaser of the property and the assignee of the note, by entering satisfaction of the debt on the margin of the record. 62 Mo. 459; 78 Id. 19; 77 Id. 383; 84 Mo. 487. *Lee v. Clark*, S. C. Mo., June 7, 1886.

16. **MANDAMUS.—Cannot Control Judgment or Discretion of an Inferior Court—Adequate Remedy by Appeal Bars Remedy by Mandamus.**—Mandamus will not lie to control the judgment or discretion of an inferior court, for this in effect would be to substitute the opinion of the superior for that of the inferior court. 16 Ga., 13; High on Extra Legal Rem., §§ 171, 176, 156. The existence of another adequate and specific remedy by appeal bars the exercise of jurisdiction by mandamus, for such a writ is not to usurp the functions of a writ of error or appeal, or to correct error which may be corrected in that way. High on Extra Leg. Rem., § 188. *State ex rel. v. McGown*, June 7, 1886.

17. **MORTGAGES.—Lien—Vendor and Vendee.**—A mortgage, if valid at the place where executed, is valid everywhere, and a mortgagee of personalty in another State may follow it into this State and foreclose the mortgage in the county where it may be found. 45 Ga., 649. Where a mortgage on personal property was regularly made and recorded in another State, and the property having been

brought into this State, the mortgagee followed it and foreclosed his mortgage in the county where the property was found, and caused it to be levied, which was done before the expiration of the time allowed for the registry of such a mortgage in this State, the foreclosure was valid as against a bona fide purchaser of the property without notice of the encumbrance, although the mortgage was not recorded in this State until after foreclosure. Code, §§ 1956, 1957. *Hubbard v. Andrews*, S. C. Ga., June 1, 1886, Ga., Rep. Vol. 1, 478.

18. **PARTITION.—Primary Object—When Questions of Title May be Raised—Effect of Adjudication—Descent and Distribution—Children of the First Wife Inherit From Childless Second Wife—Title During Her Life—Estoppel—Quidclaim Deed—After-Acquired Title.**—While the primary object of an action in partition is not to settle conflicting titles, nor to create and vest a new title, but to sever the unity of possession, and allot the respective shares, yet the question of title may be presented and settled, and the adjudication will be final and conclusive as between the parties; but it can only operate upon existing titles, and will not affect after-acquired titles. Under the Indiana statute of descents, a childless second wife takes one-third of the husband's lands at his death by descent, free from all demands of his creditors, and at her death the children by the first wife take the same by inheritance from the second wife, and not from the father; so that, while she is alive, they have no present title. A quidclaim deed will not estop the grantor from setting up an after-acquired title. *Thorp v. Hanes*, S. C. Ind., May 11, 1886, N. E. Rep. Vol. 6, 920.

19. **PARTNERSHIP.—Dissolution—Constructive of Articles—Accounting—Note.**—A partnership consisting of three persons agreed that they should dissolve, and the retiring partner should sell his interest in the firm to the remaining partners. Though the respective contributions to firm capital were unknown, they shared equally in profits and losses. Articles of dissolution provided that, for the purpose of determining the interest of the retiring partner, the shares of two of the partners, "as they stand on the books," should be added together, and the interest of the retiring partner should "be adjusted upon the basis of one equal half part of such sum." Provision was also made for an appraisement. The firm books, before the appraisement, showed an apparent excess of assets over liabilities materially larger than the real excess as shown by the appraisement. At an attempted agreement before the appraisement the interests were calculated upon the basis of the apparent excess of assets over liabilities, and at a subsequent agreement the interests in the real excess, as shown by the appraisement, were calculated upon the same basis. The retiring partner, who had refused the first settlement, accepted a firm note his share at the second. Subsequently the remaining partners declared that the second settlement was erroneous because the shares of the partners, as they stood on the books at the dissolution, had not had charged against each of them one-third of the amount of the reduction made by the appraisers, or one-third of the difference between the apparent and real excess of assets over liabilities, which defense they set up in an action upon the note given to the retiring partner. *Held*, that to refuse a recovery upon the note would be

to change the construction which all parties interested had put upon the articles of dissolution, and had acquiesced in for a year subsequently; that, therefore, the retiring partner could recover upon the note. *Wilson v. Fenimore*, S. C. Penn. April 19, 1886. Atl. R. Vol. 3, 796.

20. *Tax Collectors—Not Debtors to State, but Bail-ees—Degree of Diligence required.*—The statutory provisions prescribing the duties of tax collectors (Code of Alabama, §§ 414, 503, 4285, 4276), requiring them to pay into the treasury the taxes collected in the same character of funds as received, and prohibiting their use or conversion of the moneys collected, are irreconcilable with the theory that the collector is a debtor, and liable as such for the public moneys collected, and show that he occupies a relation analogous to that of a bailee; yet, not that of an ordinary bailee for hire, but on considerations of public policy, charged with the highest degree of care and diligence—such as a very prudent and cautious man exercises in respect to the most important matters. *The State of Alabama v. Houston*. S. C. Ala. Dec. Term, 1885-86.

21. *TAXATION—Railroad Companies—Assessment of Taxes—Roadway—Fences—State Board of Equalization—Jurisdiction—Judgment for Taxes—Entire Tax Against Different Kinds of Property Separately Assessed.*—In an action against a railroad company to recover taxes under an assessment made by the State Board of equalization, which assessment includes the fences erected upon the roadway of the company, the fences cannot be regarded as a part of the roadway for the purpose of taxation, but are "improvements" assessable by the local authorities only of the county in which they are situated. Where an action is brought by the State against a railroad company for the recovery of taxes, and the plaintiff seeks judgment for an entire tax arising upon an assessment of different kinds of property as a unit, such assessment, including property not legally assessable by the State board of equalization, and the part of the tax assessed against the latter property not being separable from the other part, an assessment of that kind is invalid, and the plaintiff is not entitled to recover. *County of Santa Clara v. Southern etc. Co.*, S. C. U. S. May 10, 1886, S. C. Rep. Vol. 6, 1132.

22. *TAX COLLECTOR.—Monthly Payment to State—What not Sufficient Excuse for Holding.*—In requiring the tax-collector to make monthly payments into the treasury, it is not contemplated that he shall carry it in person; hence, his personal illness, disabling him to travel, does not excuse his default unless it also prevented him from providing for the safe transmission of the money. The taxes may be sent or forwarded. It is incumbent upon the collector, that he may be acquitted of fault or neglect to show that he had no opportunity after the money was received, to pay over the taxes, either on the warrant, previous to the robbery, or to the treasurer by the time required by law. An overruling necessity may be regarded as sufficient to exempt him from fault or neglect, otherwise arising from an omission to perform those duties; but sickness, which disables to travel, and to attend personally to business, is not of itself sufficient. It must be further shown, that by reason of the sickness, or from other causes, he was unable to provide a safe transmission of the money to the proper

receiving officer. Less than this does not answer the requirements of his strict accountability. *State v. Houston*, S. C. Ala. Dec. Term. 1885.

23. *TAX COLLECTOR.—Robbery by Irresistible Force when Defense to Action and when not.*—If the collector, having exercised the highest degree of care, diligence and vigilance, to prevent loss, is robbed of the public moneys by irresistible force, which he could not have foreseen or guarded against, this constitutes a good defense to an action on his official bond. While the official bond does not impose absolute and unconditional liability, the statutory provisions and considerations of public policy enlarge the degree of responsibility beyond that of a mere bailee for hire; and if, having observed the highest care, diligence, and vigilance to prevent loss, the collector is robbed of money belonging to the State by irresistible force, it constitutes a valid defense to an action on his bond for the recovery of such money. It is said, money belonging to the State, for if it appears that the specific funds received by the collector have been used or changed for any unauthorized purpose, he becomes *eo instanti* a debtor, and he and his sureties are bound to absolute payment, as for a debt. In such case subsequent robbery of money substituted for the amount misused, is no defense. The robbery must be of money the property of the State. *Ibid.*

24. *TROVER AND CONVERSION.—Agent or Servant Assisting in Wrongful Disposition of Property.*—An agent or servant who, acting solely for his master or principal, and by his direction, and without knowing of any wrong, or being guilty of gross negligence in not knowing of it, disposes of, or assists the master in disposing of, property which the latter has no right to dispose of, is not thereby rendered liable for a conversion of the property. *Leuthold v. Fairchild*, S. C. Minn., May 4, 1886, N. W. Rep., Vol. 28, 218.

25. *TRUST.—Liability of one Negligently Failing to Perform Gratuitous Trust.*—Where a person assumes to collect notes for another, where it does not appear that he was to receive compensation, while in discharge of such trust, fails to exercise the same kind of care that an ordinarily prudent man would exercise in his own business affairs, but negligently permits the statute of limitations to run against a part of such notes, and, by reason of such neglect the debt is lost, such person is liable. *Kinchelo v. Priest*, S. C. Mo., June 7, 1886.

26. *WATERS AND WATER-COURSES.—Diversions of Water-Course—Eminent Domain.*—Where a railroad company inserted a pipe in the back-water of a dam, and upon their own property, and pumped water therefrom, to supply their tanks, in such quantities as to seriously diminish the supply required by a lower riparian proprietor for the running of his paper-mill, it was held that the right of the railroad company was only to use the water so as not to sensibly diminish the stream to the riparian owner below. If the company requires more than its share it must resort to the right of eminent domain. Under such circumstances, it is not necessary that there should be a proceeding by a jury of view, under the act of assembly May 16, 1857. *Pennsylvania, etc. Co. v. Miller*, S. C. Pa., April 19, 1886, Atl. Rep., Vol. 3, 780.

QUERIES AND ANSWERS.*

[Correspondents are requested to draw up their answers in the form in which we print them, and not in the form of letters to the editor. They are also admonished to make their answers as brief as may be.—Ed.]

QUERIES.

1. A., a country wood dealer goes to B., a city wood and coal dealer and asks B. whether he wants to buy a carload of wood. B. answers, "yes," A. says, I will ship a carload to you and have it put on your side track. A. then orders of B. a load of coal and says to B., "you can take your pay out of the wood—you can put it in the account against the wood"—B. delivers the coal and the carload of wood comes in and is put on his side track. A. then refuses to sell carload of wood to B. Has B. a lien on the carload of wood for the coal which he delivered to A. who is utterly irresponsible? H.

QUERIES ANSWERED.

Query No. 47. [22 C. L. J., 527.]—A. makes a note to B., reading, "Three years after date, for value, I promise to pay, etc., with eight per cent. interest per annum." Is the interest on above note due at the end of each year, so B. may sue for same, or must he wait till the three years are up? Please cite authorities.

G. & F.

Answer.—"When a note is made payable at a future day with interest at a prescribed rate per annum, such interest does not become due or payable until the principal sum does, unless there is a special provision in the note in contract to that effect. *Tanner v. Dundee Land Investment Co.*, 8 Sawyer, C. Ct. 187. Reported in U. S. Digest, New Series, Vol. XIV.

A. W. L.

Query No. 30. [22 Cent. L. J. 267.]—Suppose A. purchases of B., a wholesale dealer, 3 sacks of beans, each containing 2 bushels and worth \$1.50 per bushel, and the sacks are set apart for delivery but not paid for. In the afternoon of the same day C. purchases of B., 3 sacks of coffee each containing 120 lbs. and worth 25c. per lb. These sacks are also set apart for delivery but not paid for, and are similar in appearance to the sacks containing the beans. None of the sacks are marked in any way. The next day A. calls for the beans pays the price, viz.: \$9; but the delivery clerk by mistake gives him the three sacks of coffee. A. afterwards discovered the mistake and took the coffee to D., a retailer, and sold it, put the money in his pocket and absconded. C. comes for his coffee but finds beans awaiting him instead. B. now brings an action of replevin against D., the *bona fide* purchaser, for the recovery of the coffee. Will the action lie? If so on what grounds? A LAW STUDENT.

Answer.—In order that A. could pass the title of the coffee to D., there must have been a contract of sale of the coffee by B. to A., and not merely a delivery of the possession of the coffee by B. to A. In that case there would be a contract, by which B. had transferred the ownership to A., no matter whether it was induced by fraud and could be set aside by B. or not. The ownership being in A., he could, prior to the reclamation of the property by B., sell and deliver it to an innocent purchaser. *Benjamin on Sales*, § 433, and numerous cases cited. There being no contract of sale of the coffee between B. and A., A. had no title to it, and could convey none, and it can be replevied from D. If the coffee is the property of B. he can replevy it. If the contract of sale of the coffee to C. has been

completed, as the case as stated implies. B. can still replevy it as a bailee in possession of it. S. S. M.

Query No. 31. [22 Cent. L. J. 287.]—A. traded a team of horses to B., who is totally insolvent, for a piece of real estate, B. giving a warranty deed to the premises and also representing to A. that the premises were free from incumbrances. After receiving the deed, A. learns that B. had no title to the property, and within three days after the trade is made, replevies the horses from B., before a justice of the peace. Can this action be maintained, and is this showing an incumbrance on real estate, such an inquiry into the title to real estate go as to deprive the justice of jurisdiction or defeat the action? A SUBSCRIBER.

Answer.—A sale and delivery of goods, procured through the fraudulent representations of the buyer, and with intent to cheat the seller, may be avoided by the latter, and he may recover his goods by replevin. *Wells on Replevin*, 181, § 318, and cases cited. So A. can replevy the horses. "Subscriber" does not give the law relative to a justice's jurisdiction, about the construction of which he is inquiring. If he refers to the law of Missouri, he will find that the title to the real estate must be an issue in the case (1 Rev. St. Mo. § 2981). The mere fact that the title to real estate must be shown on the trial of the case, does not oust the jurisdiction of the justice. *Wilson v. Petty*, 21 Mo. 417. S. S. M.

CORRESPONDENCE.

INTER STATE GARNISHMENT, AGAIN.

To the Editor of the Central Law Journal:

The following authorities have not been referred to on the subject of inter-state garnishment of wages and may be of interest and value to some of the readers of the CENTRAL LAW JOURNAL.

It was recently held by the Supreme Court of Kansas in the case of *Kansas City, St. J. & C. B. R. Co. v. Gough*, 10 Pac. Rep. 88, that the earnings of a debtor for his personal services at any time within three months next preceding the attempt to subject such earnings to the payment of his debts are exempt, under § 490 of the Civil Code and § 157 of the justices' act, from such payment, if it be made to appear that such earnings are necessary for the maintenance of his family, supported wholly or partly by his labor; and as the statute of the State does not restrict the exemption to residents, the courts have no authority to make such restriction; therefore no distinction is to be made between residents and non-residents.

Where a citizen of this State attempts, by a proceeding in garnishment against a foreign railroad corporation, to subject to the payment of his claim, in the courts of this State, the personal earnings of a citizen of another State, which personal earnings are by the laws of this state, and also of such other State, exempt from being so applied, the earnings of such debtor are exempt from such process. *Burlington & M. R. R. Co. v. Thompson*, 31 Kan. 180, S. C. 1 Pac. Rep. 622, distinguished. *Kansas City, St. J. & C. B. R. Co. v. Gough*, (Kan.) 10 Pac. Rep. 89.

It was said in *Mooney v. Union Pacific Ry. Co.*, 14 N. W. Rep. 343, that a debt due from one who may be sued in this State to a non-resident of the State of Iowa for services performed in the State of his residence, may be garnished in a suit instituted against him in

taking another step in this direction, our efforts should be to diminish the already overgrown jurisdiction of the Federal courts, and restore the litigation of the country to the State courts, where it can be as well and as fairly disposed of, and with much more economy and convenience to the people." This may be regarded as, in one sense, an outcropping of the "ancient leaven," but the fact remains nevertheless, that in consequence of the enormous growth of inter-State commerce, the jurisdiction of Federal courts has greatly increased, and is rapidly increasing; whether it ought to be diminished is a grave question for the serious consideration of statesmen and jurists. Whether the broader jurisdiction of Federal Courts be an evil or a blessing, there can be no doubt that it will be very greatly increased by the adoption of any Bankrupt Law, and that under the operation of such a law the processes of those courts will be brought home to the business of multitudes of people whose names, would never otherwise appear upon their records. Whether therefore the further increase of Federal jurisdiction is a thing to be desired, or to be deplored, it is a living issue in the consideration of a Bankrupt Law, but to discuss it as fully as it deserves would at once lead us into a political field which it would be inappropriate for us to enter. The experience of the United States in the matter of Bankrupt Laws has been singularly unfavorable to that line of legislation.

The first Bankrupt Law enacted in 1800 was repealed in 1803 having failed utterly to receive the sanction of popular approval. The second, enacted in 1841, was practically nothing more than a whitewashing measure, to enable insolvents wrecked by the currency collapse of 1837, to take a new departure, and enter upon new enterprises. The country soon demanded and obtained its repeal. The popular impression then was that men who owed debts ought to pay them, or at least to continue to owe them, and that the creditor was entitled to the benefit of all the chances of the debtor's future. The Bankrupt Law of 1867 was somewhat longer lived, but after vigorous efforts to save it by amendments, it too succumbed to popular displeasure. Each of these two latter laws was, in the main, a "relief" measure, the

product of a financial emergency, designed chiefly as "a new way to pay old debts," and only partially as a permanent portion of judicial processes for the collection of debts.

From this recital it is manifest that for nearly a hundred years, Congress has possessed the power to enact Bankrupt Laws, and has never exercised it without a prompt rebuke from the people, necessitating the repeal of the law. The objections to this line of legislation which have been most seriously urged are: that the operation of any bankrupt law is cumbrous and expensive, that although courts are good instrumentalities for deciding what men's rights are, they are, to use Senator George's language "very poor ones to manage men's business;" that under any bankrupt system, the jurisdiction of the United States Courts is unduly extended; that under the voluntary clauses of the law an excellent opportunity is afforded to fraudulent debtors to extinguish their liabilities by paying little or nothing; that the retrospective action of the law, by which debtors can be discharged from debts contracted before the passage of the act is contrary to the spirit of the constitution, although clearly within its letter; that although all contracts are presumed to be made with reference to all laws in force at the time, it is not fair to presume that contracts are made with reference to the power of Congress to enact a Bankrupt Law, the exercise of which has been so rare and so transitory. If the future Bankrupt Law shall be so framed as to obviate these objections it may possibly stand the test of popular criticism and scrutiny, otherwise it will probably soon perish like its predecessors.

NOTES OF RECENT DECISIONS.

WILL — CONSTRUCTION — EXTRINSIC TESTIMONY — CONDITIONAL LIMITATIONS — CHARITABLE USES.—In the Supreme Court of Wisconsin was recently decided an interesting case involving the construction of testamentary papers, the validity of bequests to charitable uses and the operation of conditional limitations.¹ It is a little noteworthy

that a very elaborate testamentary paper, containing many items, disposing of a very handsome fortune, and raising several important questions, was marred by two gross mistakes, misdescribing the two objects of the testator's bounty, corporations, and raising a preliminary question as to how far the error of the scrivener would be cured by the charitable construction of the court. The will failed to designate with accuracy to which of two "Cemetery Associations" a legacy of \$1,000 was bequeathed, and to describe properly a Presbyterian "Church" or "Society" to which \$10,000 was given. The court, however, had no difficulty in ruling that extrinsic evidence was admissible to show which was the "Cemetery," and which the "Society," that the testator intended to endow.²

The question when a bequest is within the rule forbidding perpetuities seems to be this: Bequests of legacies and personal property, when the payment or distribution is to be made at a future time, certain to arrive, and not subject to a condition precedent, are deemed vested, when there is a person in being at the time of the testator's death, capable of taking when the time arrives. On the other hand, legacies payable only upon an event which may never happen, and therefore subject to a condition precedent, are contingent. Hence, the court concluded that the bequest to the church, although by the terms of the will, it was not payable until five years after the death of the testator, conferred upon the church a vested interest in the legacy, and was in every respect valid.

Whether a provision in favor of the "resident poor of the town" was sufficiently certain was also considered. It was held to be sufficiently definite.³

The cases on this subject are numerous, but all lead us to the conclusion that bequests of this character are sufficiently certain, if there is such a general description of the persons to be benefited, as may reasonably lead at the proper time to an identification of the particular individuals. "In trusts of this kind," says the Supreme Court of Maine,⁴ "the individuals who are ultimately to be benefited are always uncertain." And in another Maine case,⁵ it was held that a benefit of this description was valid, although the beneficiary was not in existence when the will was made or the testator died. It was to the "first Calvinist Baptist Society that may be organized" in a specified place.⁶ In a Massachusetts case Shaw, C. J., said: "When a gift is made to found a hospital or college not in being, and which requires a future act of incorporation, the gift is nevertheless valid and the court will carry it into effect."⁷ Upon abundant authority, therefore, the court held that the benefits to the cemetery company, and to the church, were valid. In this case, too, another interesting question is raised. The testator bequeathed to each of his two grandsons the sum of \$10,000, upon the condition that if either of them should die, "without leaving any heir," before his legacy should be paid to him, the survivor should receive the share of the deceased. One of the grandsons did die, and the court, of course, held that his share vested in his brother, subject, however, to the conditions upon which he was to receive his own legacy. Those conditions were, that before receiving his legacy under the will, the legatee should have learned some useful trade, business or profession, and should be of good moral character. This condition, it was contended, was void, because it was *in terrorem*, and against public policy. In answer to this line of argument the court says:

"The authorities, however, seem to be

Zanesville, 17 Ohio St. 352; Hesketh v. Murphy, 36 N. J. E. 304; State v. Griffith, 2 Del. Ch. 392; Craig v. Secrist, 54 Ind. 419; Shotwell v. Mott, 2 Sandf. Ch. 46.

⁴ Howard v. American, etc. Soc., *supra*; Bartlett v. King, 12 Mass. 537.

⁵ Swasey v. American Bible Soc., 57 Me. *supra*.

⁶ Atty-Gen. v. Downing, 8 Ves. Jr. 714.

⁷ Sanderson v. White, 18 Pick. 336.

² State v. Timme, 56 Wis. 423; S. C. 14 N. W. Rep. 604; Begg v. Begg, 56 Wis. 584; S. C. 14 N. W. Rep. 602; Scott v. West, 63 Wis. 551; S. C. 24 N. W. Rep. 161, and 25 N. W. Rep. 18; Begg v. Anderson, 64 Wis. 307; S. C. 25 N. W. Rep. 8; Cleveland v. Burnham, 64 Wis. 355; S. C. 25 N. W. Rep. 407; *In re Brake*, 32 Moak, Eng. Rep. 601; Brownfield v. Brownfield, 51 Amer. Dec. 590; Hawkins v. Garland, 44 Amer. Rep. 138; Tilton v. American Bible Soc., 49 Amer. Rep. 321; Newell's Appeal, 24 Pa. St. 197; Milnot v. Boston Asylum & F. S., 7 Metc. 416; Howard v. American P. S., 49 Me. 288; Lefevre v. Lefevre, 59 N. Y. 434; Patch v. White, 117 U. S. 210; S. C. 6 Sup. Ct. Rep. 617, 710.

³ Howard v. American, etc. Society, 49 Me. 288; Swasey v. American Bible Soc., 57 Me. 523; McIntire v.

strongly the other way. This is on the theory that every person has a legal right to dispose of his own property as he sees fit. Thus, conditions annexed to a devise or bequest from a husband to a wife, or a wife to a husband, to be held only so long as he or she remains unmarried, are quite common, and have frequently been held valid. *Allen v. Jackson*, 1 Ch. Div. 399, reversing the same case in 19 Eq. Cas. 631; *Pringle v. Dunkley*, 53 Amer. Dec. 110; *Bostick v. Blades*, 59 Md. 231; S. C. 43 Amer. Rep. 548. So, conditions that the devisee or legatee shall not marry prior to arriving at a particular age, without the consent of a person named, have been held valid. *Scott v. Tyler*, 2 Brown, Ch. 431; *Stackpole v. Beaumont*, 3 Ves. Jr. 97; *Hogan v. Curtin*, 88 N. Y. 162; S. C. 42 Amer. Rep. 244. The age named must, of course, be reasonable; as, for instance, 21 years of age. But a condition annexed to a devise or bequest from parent to child in absolute restraint of marriage, has been held void, as against public policy. *Williams v. Cowden*, 13 Mo. 211; S. C. 53 Amer. Dec. 143; *Randall v. Marble*, 69 Me. 310; *Otis v. Prince*, 10 Gray, 581. The same has been held where the devise or bequest was to a widow from her husband, and there was no gift over in case of breach of the condition. *Parsons v. Winslow*, 6 Mass. 169; S. C. 4 Amer. Dec. 107, and notes; *Crawford v. Thompson*, 91 Ind. 266; S. C. 46 Amer. Rep. 598.

In *Cook v. Turner*, 14 Sim. 493, the will contained a gift over in case the legatee should dispute the will, or the testator's competency to make it, or should not confirm it when required by the trustees; and the condition was held valid.

In *Dickson's Trust*, 1 Sim. (N. S.) 37, the testator, by a codicil, annexed a condition to the bequest to his daughter to the effect that she should not take, in case she became a nun, which she did; and it was held by Lord Cransworth that the condition was lawful, notwithstanding there was no gift over on its breach.

That case was followed in *Hodgson v. Halford*, 11 Ch. Div. 959, S. C. 32, Moak, Eng. Rep. 918, where the condition annexed to the legacy was, in effect, that it should be forfeited in case the legatee married any person

who was not a born Jew, professing the Jewish religion; and it was held valid, and not against public policy. It was there said that all the authorities holding the other way were 'cases in which the condition was unquestionably against public morality, and it was on that ground that the court declined to give effect to it.'"

There was still another question which the court found it necessary to settle. The will provides that in case the legacies to the two grandsons shall fail by the death of both of them before attaining the age of thirty years, their legacies should revert to the executors and be expended by them "for charitable purposes, or given to any of the testator's heirs as may be in need, or not in very comfortable circumstances." The first alternative for charitable purposes generally, brings up the question whether the statute of 43 Eliz. ch. 4 is in force in Wisconsin. Upon that point the court holds that the *cy pres* feature of the statute of Elizabeth is certainly not in force in Wisconsin, because the courts of that State being endowed with only "strictly judicial powers" cannot exercise such powers as are entrusted to the Lord Chancellor as keeper of the great seal. "But in so far as that statute was only confirmatory of such powers exercised by the Lord Chancellor as were strictly judicial, it became by judicial construction interwoven in, and a part of the common law of England, and to that extent is in force here."⁸

Several other questions of interest were adjudicated, which we can only notice very briefly. It is held that although a bequest of money to be used in a specified event for charitable purposes is too indefinite to be carried into effect, an alternative authority to bestow the money on "any of my heirs who are in need or not in very comfortable circumstances," is sufficiently definite and may be enforced. It was further held in this con-

⁸ *Vidal v. Gerard's Exrs.*, 2 How. 128; *Howard v. American P. Soc.*, 49 Me. 288; *Shields v. Jolly*, 1 Rich. Eq. 99; S. C. 42 Amer. Dec. 349; *Derby v. Derby*, 4 R. I. 436; *Executors of Burr v. Smith*, 7 Vt. 241; *McAllister v. McAllister*, 46 Vt. 272; *Fontain v. Ravenel*, 17 How. 385 *et seq.*; *Ould v. Washington H. F.*, 95 U. S. 803; *Goins v. Emery*, 16 Pick. 107; S. C. 26 Amer. Dec. 645; *State v. Griffith*, 2 Del. Ch. 392; *Miller v. Chittenden*, 2 Iowa, 369 *et seq.*; *Williams v. Williams*, 8 N. Y. 525; *Treat's Appeal*, 30 Conn. 113; *Williams v. Pearson*, 38 Ala. 299.

nection, that if one of two alternative purposes of a gift is too indefinite to be carried into effect, the validity of the other is not thereby impaired. And further, that if a fund devoted by will to a charitable purpose is too small to accomplish the object desired, it will revert to the persons entitled to it by law; and finally that where a testator throughout his will bequeaths and treats his estate as personal property, the power of the executors to convert the realty into cash is implied.

RESTORATION OF A LOST OR SPOILIATED WILL.

To bring this discussion within prescribed limits, all questions wherein judicial *dicta* have not branched off from the law of wills in general, or which have no especial bearing upon the mode of procedure looking to the restoration of lost wills, and the admission of copies or drafts of the same to probate, will be omitted.

Jurisdiction.—It has generally been held that courts of equity have jurisdiction to establish lost and spoliated wills.¹ In Kentucky chancery takes cognizance only in case of spoliation.² In Ohio,³ South Carolina,⁴ Georgia,⁵ Rhode Island⁶ and Kansas,⁷ the preliminary application for the admission to probate of a copy or draft, must be made in the probate court. In Missouri,⁸ Colorado⁹ and Wisconsin,¹⁰ jurisdiction is in the county court.

¹ Adams Eq. 248, n; Hill Trustees, 151; Perry Trusts, § 183; Story Eq. Jur. § 254; Bigelow Fraud, 128; Kerr Fr. and Mistake, 275; 3 Redf. Wills, 17; Allison v. Allison, 7 Dana, 94; Bailey v. Stiles, 1 Green, Ch. 220; Buchanan v. Matlock, 8 Humpf. 390; Legare v. Ashe, 1 Bay. (S. C.) 464; Bulkley v. Redmond, 2 Bradf. (N. Y. Sur.) 281; Bowen v. Idley, 6 Paige, 46. In California and Arkansas jurisdiction is in chancery by statute.

² Hunt v. Hamilton, 9 Dana, 90; Campbell v. West, 3 B. Mon. 242.

³ Morningstar v. Selby, 15 Ohio, 345.

⁴ Myers v. O'Hanlon, 13 Rich. 196.

⁵ Slade v. Street, 27 Ga. 17.

⁶ Clarke v. Clarke, 7 R. I. 45.

⁷ Rev. Stats.

⁸ Jackson v. Jackson, 4 Mo. 210; Graham v. O'Fallon, 3 Mo. 507; 4 Mo. 338; Ib. 601. The Probate Court has been abolished here and its jurisdiction transferred to the County Court.

⁹ Rev. Stats.

¹⁰ Rev. Stats. The Circuit Court has concurrent jurisdiction.

Proof of Loss.—There is no difference between the rules of evidence applicable to the case of a lost will, and those governing the re-production of any other lost instrument.¹¹ Therefore the first step in the proceeding now under consideration, is to prove the loss of the original.¹² It is to be established that diligent but unsuccessful search has been made in all places where the document was most likely to be found.¹³

Proof of Execution.—As in the case of an existing will offered for probate, so if the will be lost, due execution must be proven.¹⁴ But it is to be noticed that courts have not required that this proof be stringent. Thus the testimony of a single witness has been deemed sufficient,¹⁵ and wills have been admitted to probate, against the oath of a subscribing witness, that the legal formalities were not complied with by the testator at the execution of the document.¹⁶ The statute relating to the taking proof of the execution and validity of lost wills is remedial, and should be liberally construed.¹⁷ In this spirit Wood-

¹¹ Appendix II; 1 Redf. Wills, ed. of 1876.

¹² This is a principle too well known to require reference to any but the more leading text books and cases. Vide Story Eq. Jur. § 88; Starkie Ev. 531, n; Cresley Ev. 269; 1 Phillips Ev. 5 and 6; 2 Best Ev. (Morgan's Notes) 814; 1 Greenleaf Ev. § 558; Smith v. Carrington, 4 Cranch, 62; Sebree v. Dorr, 9 Wheat, 558; Riggs v. Tayloe, Ib. 483; Renner v. Bk. of Columbia, Ib. 581; Tayloe v. Riggs, 1 Pet. 591; U. S. v. Rayburn, 6 Ib. 352; Winn v. Patterson, 9 Ib. 663; U. S. v. Laub, 12 Ib. 1; Williams v. U. S. 1 How. 290; DeLane v. Moore, 14 Ib. 253; Turner v. Yates, 16 Ib. 14.

¹³ As to what constitutes sufficient search, see the exhaustive note to 2nd Best Ev. (Morgan's Notes), p. 814; Minor v. Tillotson, 7 Pet. 99; Simpson v. Dall, 3 Wall. 460; Williams v. U. S. 1 How. 290; DeLane v. Moore, 14 Ib. 253; Hotchkiss v. Mosler, 48 N. Y. 478; Green v. Disbrow, 7 Lans. 381; Hemphill v. McClimans, 24 Pa. St. 367; Eure v. Pittman, 3 Hawks, (N. C.) 384; Waller v. School Dis. 22 Conn. 326; Dan v. Brown, 4 Cow. 483; Jackson v. Russell, 4 Wend. 543.

¹⁴ 1 Jarman Wills, 220; 2 Redf. Wills, 7, n; Wharton Ev. § 139; 2 Phillips Ev. p. 532; Cow. H. & E. note, 458; Bailey v. Stiles, 1 Green Ch. 220.

¹⁵ Dan v. Brown, 4 Cow. 483; Jackson v. Betts, 6 Ib. 377; Dickey v. Malech, 6 Mo. 171; Kearns v. Kearns, 4 Harr. 183; Graham v. O'Fallon, 3 Mo. 507; Baker v. Dobyn, 4 Dana, 221; Boudinot v. Bradford, 2 Dall. 266; Carson's Appeal, 59 Pa. St. 493; Mullen v. McKelvy, 5 Watts, 399; Greenough v. Greenough, 11 Pa. St. 489; Vernon v. Kirk, 30 Ib. 218; McKee v. White, 50 Ib. 354.

¹⁶ Jackson v. Christman, 4 Wend. 277; Peebles v. Case, 2 Bradf. 226; Chaffee v. Baptist, etc. 10 Paige, 85; Jauncey v. Thorne, 2 Barb. Ch. 40; Thomas v. Turner, 6 T. B. Mon. 52; Haynes v. Haynes, 33 O. S. 598.

¹⁷ Hall v. Allen, 31 Wis. 691.

worth, J., in *Dan v. Brown*,¹⁸ required that only a *prima facie* case of due execution be made out.

Proof of Contents.—Both in England and America it has been held that the contents of a lost will may be proved by the evidence of a single witness, though he be interested, whose credibility and means of knowledge are not questioned.¹⁹ It is not necessary that the witness recall the exact words of the original,²⁰ but the evidence must be clear and satisfactory.²¹ Authorities differ upon the question, whether or not the provisions of the original must be reproduced *in toto*. It has been said that the evidence must be of the whole contents, without exception or omission.²² The more reasonable doctrine that probate may be made of so much of the will as can be satisfactorily established, is supported by good authority.²³ The leading English case of *Sugden v. Lord St. Leonards*,²⁴ decided in 1876, seems to settle the point beyond question, that portions of the original may be made effectual where the larger part, even, of the will cannot be restored. In general, courts demand a copy of the will upon which to grant probate, but if that be not obtainable a draft may be admitted,²⁵ or the will may be restored by parol evidence.²⁶

¹⁸ *Dan v. Brown*, 4 Cow. 483.

¹⁹ *Brown v. Brown*, 8 Ellis & Bl. 876; *Sugden v. Lord St. Leonards*, 1 L. R. P. D. 154; *Dan v. Brown*, 4 Cow. 483; *Jackson v. Betts*, 6 Id. 377; *Dickey v. Malech*, 6 Mo. 177; *Kearns v. Kearns*, 4 Harr. 183; *Baker v. Dobyn*, 4 Dana, 221. The statutes of New York, Arkansas and California, require proof of contents by two witnesses, but those of the first two States make a draft or copy equivalent to one witness.

²⁰ *Allison v. Allison*, 7 Dana, 96.

²¹ *Davis v. Sigourney*, 8 Mete. 487; *Eure v. Pitman*, 8 Hawks, 384; *Hylton v. Hylton*, 1 Gratt. 161; *Rhodes v. Vinson*, 9 Gill. 169; *Chisholm's Heirs v. Ben*, 7 B. Mon. 415; *Jones v. Murphy*, 8 Watts & Serg. 275; *Hatch v. Sigman*, 1 Dem. (N. Y.) 519; *Clarke v. Morton*, 5 Rawle, 235; *Johnson's Will*, 40 Conn. 587.

²² *Davis v. Sigourney*, 8 Mete. 487; *Durfee v. Durfee*, Id. 490, n; *Rhodes v. Vinson*, 9 Gill 169; *Butler v. Butler*, 5 Harr. 178; *Johnson's Will*, 40 Conn. 587; *Sheridan v. Houghton*, 6 Abb. (N. Y.) N. Cas. 234; *McNally v. Brown*, 5 Redf. 372; *Wharram v. Wharram*, 3 Sw. & Tr. 301.

²³ *Steele v. Price*, 5 B. Mon. 72; *Jackson v. Jackson*, 4 Mo. 210; *Dickey v. Malech*, 6 Id. 177; *Williams on Ex.* 42; 3 Redf. Wills, 53.

²⁴ *Sugden v. Lord St. Leonards*, 1 L. R. P. D. 154.

²⁵ 2 Redf. Wills, 7, n; *Jackson v. Lucett*, 2 Caines, 263; *Jackson v. Russell*, 4 Wend. 543; *Smith v. Steele*, 1 Harr. & McHen. 419; *Happy's Will*, 4 Bibb. 553; *Sly v. Sly and Dredge*, L. R. 2 P. D. 91; *In re, Barber*, L. R. 1 P. & D. 267. The same principle is, in effect, upheld in the cases cited in note 26, herein.

²⁶ See notes 27-32; *Wharram v. Wharram*, 3 Sw. &

Evidence.—In this class of cases it was, at one time, somewhat questioned whether secondary evidence of a will is admissible,²⁷ but it is now fully settled, both in England and America, that secondary evidence may be resorted to for that purpose.²⁸

The declarations of the testator, both as to the continued existence, and as to the contents of the will are admissible,²⁹ and they are admissible both to rebut the presumption of cancellation,³⁰ and to support that presumption,³¹ but less weight is to be given to subsequent than to contemporaneous declarations,³² when offered as evidence of the animus with which an act is done.³³

The Presumption of Cancellation.—It is a general rule, firmly established, both in England and America, that if a will is traced into, and not out of, the testator's possession, and cannot be found at his death, the presumption is that he destroyed it *animo revocandi*.³⁴ But when the will is traced out of

Tr. 301; *Podmore v. Wharton*, Ib. 449; *Finch v. Finch*, 1 L. R. P. & D. 871; *Burls v. Burls*, 1 L. R. P. & D. 472; *In re, Barber*, 1 L. R. P. & D. 267; *Graham v. O'Fallon*, 3 Mo. 507; *Jackson v. Jackson*, 4 Id. 210; *Dickey v. Malech*, 6 Id. 177.

²⁷ *Quick v. Quick*, 1 Sw. & Tr. 146.

²⁸ See notes 26, 27, 29-33. See also note 12, for the general principle. Redf. Wills, § 348; *Williams* [Ex. 147; *Wharton* Ev. § 138; *Starkie* Ev. 543; [Taylor Ev. §§ 435, 496; *Brown v. Brown*, 8 E. & B. 876; *In re, Brown*, 1 Sw. & Tr. 32; *In re, Gardner*, Ib. 109; *Doe v. Ross*, 8 Dowl. 389; *Eckersley v. Platt*, 1 L. R. P. & D. 281; *Jackson v. Betts*, 9 Cow. 208; *Voorhees v. Voorhees*, 39 N. Y. 463; *Harris v. Harris*, 36 Barb. 88; *Bulkeley v. Redmond*, 2 Bradf. 281.

²⁹ *Besta* Ev. 401; *Whar. Ev.* § 139; *Taylor* Ev. 166; *Reynold's* Stephen Ev. 70, 71; 1 Greenl' Ev. § 558, n; *Whiteley v. King*, 17 C. B. (N. S.) 756; *Saunders v. Saunders*, 6 Ec. & Mar. Cas. 518; *Williams v. Jones*, 7 Id. 106; *Eckersley v. Platt*, 1 L. R. P. & D. 281; *Patton v. Poulton*, 1 Sw. & Tr. 55; *Brown v. Brown*, 8 E. & B. 876; *Sugden v. Lord St. Leonards*, 1 L. R. P. D. 154; *Mercer v. Mackin*, 14 Bush, 434; *Pickens v. Davis*, 134 Mass. 252; *Johnson's Will*, 40 Conn. 587; *Foster's Appeal*, 87 Pa. St. 67; *Hatch v. Sigman*, 1 Dem. (N. Y.) 519; *Southworth v. Adams*, 11 Biss. 256; *Legare v. Ashe*, 1 Bay, (S. C.) 464.

³⁰ See cases cited in note 29.

³¹ *Keen v. Keen*, L. R. 3 P. & D. 105.

³² *Johnson v. Lyford*, L. R. 1 P. & D. 546.

³³ *Pemberton v. Pemberton*, 18 Ves. 310; *In re, Weston*, L. R. 1 P. & D. 633.

³⁴ This presumption is either expressly stated or indirectly recognized in all the cases cited in note 29, herein. But see further: *Lillie v. Lillie*, 3 Hagg. 184; *Helyar v. Helyar*, 1 Phill. Rep. Lee's Judg. 472; *Wharram v. Wharram*, 3 Sw. & Tr. 301; *Doe v. Palmer*, 18 Q. B. 747; *Colvin v. Frazer*, 2 Hagg. 266; *In re, Shaw* 1 Sw. & Tr. 62; *Togart v. Squire*, 1 Curt. 289; *Welch v. Phillips*, 1 Moo. P. C. 299; *Finch v. Finch*, L. R. 1 P. & D. 371; *Battyl v. Lyles*, 4 Jur. N. S. 718; *Dickinson v. Stidolph*, 11 Com. B. (N. S.) 341; *In re, Brown*,

the testator's possession it is incumbent upon the party alleging revocation to prove that it came again into the testator's custody, or was destroyed at his express request.³⁵ And further, if, after execution of the will, the testator becomes insane, the opponent of the will must prove destruction of the same by the testator during a lucid interval.³⁶ The presumption under consideration is but a weak one.³⁷ It is only a *prima facie* presumption, and not a legal conclusion.³⁸ Speaking of this presumption the learned judge, in *Whiteley v. King*,³⁹ says: "All these presumptions, if they come to be analyzed, may be resolved into the reasonable probability of fact deduced from the ordinary practice of mankind, and from sound reason. Persons in general keep their wills in places of safety. They are instruments in their nature revocable. Testamentary intention is ambulatory till death, and if the instrument be not found in the repositories of the testator, the common sense of the matter *prima facie* is, that he himself destroyed it, meaning to revoke it." This is a presumption which may be rebutted by either direct or circumstantial evidence.⁴⁰ Now, what is meant by *animo revocandi*? The legal signification of the phrase is no more than the English translation of the Latin words, which is: *with the intention of revoking*,

and, therefore, to fathom the intention of the testator with regard to his will, is the task set before the court (in the absence of statutory guidance), upon an application being made for the admission of a copy or draft of a lost or spoliated will to probate. Such intention may be disclosed (a), by the acts of the testator; (b), by his declarations, or (c), it may be inferred from the circumstances of the case, *i. e.*, from the will itself. To illustrate: (a) In *Dan v. Brown*,⁴¹ the testator, several months before his death, called for his will, and stated to his attorney that he wished to add a codicil. Woodworth, J. considers this act on the testator's part, evidence of his approval of the general features of the will, and his desire to adhere thereto, expressly stating the opinion of the court to be, that, while little weight was to be given (in this case) to the declarations of the testator, yet the simple act referred to was sufficient evidence to warrant the finding that the will remained in force at the death of the testator. (b) If the testator be a sane and honest man, having no motive to deceive, then his declarations that his will exists, his expressions of satisfaction in that fact, and in the contents of the instrument, are conclusive proof that he had not destroyed it intentionally. Wharton evidently considers the belief of the testator in the continued existence of his will, a complete rebuttal of the presumption now under consideration. He says,⁴² "Even where a will which has been duly executed, has been lost, parol evidence is admissible to show that the loss did not occur from an intention of revocation on the testator's part, but that he believed that it was still in existence at the time of his death." In *Whiteley v. King*,⁴³ the court through Earl, C. J., says:

"Surely you may look at a man's words to see what his intentions are. The question here was, whether the testator had the intention to destroy his will and codicil. * * * The declarations of the testator are cogent evidence of his intention. In this case his repeated declarations, down to within a very few days of his death, were abundant evidence that the testator did not intend to cancel or destroy his will. (c) In *Sugden v.*

1 Sw. & Tr. 32; *Wood v. Wood*, 1 L. R. P. & D. 309; *Cutto v. Gilbert*, 9 Moo. P. C. 143; *Smock v. Smock*, 11 N. J. Eq. 156; *Brown v. Brown*, 10 Yerg. 84; *Betts v. Jackson*, 6 Wend. 173; *Dudley v. Wardner*, 41 Vt. 59; *Idley v. Bowen*, 11 Wend. 227; *Dawson v. Smith*, 3 Houst. 335; *Davis v. Sigourney*, 8 Metc. 487; *Minkler v. Minkler*, 14 Vt. 125; *Appling v. Eades*, 1 Gratt. 286; *Holland v. Ferris*, 2 Bradf. 334; *Weeks v. McBeth*, 14 Ala. 474; *Johnson v. Brallsford* 2 Nott. & McC. 272; *Jones v. Murphy*, 8 Watts & Serg. 275; *Beaumont v. Kelm*, 50 Mo. 28; *Patterson v. Hickey*, 32 Ga. 156; *Bounds v. Gray*, Ga. Dec. Pt. II, 136; *Liveley v. Harwell*, 29 Ga. 509; *Havens v. Van Den Burgh*, 1 Dem. 27; *Kitchens v. Kitchens*, 39 Ga. 168; *Jackson v. Kniffen*, 2 Johns. 31; *Lewis v. Lewis*, 2 Watts & Serg. 455; *Burns v. Burns*, 4 Serg. & Rawle, 235; *Hildreth v. Shillinger*, 10 N. J. Eq. 196; *Bailey v. Stiles*, 1 Green Ch. 220.

³⁵ *Colvin v. Frazer*, 2 Hagg. 327; *Wynn v. Heveningham*, 1 Coll. 628; *Schultz v. Schultz*, 35 N. Y. 653; *Hildreth v. Shillinger*, 10 N. J. Eq. (2 Stark.) 196.

³⁶ *Harris v. Berral*, 1 Sw. & Tr. 153; *Sprigge v. Sprigge*, 1 L. R. P. & D. 608; *Whiteley v. King*, 17 C. B. (N. S.) 756; *Saunders v. Saunders*, 6 Ec. & Mar. Cas. 518; *Williams v. Jones*, 7 Id. 106; *Patton v. Poulton*, 1 Sw. & Tr. 55; *Ekersley v. Platt*, 1 L. R. P. & D. 148.

³⁷ *Brown v. Brown*, 8 E. & B. 875, 889, n.

³⁸ *Legare v. Ashe*, 1 Bay. S. C. 464.

³⁹ *Whiteley v. King*, 17 Com. B. (N. S.) 756.

⁴⁰ See notes 26-31, herein.

⁴¹ *Dan v. Brown*, 4 Cow. 483.

⁴² *Wharton Ev.* § 138.

⁴³ *Whiteley v. King*, 17 Com. B. N. S. 756.

Lord St. Leonards⁴⁴ Sir J. Hannen remarks: "This presumption may be rebutted by evidence leading to the conclusion, that the testator did not do that which, in the absence of evidence to the contrary, it is presumed he had done. That evidence must necessarily be of great variety, according to the various circumstances of the cases that are presented to courts of justice. The first element of this consideration of whether or not a testator has destroyed his will, is to be found in the instrument itself." Later in the same case, in reviewing the decision of Sir J. Hannen, Cockburn, C. J. says:⁴⁵ "You must take into account the improbability of a man like Lord St. Leonard's destroying his will and doing so with the intention of dying intestate * *

* * In substance, we have Lord St. Leonards, down to the very last moments of his life, saying "I have made all the testamentary dispositions which a careful man ought to make, which a father ought to make for his family, and I die in peace with that conviction." In general it may be said, that where a man makes his will with a definite object in view, e.g., to make special provision for a certain favorite,⁴⁶ and the circumstances surrounding the testator at the making of the will remain the same at his death, it is unnatural to suppose that he would deliberately defeat, by destroying that will, the very purpose which originally controlled him.

United States Statutes.—The statutes of the various States bearing upon the restoration of lost and spoliated wills, may be classed under two divisions. 1. Those which provide for the admission to probate of a copy of the original, when it is proven, either that the will existed subsequent to the death of the testator, or was destroyed, without his consent, during his lifetime.⁴⁷ 2. Those which do not allow probate of a copy in the second case, but demand that the will be proven to have existed subsequent to the death of the testator.⁴⁸ For convenience, let the New York and Ohio statutes be treated as representatives of their respective divisions. The only

fair interpretation of the New York statute, is to consider the intention of the law makers to have been, to incorporate the common law presumption of destruction of a lost will *animo revocandi*, into the statutory law of that State. If the will existed subsequent to the testator's death, or was fraudulently destroyed during his lifetime, then he did not destroy it *animo revocandi*. To satisfy the requirements of the statute is to rebut the presumption, and *vice versa*. Such is, in effect, the treatment of the statute in *Schultz v. Schultz*.⁴⁹ And I find no authority denying to the petitioner the right to satisfy the statute by any of the methods, which have been mentioned, for rebutting the presumption.

Of the Ohio Statute it is difficult to see the justice. In the light of the decision in *Mary Sinclair's will*,⁵⁰ it would seem that the legislature lost sight of the well known legal principle, denying to any man the right to take advantage of his own wrong. As equity has no jurisdiction to give relief,⁵¹ the heir at law might, in a contest of a lost will, come into court boasting of his destruction of the original, no matter what might be the injury to the testator as well as to the devisee, relying upon the statute to protect him in the enjoyment of the estate thus fraudulently obtained. This statute requires that the court be satisfied that the original will existed subsequent to the death of the testator. It cannot be argued that it is incumbent upon the applicant for the establishment of the lost will to prove the continued existence by positive evidence. Such evidence is not obtainable under the circumstances of the case. The court is to be satisfied of that fact, or, as U. S. Circuit Judge Dyer puts it,⁵² is to be "judicially convinced." This continued existence may be proven as well by circumstantial, as by direct evidence.⁵³ Under this statute, therefore, as well as in New York, in the absence of direct evidence on either side,⁵⁴ the question is whether or not the reasonable probability is, that the will was lost or destroyed after the testator's death. If the court is satisfied that it was so lost or destroyed, probate must be granted

⁴⁴ *Sugden v. Lord St. Leonards*, 1 L. R. P. D. 154, 195.

⁴⁵ *Id.* p. 214.

⁴⁶ *Legare v. Ashe*, 1 Bay. 464.

⁴⁷ Statutes of Arkansas, California, Georgia, Indiana, New York and Wisconsin.

⁴⁸ Statutes of Colorado, Kansas and Ohio. The statutes of the other States are silent on this particular topic.

⁴⁹ *Schultz v. Schultz*, 35 N. Y. 633.

⁵⁰ *Mary Sinclair's Will*, 5 O. S. 290.

⁵¹ See note 8.

⁵² In *Southworth v. Adams*, 11 Biss. 256.

⁵³ *Schultz v. Schultz*, *supra*; See notes 26-32, *herein*.

⁵⁴ See note 53, *herein*.

on the copy or draft of the original. In spite of the harshness of the statute above referred to, there are three points in the decisions of Ohio, which seem to indicate a decided leaning in favor of the will. 1. The statutes allow the court, in the hearing of the original application, to examine only those witnesses who are in favor of the probate of the copy, and thus preclude to the opponent, the possibility of proving the destruction of the will prior to the testator's death;⁵⁵ and after the copy is once admitted to probate, the *onus probandi* is shifted to the contestants.⁵⁶ 2. The statute is, to some extent, in *odium spoliatoris*, and in order to render the remedies at all practical and effective, it is proper that it should be administered somewhat in the same spirit.⁵⁷ To reconcile the dicta of the same court in *Sinclair's will* and *Banning v. Banning* is a task beyond the powers of discernment and analysis of the average mind. 3. The leaning of the law in Ohio, unlike that in England is in favor of the devisee instead of the heir.⁵⁸

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⁵⁵ Rev. Stats. § 5946; Hathaway's Will, 4 O. S. 383.

⁵⁶ Haynes v. Haynes, 33 O. S. 593.

⁵⁷ Banning v. Banning, 12 O. S. 437.

⁵⁸ *Ib.* Smith v. Jones, 4 O. 116.

INJURIES TO CHILDREN.

In actions for this class of injuries it is necessary to consider several essential particulars: 1. The age and capacity of the injured child. 2. Whether the court having jurisdiction of the action will apply what is technically known as the rule of "imputed negligence." 3. Whether the action is by the injured child or by its parents for loss of service, expense of medical treatment or for a statutory penalty in case of death. 4. The circumstances of injury.

Age and capacity of the child. When it is clearly established that a child's infirmities of age or intellect are such that it has no capacity for distinguishing between circumstances of danger and safety, or avoiding the one in preference to the other, the court will, as a matter of law, pronounce it *non sui juris*, and, therefore, personally incapable of contributory negligence. When it's capac-

ity does not clearly appear, it is a proper question for the jury whether the child is *sui juris*. On the other hand, when it is evident that the child is capable of caring efficiently for its safety, the court will, as a matter of law, pronounce it *sui juris*.

Thus it has been held as a matter of law that children of the following ages are to be regarded as *non sui juris*: One year and five months,¹ two years,² two years and four months,³ two years and nine months,⁴ three years and seven months,⁵ nearly four years,⁶ four years,⁷ under five years,⁸ five years,⁹ six years,¹⁰ and it would seem even seven years.¹¹ But this question was decided by the jury in cases of children of the following ages: Ten years,¹² eight years,¹³ nearly seven years,¹⁴ six years and seven months,¹⁵ six years,¹⁶ five and one half years,¹⁷ five years,¹⁸ and even four years and seven months.¹⁹ However, a boy nearly eleven years old, active and intelligent, has been pronounced by the court capable of taking care of himself upon the street.²⁰

When the age of the child is such that it is close upon the dividing line between that

¹ Kreig v. Wells, 1 E. D. Smith, 74.

² Hartfield v. Roper, 21 Wend. 615; Wright v. Malden, etc. R. Co., 4 Allen, 283.

³ Callahan v. Bean, 9 Allen, 401.

⁴ Evansville, etc. R. Co. v. Wolf, 59 Ind. 89; O'Flaherty v. Union R. Co., 45 Mo. 70.

⁵ Mangam v. Brooklyn, etc. R. Co., 38 N. Y. 455; s. c., 36 Barb. 230.

⁶ McLain v. Van Zandt, 7 Jones & Sp. 347; s. c., 48 How. Pr. 80.

⁷ Lehman v. Brooklyn, etc. R. Co., 29 Barb. 234; North Pennsylvania R. Co. v. Mahoney, 57 Pa. St. 187.

⁸ Lafayette, etc. R. Co. v. Huffman, 28 Ind. 287.

⁹ Jeffersonville, etc. R. Co. v. Bowen, 40 Ind. 545; s. c., 49 Ind. 154; McGarry v. Loomis, 63 N. Y. 104; Pittsburgh, etc. R. Co. v. Cadwell, 74 Pa. St. 421.

¹⁰ Chicago v. Starr, Adm., 42 Ill. 174.

¹¹ Pittsburgh, etc. R. Co. v. Vining's Adm., 27 Ind. 513.

¹² Lovett v. Salem, etc. R. Co., 9 Allen, 557; Karr v. Parks, 40 Cal. 188.

¹³ Drew v. Sixth Ave. R. Co., 26 N. Y. 49; s. c., 3 Keyes, 420.

¹⁴ Oldfield v. Harlem, etc. R. Co., 14 N. Y. 310; s. c., 3 E. D. Smith, 103.

¹⁵ Honegsberger v. Second Ave. R. Co., 1 Keyes, 570; s. c., 33 How. Pr. 195; 1 Daly, 89.

¹⁶ Cosgrove v. Ogden, 49 N. Y. 255.

¹⁷ Barksdall v. New Orleans, etc. R. Co., 23 La. An. 180.

¹⁸ Karr v. Parks, 40 Cal. 188; s. c., 44 Cal. 46.

¹⁹ Lynch v. Smith, 104 Mass. 53; St. Paul v. Kuby, 8 Minn. 154.

²⁰ O'Mara v. Hudson, etc. R. Co., 38 N. Y. 445; McMahon v. New York, 38 N. Y. 642, 647. See also Nagle v. Allegheny, etc. R. Co., 8 Cent. L. J. 807.

class of children whom the court will pronounce *non sui juris* and that which is relegated to the decision of the jury, it is not surprising to find testimony that the child is one of more than ordinary intelligence and activity²¹ or possessed of discretion in advance of its years and size,²² for it being established that the child is capable of appreciating danger and avoiding it, the parent will not be subject to the charge of negligence in allowing it to go at large with a certain degree of freedom.

The rule which imputes the negligence of the parents of children, or the custodians of other persons now *sui juris*, to their respective charges found expression in this country for the first time in the case of *Hartfield v. Roper*,²³ and twenty years before, it received the sanction of the English courts. It was resolved in *Hartfield v. Roper* that where a child of such tender age as not to possess sufficient discretion to avoid danger, is permitted by its parents to be in a public highway without any one to guard it, and is there run over by a traveller and injured, neither trespass nor case will lie, unless the injury be "voluntary" or the result of "gross neglect" on the part of such traveller. In an action for such injury, if the conduct of the child be such as would constitute negligence on the part of an adult, although the child, by reason of its tender age, be incapable of using that degree of care which is expected of a person of prudence, the want of such care on the part of parents or guardians of the child furnishes a complete defence to an action by the child for the injury sustained.²⁴

A single extract from the opinion of the court will be sufficient to present the grounds of the decision. Said Cowen, J.²⁴ An infant is not *sui juris*. He belongs to another to whom discretion in the care of his person is exclusively confided. That person is keeper and agent for this purpose; and, in respect to third persons, his act must be deemed that of the infant; his neglect, the infant neglect.

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²¹ *Oldfield v. Harlem, etc. R. Co.*, 14 N. Y. 810.

²² *Lynch v. Smith*, 104 Mass. 58.

²³ 21 Wend., 615.

²⁴ 21 Wend., 619.

TELEPHONE LAW — PATENT RIGHT — CONSTITUTIONAL LAW — POWER OF STATE TO REGULATE PROPERTY CREATED UNDER A PATENT — PROPERTY DEVOTED TO PUBLIC USE.

HOCKETT v. STATE.

Supreme Court of Indiana, November, 1885.

TELEPHONE — State Regulation — Act Limiting Rental Price of Instruments — Constitutional Law.—The State has the right to prescribe the maximum price which a telephone company shall charge for the use of its telephones, and the act of April 18, 1885, limiting the rental price of such instruments, and also the amount which shall be collected for conversations between cities and villages, is constitutional.

——. **Patent—Power of State to Regulate Property Created Under**—The fact that the telephone and appliances are articles patented under the Constitution and laws of the United States, while vesting in the patentee, his heirs and assigns, the exclusive right for a limited time, to make, use and vend the tangible property brought into existence by the application of the discovery covered by the letters patent, does not preclude State regulation of the property thus brought into existence.

——. **Property Devoted to Public Use**—In legal contemplation all the instruments and appliances used by a telephone company in the prosecution of its business are devoted to a public use, and property thus devoted to such use becomes a legitimate subject of legislative regulation.

——. **Guaranteed Rights in Property**—State regulation of property devoted to a public use is not the taking of property for a public purpose within the meaning of § 21, of art. 1, of the Constitution of this State, nor is it an interference with the guaranteed rights of the citizen in private property.

——. **Word "Telephone" Includes all Instruments for Reception and Transmission of Messages**—The word "telephone," as used in the act of April 18, 1885, was intended to designate, and did in fact refer to an apparatus composed of all the usual and necessary instruments for the transmission and reception of telephonic messages, and not to a single instrument only.

——. **Term of Art.—Evidence**—The word "telephone" having become a term of art, evidence is admissible to explain its proper meaning.

——. **Legislative Intention**—There being nothing in the act of April 18, 1885, or in other laws, which requires a telephone company to construct a new line against its will, or to maintain an old line longer than it may feel justified in doing, evidence that it could not construct, or continue to use a particular line at the price limited without loss, cannot be considered in determining the legislative intention in passing such act.

——. **Justice or Expediency of Act—Remedy**—Where a statute is one which the legislature had power to enact, the courts can not sit in judgment upon either its justice or expediency, but relief must be sought of the legislature.

From the Marion Criminal Court.

J. E. McDonald, J. M. Butler. A. L. Mason, T.

A. Hendricks, C. Baker, O. B. Hord, A. W. Hendricks, A. Baker, E. Daniels, — Williams, and — Thompson, for appellant; F. T. Hord, Attorney-General, A. C. Harris, W. H. Calkins, C. Byfield and L. Howland, for the State.

NIBLACK, C. J. delivered the opinion of the court:

On the 13th day of April, 1885, the legislature of this State passed an act entitled "An act to regulate the rental allowed for the use of telephones, and fixing a penalty for its violation," the tenor of which is as follows:

"SECTION 1. *Be it enacted by the General Assembly of the State of Indiana*, That no individual, company or corporation, now or hereafter owning, controlling or operating any telephone line in operation in this State shall be allowed to charge, collect or receive as rental for the use of such telephones, a sum exceeding three dollars per month where one telephone only is rented by one individual, company or corporation. Where two or more telephones are rented by the same individual, company or corporation, the rental per month for each telephone so rented shall not exceed two dollars and fifty cents per month.

"SEC. 2. Where any two cities or villages are connected by wire operated or owned by any individual, company or corporation, the price for the use of any telephone for the purpose of conversation between such cities or villages, shall not exceed fifteen cents for the first five minutes, and for each additional five minutes no sum exceeding five cents shall be charged, collected or received.

"SEC. 3. Any owner, operator, agent or other person, who shall charge, collect or receive for the use of any telephone any sum in excess of the rates fixed by this act, shall be deemed guilty of a public offence, and on conviction shall be fined in any sum not exceeding twenty-five dollars."

On the 27th day of July, 1885, Theodore P. Haughey, requested the Central Union Telephone Company, a corporation organized under the laws of the State of Illinois, but owning and operating a telephone exchange, and system of telephone lines, at the city of Indianapolis, in this State, to rent him one telephone, to be used at his residence upon his farm, four and one-half miles from the company's telephone exchange, and two miles outside of the corporate limits of the city of Indianapolis, and to connect such telephone with the exchange by the erection of the necessary poles and wires. In response to this request, the company offered to rent to Haughey a hand telephone and magneto bell, and to connect them with its exchange, and to furnish exchange service from 7 o'clock, a. m., until 6 o'clock, p. m., each day, for \$3 per month, the company to have the right to place other subscribers upon the same line. But Haughey declined to accept that offer, and instead entered into a contract with the company for the use of "one battery transmitter and one magneto telephone," and "the necessary ap-

pliances for connecting them with the exchange," upon certain terms and conditions named in the contract, for which he agreed to pay the company the sum of \$33.50 for each quarter, or \$11.16 2-3, per month. The contract says:

"The above total sum is based upon the charges itemized as follows:

"Rental of one magneto telephone and one battery transmitter, (two telephones), at the rate of, \$20 per ann'm
"Labor and service charges for switching, construction and maintenance charges for lines, batteries, central office apparatus, magneto bell and other appurtenances, at the rate of, \$114 " " "

The telephone company built the line and furnished the equipments for the use of Haughey, called for by its contract with him.

At the expiration of the first three months after the contract went into effect, the appellant, John E. Hockett, acting as the district superintendent and general agent of the company at Indianapolis demanded of, and received from Haughey the sum of \$33.50, claimed to be due under the contract for the latter's use of the line and equipments therein provided for, during the preceding three months.

An information was thereupon filed against Hockett, charging him with a violation of the provisions of the act of the legislature, herein above set out, and, upon proof of the matters above stated, with others of a formal, incidental, or a merely collateral character, the court below found him guilty of having charged more for the use of a telephone than the law permitted him, as well as the company he represented, to do, and, after overruling a motion for a new trial, adjudged that he pay a fine as a penalty for the commission of a criminal offence.

It was shown at the trial that articles furnished to Haughey as a telephone equipment, as well as all the other mechanical contrivances used by the company in the transmission of words and sounds over its wires, are patented articles, and that the company holds the right to use these patented articles by assignment either direct or remote from the patentee.

It is first and most earnestly contended that, as the articles used by the company as above are patented; under the Constitution and laws of the United States, the legislature of a State has no power to limit the price, use, sale or rental value of such articles; and that, as a consequence, all acts of a State Legislature of the class to which the one before us belongs, are inoperative and ineffectual for any practical purpose. Conceding the force, as well as the plausibility, of many of the arguments and illustrations used by counsel, the ready, and, indeed, inevitable answer is, that the question thus presented ought no longer to be regarded as an open question. There is a reserved, and, at the same time, well recognized

power, affecting their domestic concerns, remaining in all the States, which the government of the United States can not, and has seldom attempted to invade. This power is so varied and comprehensive that an exact definition, as applicable to all its phases, has so far been found to be impracticable, but the instances in which the existence of such a power has been judicially recognized, in particular cases, are quite numerous, as well as various in their application to our complex system of government. This reserved power is usually, though perhaps not always accurately, denominated the police power of a State, and embraces the entire system of internal State regulation, having in view not only the preservation of public order and the prevention of offences against the State, but also the promotion of such intercourse between the inhabitants of the State as is calculated to prevent a conflict of rights and to promote the interest of all. *Cooley Const. Lim.* 572.

It is a power inherent in every sovereignty, and is, in its broadest sense, nothing more than the power of a State to govern men and things within the limits of its own dominion. *License Cases*, 5 How. 504, 582.

It extends to the protection of the lives, limbs, health, comfort and convenience, as well as the property of all persons within the State. It authorizes the legislature to prescribe the mode and manner in which every one may so use his own, as not to injure others, and to do whatever is necessary to promote the public welfare, not inconsistent with its own organic law. *Thorpe v. R. & B. R. R. Co.*, 27 Vt. 140.

In 1867 letters patent were issued to one DeWitt for a discovery in the manufacture of a quality of oil known as "Aurora Oil," and one Patterson, became the assignee of the right conferred upon DeWitt by his letters patent. Under a system of inspection provided by the laws of Kentucky, some casks containing this Aurora oil were branded "unsafe for illuminating purposes," and notwithstanding a statute of that State making it a penal offence to sell oil thus branded, Patterson sold the casks of oil in question to one Davis. Patterson was thereupon indicted, tried and convicted in one of the Kentucky courts for the alleged unlawful sale of these condemned casks of oil. This judgment convicting Patterson of a criminal offence having been affirmed by the Court of Appeals of that State, the cause was taken to the Supreme Court of the United States to test the validity of the statute under which Patterson was so convicted, as a restraint upon the sale of a commodity covered by letters patent from the United States. Upon a review of all the questions involved, the validity of the statute was maintained and the judgment of the Court of Appeals was in all things affirmed. See *Patterson v. Kentucky*, 97 U. S. 501.

The court held in that case, and as we have no doubt correctly, that all that the letters patent secured was the exclusive right in the discovery, and

that the right thus secured was an incorporeal right, and hence without "tangible substance;" that the right to sell the oil was not derived from the letters patent, but existed and could have been exercised before the issuing of such letters, unless prohibited by some local statute; that because the patentee acquired a monopoly in his discovery, and was hence secure against interference, it did not follow that the tangible property which came into existence by the application of the discovery was beyond the control of State legislation; that, on the contrary, the right of property in the physical substance, which is the fruit of the discovery, is altogether distinct from the discovery itself, just as the property in the instruments or plate by which copies of a map are multiplied is distinct from the copyright itself; that hence the right conferred upon the patentee and his assigns to make, use and vend the corporeal article or commodity brought into existence by the application of the patented discovery must be exercised in subordination to the police or local regulations established by the State. The doctrine of that case was approved and followed in the more recent case of *Webber v. Virginia*, 103 U. S. 344, and has the support, either in direct terms or in principle, of numerous other carefully considered cases. *Patterson v. Commonwealth*, 11 Bush, 311 (21 Am. R. 220); *State v. Telephone Co.*, 36 Ohio St. 296 (38 Am. R. 583, and note); *Jordan v. Dayton*, 4 Ohio, 295; *Fry v. State*, 63 Ind. 552; *People v. Russell*, 49 Mich. 618 (43 Am. R. 478); *Thompson v. Staats*, 15 Wend. 395; *Martinetti v. Maguire*, Deady, 216; *Vannini v. Paine*, 1 Harrington, 65; *License Tax Cases*, 5 Wall. 462; *United States v. DeWitt*, 9 Wall. 41; *Railroad Co. v. Husen*, 95 U. S. 465; *Beer Co. v. Massachusetts*, 97 U. S. 25; *Brechbill v. Randall*, 102 Ind. 528 (52 Am. R. 695); *Palmer v. State*, 39 Ohio St. 236 (48 Am. R. 429); *Western U. Tel. Co. v. Fendleton*, 95 Ind. 12 (48 Am. R. 692); *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 660.

While, therefore, it is true that letters patent confer upon the patentee a monopoly to the extent of vesting in him, his heirs and assigns, the exclusive right to make, use and vend the tangible property brought into existence by a practical application of the discovery covered by the letters patent, for a limited time, it is not true that such exclusive right authorizes the making, using or vending of such tangible property in a manner which would be unlawful except for such letters patent, and independently of State legislation and State control.

It is next contended that the Central Union Telephone Company was organized, and has so far been conducted as an ordinary business investment, and is in its methods, as well as in its relations to its patrons and subscribers, a merely private enterprise, no more subject to legislative control than any other private business with which a considerable number of persons have become either directly or indirectly connected; that conse-

quently the act of the legislature, under which this prosecution was instituted, is inoperative and void as a restraint upon the company in its charges for the rental and use of its instruments.

The telephone is one of the remarkable productions of the present century, and, although its discovery is of recent date, it has been in use long enough to have attained well defined relations to the general public. It has become as much a matter of public convenience and of public necessity as were the stage coach and sailing vessel a hundred years ago, or as the steamboat, the railroad and the telegraph have become in later years. It has already become an important instrument of commerce. No other known device can supply the extraordinary facilities which it affords. It may, therefore, be regarded, when relatively considered, as an indispensable instrument of commerce. The relations which it has assumed towards the public make it a common carrier of news, a common carrier in the sense in which the telegraph is a common carrier, and impose upon it certain well defined obligations of a public character. All the instruments and appliances used by a telephone company in the prosecution of its business are consequently, in legal contemplation, devoted to a public use. *State, ex rel. v. Nebraska Telephone Co.*, 22 N. W. Rep. 237; 22 Cent. Law Jour. 33; *State of Missouri v. Bell Telephone Co.*, 23 Fed. Rep. 539; *State v. Telephone Co.*, *supra*; *American Rapid Tel. Co. v. Connecticut Telephone Co.*, 44 Am. R. 237, n.

It is now a well settled legal proposition that property thus devoted to a public use becomes a legitimate subject of legislative regulation and control. In recognition of that doctrine the case of *Munn v. Illinois*, 94 U. S. 113, has become a leading case.

It was, in general terms, held in that case, that when the owner of property devotes it to a use in which the public has an interest, he in effect grants to the public an interest in such use, and must, to the extent of that interest, submit to be controlled by the public, for the common good, as long as he maintains the use to which he has so devoted his property, and that he can only escape such public control by withdrawing his grant and discontinuing the use. In support of that conclusion, the court said it has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, and the like, and, in so doing, to fix a maximum of charges to be made for services rendered, accommodations extended and articles sold. This case has been the subject of much unfriendly comment and has encountered some very sharp criticism, but its authority as a precedent remains unshaken.

This State regulation and control of property devoted to a public use is not the taking of property for a public purpose within the meaning of § 21 of art. 1 of the Constitution of this State. Nor

is such regulation and control an interference with the guaranteed rights of the citizen in private property. As bearing generally upon the subjects lastly above referred to, see, also, the cases of *Chicago, etc., R. R. Co. v. Iowa*, 94 U. S. 155; *Chicago, etc., R. R. Co. v. Ackley*, 94 U. S. 179; *Winona, etc. R. R. Co. v. Blake*, 94 U. S. 180; *Railroad Co. v. Richmond*, 96 U. S. 521; *Railroad Co. v. Fuller*, 17 Wall. 560; *Olcott v. Supervisors*, 16 Wall. 678; *Ruggles v. Illinois*, 108 U. S. 526; *Spring Valley Water Works v. Schottler*, 110 U. S. 347; *Ruggles v. People*, 91 Ill. 256; *Illinois Central R. R. Co. v. People*, 108 U. S. 541; s. c., 1 A. & E. R. R. Cas. 188; *Allnut v. Ingalls*, 12 East, 527; *Mayor, etc. of Mobile v. Yuille*, 3 Ala. 137; *N. J. Steam Nav. Co. v. Merchants' Bank*, 6 How. 343; *Bolt v. Stennett*, 8 T. R. 606; *Com. v. Duane*, 98 Mass. 1; *Com. v. Tewsbury*, 11 Met. 55; *Com. v. Alger*, 7 Cush. 53; *Metropolitan Board v. Barrie*, 34 N. Y. 657; *Slaughter-House Cases*, 16 Wall. 36; *Sharpless v. Mayor, etc.*, 21 Pa. St. 147; *Grant v. Courter*, 34 Barb. 232; *Bartemeyer v. Iowa*, 18 Wall. 129; *Beer Co. v. Mass.*, *supra*; *Ogden v. Saunders*, 12 Wheat. 212; *Standard Oil Co. v. Combs*, 96 Ind. 179 (49 Am. R. 156); *Western U. Tel. Co. v. Pendleton*, *supra*; *Indianapolis, etc. R. R. Co. v. Kercheval*, 16 Ind. 84; *Foster v. Kansas*, 112 U. S. 201; *Brechbill v. Randall*, 102 Ind. 528; *Fry v. State*, *supra*; *Toledo Agr'l Works v. Work*, 70 Ind. 253; *West Virginia, etc. Co. v. Volcanic Oil Co.*, 5 W. Va. 382; *State v. Perry*, 5 Jones L. 252; *Attorney General v. Railroad Companies*, 35 Wis. 425.

The obvious deduction from what has been said, as well as from the authorities cited, is, that the power of a State legislature to prescribe the maximum charges which a telephone company may make for services rendered, facilities afforded, or articles of property furnished for use in its business, is plenary and complete.

It was made to appear by the evidence that there are several instruments more or less in use by telephone companies, each known as a "telephone," one as the hand telephone, another as the box telephone, a third as the switchman's head telephone, and the fourth as the battery transmitting telephone; that the first, known also as the Bell hand or magneto telephone, consists of a bar magnet with a helix of wire at one end, a diaphragm suitably mounted in front of the helix, and a hard rubber case supporting the whole, with combined poles for making connection with a cord from twenty-four to thirty inches long, and through it with a magneto bell; that this telephone will both transmit and receive sounds or words carried electrically over a connecting wire; that this instrument was at first, with the assistance only of the magneto or call bell, used in transmitting as well as in receiving telephonic messages; that some time after this Bell hand telephone had thus come into use, the battery transmitting telephone, known as the Blake transmitter, was introduced and generally accepted as a very

decided improvement in the transmission of words and sounds over wires used by telephone companies, words and sounds being transmitted through it in a louder tone and with greater effect than through the Bell hand telephone; that for some time previous to the 13th day of April, 1885, this Blake transmitter had come into general use in the transmission of messages with that class of patrons and subscribers who desired the best available telephonic service; that since the Blake transmitter had come into general use as stated, the Bell hand telephone had been chiefly used as a receiver for messages, only a comparatively few persons continuing to use it also for transmitting purposes; that, on the day last named, and for a considerable time previously, a fully equipped organization for the convenient and ready transmission and reception of messages over telephonic wires, consisted, as it still consists, of a Bell hand telephone and cord, a Blake transmitter, a magneto or call bell, a cell of battery, a backboard and a battery box; that the instruments thus constituting a telephonic equipment have been and still are only rented by telephone companies to their patrons and subscribers, the latter not being allowed to either purchase or own any of such instruments.

Upon the facts thus disclosed by the evidence, it is, in the third place, contended that the act of April 13, 1885, under consideration, only limits the price to be charged to three dollars per month when one instrument, known as a telephone, is rented to a patron or subscriber, and does not apply to a case like the one before us, where two instruments, each answering to that name, are, for his greater convenience, rented to the same person to be used together, and that consequently, the facts of this case do not bring it within the penal provisions of that act.

In a general sense, the name "telephone" applies to any instrument or apparatus which transmits sound beyond the limits of ordinary audibility. The speaking tube used in conveying the sound of the voice from one room to another in large buildings, or a stretched cord or wire attached to vibrating membranes or discs, by which the voice is carried to a distant point, is, strictly speaking, a telephone. But since the recent discoveries in telephony, the name is technically and primarily restricted to an instrument or device which transmits sound by means of electricity and wires similar to telegraphic wires. In a secondary sense, however, being the sense in which it is most commonly understood, the word "telephone" constitutes a generic term, having reference generally to the art of telephony as an institution, but more particularly to the apparatus, as an entirety, ordinarily used in the transmission, as well as in the reception, of telephonic messages. In this latter sense, the Central Union Telephone Company, in behalf of which the appellant stands as the representative in this proceeding, has very significantly sanctioned the use of the word "telephone."

In August, 1885, it published a book for the use

of its patrons and subscribers, entitled "Indianapolis Telephone Directory," in which those having the use of its telephonic instruments were instructed as follows:

"Call by numbers.

"When through talking ring out.

"Make all complaints to the chief operator—call No. 1,000.

"Help each other by answering your telephone promptly.

"Do not allow non-subscribers to use your telephone. It is unjust to other subscribers, impedes the service, and is a violation of your contract."

These were a substantial repetition of instructions issued by the Western Telephone Company, one of the predecessors of the Central Union Telephone Company, in June, 1883. It these instructions the "telephone" is plainly referred to as an organized apparatus—an institution—and not as a single instrument. In this use of the word "telephone," the telephone companies in question simply adopted and emphasized what had already been generally accepted as the proper meaning of that word in the connection in which it was so used by them.

Before the great discovery of Prof. Morse, in telegraphy, the power of electricity to give a sudden and mysterious impulse to a suspended wire was well understood among those most familiar with experiments in electrical science. His discovery consisted in the invention of an instrument, or machine, which utilized the power of electricity, and thereby enabled him to send intelligible messages over suspended wires to remotely distant places. When that instrument, or machine, first came into use, the word "telegraph" was understood to more particularly refer to it as the thing best known by that name; but since that time a much wider and more comprehensive meaning has been attached to that word.

The "telegraph" is now usually accepted, and in common parlance is generally understood, as referring to the entire system of appliances used in the transmission of telegraphic messages by electricity, consisting of: First. A battery or other source of electric power; Secondly. Of a line-wire or conductor for conveying the electric current from one station to another; Thirdly. Of the apparatus for transmitting, interrupting, and, if necessary, reversing the electric current at pleasure; and Fourthly. Of the indicator or signaling instrument. See Imperial Dictionary, title "Telegraph."

In the respect indicated, the varying meanings of the word "telephone" are analogous to those applied to the word "telegraph," there being very much in common between the two systems of telephony and telegraphy. In reaching a conclusion as to what is generally understood by the use of the word "telephone," we have been governed partly by the information judicially within our reach, and other respects by the evidence. The word having become a term of art, evidence was

admissible to explain its proper meaning. 1 Greenl. Ev., § 280; Whart. Ev., § 961 to 972.

In view of the condition of things as shown to have existed on the 13th day of April, 1885, we feel constrained to hold that the word "telephone," as used in the act of that date, was intended to designate, and in fact really referred to an apparatus composed of all the usual and necessary instruments for the convenient and ready transmission and reception of telephonic messages, and not to a single instrument only.

There was evidence at the trial tending to prove that the Central Union Telephone Company can not supply the facilities to Haughey, provided for in its contract with him for three dollars per month, without actual and very serious loss, and, arguing that the Legislature can not be presumed to have intended to inflict injustice upon any person or corporation, it is insisted we ought to take the company's liability to sustain a great loss in a certain contingency into consideration in determining the legislative intention in enacting the statute in question in this case. This argument is largely based upon the assumption that the company was not at liberty to decline to extend its line to Haughey's farm upon his request that such an extension should be made, and that it will be compelled to maintain such extension so long, as Haughey may require it to be maintained, independently of any contract with him on the subject. This assumption is, however, not well founded. There is nothing in the act of the legislature under review, or contained in any other statutory or common law regulation applicable to the subject, to which our attention has been called, which requires a telephone company to construct a new line against its will or to maintain an old line longer than it may feel inclined to do so in the exercise of a legitimate business discretion. Besides, the power of the legislature to pass the act in question being conceded, this court can not sit in judgment upon either the justice or the expediency of the enactment of such a law. If the law shall prove to be either unjust or inexpedient in its operation, whether upon persons or corporations, the appeal must be to the legislature and not to the courts. 20 Cent. Law Jour. 83.

The judgment is affirmed, with costs.

NOTE.—This case is one of more than unusual importance. But, closely read, it is only the application of well-settled principles and rules to a new state of facts; and evidently the court does not find itself embarrassed by the novelty of the case; at least not so much as the court which first tried a railroad case found itself treading on unknown territory.

1. And first let us examine those cases where a patent right has been set up to overthrow the police regulations of a State.

The court has given a very clear and succinct statement of the case of *Patterson v. Kentucky*,¹ and farther comment thereon is unnecessary. That case is found reported, or decided, in the Court of Appeals of

Kentucky,² and the reasoning is the same as in the opinion of the United States Supreme Court.

The latter court cites a *dictum* of Chancellor Kent, in *Livingston v. Van Ingen*,³ where he said that "the national power will be fully satisfied if the property created by patent be, for the time given, enjoyed and used exclusively, so far as, under the laws of the several states, the property shall be deemed [fit] for toleration [and use]. There is no need of giving this power any broader construction in order to attain the end for which it was granted, which was to reward the beneficent efforts of genius, and to encourage the useful arts."

Another case relied upon by the Supreme Court was *Jordan v. Overseers of Dayton*.⁴ Jordan was sued in debt, to recover certain penalties for practicing medicines in violation of an Ohio statute regulating the practice of physic and surgery. His defense rested, in part, upon the ground that the medicine administered by him was that for which letters-patent had issued to his assignor, granting to the latter the exclusive right of making, constructing, using and vending to others to be used, the medicines in question, which was described in the letters patent as a new and useful improvement, and as being a mode of preparing, mixing, compounding, administering and using that medicine. The contention of Jordan was, that the State government could not restrict or control the beneficial or lucrative use of the invention; and that, as assignee of the patentee, he was entitled to administer the patented medicine without obtaining a license to practice physic or surgery as required by the statute. This contention, however, was held to be unsound, and Jordan was held rightly convicted.

Another case relied upon by the Supreme Court was *Vannini v. Paine*.⁵ In that case it appears that Yates and McIntyre were assignees of Vannini, the inventor and patentee of a mode of drawing lotteries, and making schemes for lotteries on the combination and permutation principle. Other brokers issued a scheme for drawing a lottery, under an act for the benefit of a school, adopting the plan of Vannini's patent. Yates and McIntyre filed their bill for an injunction upon the ground, partly, that the defendants were proceeding in violation of the patent rights secured to Vannini. The court replied to this claim that: "At the times Yates and McIntyre made contracts for the lottery privileges set forth in the bill, we had in force, an act of assembly prohibiting lotteries, the preamble of which declares that they are pernicious and destructive to frugality and industry, and introductive of idleness and immorality, and against common general welfare. It, therefore, cannot be admitted that the plaintiffs have a right to use an invention for drawing lotteries in this State, merely because they have a patent for it under the United States. A person might with as much propriety claim a right to commit murder with an instrument, because he held a patent for it as a new and useful invention."⁶

A resident of Virginia sold sewing machines manufactured in New Jersey without having taken out a license in accordance with the provisions of a statute. He claimed exemption by reason of the patent on the machine, but was convicted. The Court of Appeals of that State affirmed the judgment of conviction. On appeal to the United States Supreme Court, this claim was also denied. The court said: "Congress never intended that the patent laws should displace the police

² 11 Bush. 811; S. C. 21 Am. Rep., 220.

³ 9 Johns., 507.

⁴ 4 Ohio, 285.

⁵ 1 Harr. (Del.) 65.

⁶ *Webber v. Virginia*, 13 Otto, 844, S. C. 12 Cent. L. J. 488 cited and approved; *Patterson v. Kentucky*.

powers of the States, meaning by that term those powers by which the health, good order, peace and general welfare of the community are promoted. Whatever rights are secured to inventors must be enjoyed in subordination to this general authority of the State over all property within its limits."

This case was reversed upon the point that the statute was unconstitutional, because it required a license of those who only sold articles manufactured in other States. It was an attempt to regulate commerce between the States. This latter point had been decided previously in the same court where the right to sell a patented article was involved.⁷

In Ohio it has been decided that it is no defense for selling impure provisions without a stamp required by statute, that the article sold is patented.⁸ So in the same State a statute, like the one in question in the principal case, was held valid, and the fact that the telephone was patented did not affect its validity.⁹

In Michigan one peddling an article of which he is also the patentee may be required to take out a peddler's license under a municipal ordinance.¹⁰

In Indiana a statute required that any person taking an obligation in writing for which a patent right formed the consideration should, before it was signed by the maker, insert in the body of the obligation above the signature the words "given for a patent right." This statute was held to be unconstitutional, because it interfered with the right of Congress to legislate concerning patents.¹¹ In this case the court followed the opinion of Justice Davis to the same effect. In this latter case a statute required one selling within the State any article that was patented, to file with the clerk of the circuit court copies of the letters patent, on oath that they were genuine, and that he had authority to sell under them. Justice Davis held this statute void.¹²

Afterwards, this latter statute was held void by the Indiana Supreme Court.¹³ Afterwards, these cases were expressly overruled.¹⁴

The case cited from Indiana,¹⁵ was a suit upon a contract for a patent right. A number of cases similar to that has arisen in States where a statute was in force requiring notes given for a patent right to specify that they were so given, else they would be void into whosoever's hands they might fall. In a number of States such a statute has been held invalid.¹⁶

⁷ *Welton v. State*, 1 Otto 375; See *Hannibal etc. R. R. Co. v. Husen*, 5 Otto 465; *Guy v. Mayor etc. of Baltimore*, 10 Otto 434; *Tiernan v. Rinker*, 12 Otto 129; *County of Mobile v. Kimball* 12 Otto 691; *Walling v. Michigan*, 116 U. S. 446; *Higgins v. Three Hundred Casks of Lime*, 130 Mass. 1; *State v. Farbush*, 72 Me. 493; *State v. North*, 27 Mo. 464; *Daniel v. Richmond*, 78 Ky. 542; *State v. Browing*, 63 Mo. 591; *State v. McGinnis*, 37 Ark. 363; *Scott v. Watkins*, 22 Ark. 556; *McGuire v. Parker*, 32 La. Ann. 832.

⁸ *Palmer v. State*, 39 Ohio St. 236; S. C. 48 Am. Rep. 429.

⁹ *State v. Telephone Co.*, 36 Ohio St. 296; S. C. 38 Am. Rep. 583.

¹⁰ *People v. Russell*, 49 Mich. 617; S. C. 43 Am. Rep. 478.

¹¹ *Heim v. First National Bank of Huntington*, 43 Ind. 167; S. C. 13 Am. Rep. 993.

¹² *In re Robinson*, 3 Biss. 309; S. C. 4 Fischer, 187.

¹³ *Grover & Baker Sewing Machine Co. Butler*, 83 Ind. 454; S. C. 21 Am. Rep. 200; *Walter A. Wood Mowing etc. Machine Co. v. Caldwell*, 54 Ind., 270; S. C. 20 Am. Rep. 611; *Breckbill v. Randall*, 102 Ind. 528; S. C. 52 Am. Rep. 696.

¹⁴ *Fry v. State*, 68 Ind. 552; S. C. 30 Am. Rep. 238; *Toledo Agricultural Works v. Work*, 70 Ind. 253.

¹⁵ *Heim v. Bank supra*.

¹⁶ *Cranson v. Smith*, 37 Mich. 309; S. C. 26 Am. Rep. 514; 5 Cent. L. Jr. 398; *Crittenden v. White*, 23 Minn. 167; S.

But the Supreme Court of Pennsylvania has held such a statute valid,¹⁷ and since the decision of *Patterson v. Kentucky*, there can be little or no doubt of its validity, and the correctness of the Pennsylvania decision.

A statute of the United States provided that any one who should sell, or mix for sale, any naphtha and illuminating oils, or oil made of petroleum for illuminating purposes, inflammable at a less temperature than 110 degrees Fahrenheit, should be deemed guilty of an offense against the revenue laws, and be liable to conviction and punishment in the United States court. This statute was held unconstitutional on the ground that Congress had no power to prohibit trade within the States; but it was held valid so far as it affected territory under the exclusive control of the Federal government.¹⁸

The second point made in the principal case is, that a telephone company is a common carrier. In this the court is supported by the Ohio case.¹⁹ It is very difficult to see how a telephone company in this respect differs from a telegraph company.²⁰

All courts, however, have not acceded to the rule that they are common carriers; and some of them have denied it.²¹

Whether a telegraph company is a common carrier or not, will probably be settled by the United States Courts' decisions, because of questions arising of commerce between the States; and to these decisions the courts will eventually drift. Already that court has decided that such a company is a common carrier, subject to many of the liabilities of common carriers; and that it is subject to the regulating power of Congress in respect to their foreign and inter-State business.²²

A telephone company being a common carrier, it may, therefore, be regulated by the legislature the same as any other common carrier; and this regulation by the legislature may extend to the amount of toll the company may charge for its services. Such legislation is not in conflict with the Constitution of the United States; does not impair the obligation of contracts, nor is it, usually, a regulation of commerce between

C. 23 Am. Rep. 676; *Hollida v. Hunt*, 70 Ill. 109; S. C. 29 Am. Rep. 63; *State v. Peck*, 25 Ohio St. 29; *Woolen v. Banker*, 6 Am. L. Rec. 236. See *Pendar v. Kelley*, 15 Amer. L. Reg. 611.

¹⁷ *Haskell v. Jones*, 86 Pa. St. 173; S. C. 5 W. N. 165; 5 Rep. 457.

¹⁸ *United States v. DeWitt*, 9 Wall. 41.

¹⁹ *State v. Telephone Co. supra*. See 10 Cent. L. Jr., 178, 438; *State v. Nebraska Telephone Co.*, 17 Neb. 126; S. C. 24 Am. L. Reg. 263; See 11 Cent. L. Jr. 359; 38 Am. Rep. 587; 44 Am. Rep. 241; *Louisville etc. Co. v. Am. etc. Co.*, 24 Al. 6 L. Jour. 283.

²⁰ *Western Union Tel. Co. v. Pendleton*, 95 Ind. 12; S. C. 48 Am. Rep. 692; *Western Union Tel. Co. v. Blanchard*, 68 Geo. 699; S. C. 45 Am. Rep., 480; *Western Union Tel. Co. v. Ferris*, 102 Ind. 91; *McAndrew v. Electric Telegraph Co.*, 17 C. B. 3; *Parks v. Alta California Tel. Co.*, 13 Cal. 422; *New York etc. Tel. Co. v. Dryburg*, 35 Pa. St. 298; S. C. 8 Amer. L. Reg. 490; *Bowen v. Lake Erie Tel. Co.*, 1 Amer. L. Reg. (O. S.) 685; *New York etc. Tel. Co. v. DeRutte*, 5 Amer. L. Reg. 407; *Graham v. Western Union Tel. Co.*, 10 Amer. L. Reg. 319; S. C. 1 Col. 230; *Breese v. U. S. Tel. Co.*, 48 N. Y. 132; S. C. 45 Barb. 374.

²¹ *Comms. v. Western Tel. Co.*, 6 Am. L. Reg. 443; S. C. on appeal, 1 Met. (Ky.) 164; 6 Am. L. Reg. 734; *Birney v. N. Y. etc. Tel. Co.*, 18 Md. 341; *Western Union Tel. Co. v. Carew*, 7 Am. L. Reg. 18; 15 Mich. 525; *Western Union Tel. Co. v. Fontaine*, 58 Geo. 433.

²² *Pensacola Tel. Co. v. Western Union Tel. Co.*, 6 Otto, 1; *Western Union Tel. Co. v. State of Texas*, 15 Otto 490; S. C. 14 Cent. L. Jr. 448.

the States.²² The regulation of the tolls may be by commission.²⁴

So the legislature may prevent unjust discrimination in its rates; for this is nothing more than confirmatory of the common law.²⁵

A number of decisions have been made upon questions whether a company, which has received a charter empowering it to regulate and charge tolls for its services, can be controlled by the legislature in the amount of its charges. Thus, where a charter of a railroad company conferred upon the company the power to regulate its tolls for a certain length of time, an act of the legislature regulating the same tolls during that time, was held unconstitutional.²⁶

Yet where the charter of a railroad company provided that the company could "fix, regulate and secure tolls and charges" for its services, it was held that the legislature had not yielded up its power to control the rates thereafter.²⁷ This was upon the maxim of interpretation that grants of immunity from legitimate governmental control are never to be presumed; but the presumptions are all the other way.²⁸

Whether or not a regulation of the amount of tolls that can be charged is a violation of the carrier's charter, must eventually depend upon the construction given to these clauses by the United States Supreme Court; because the validity of these limitations or statutes rests upon the question whether they violate the contract between the carrier and State embodied in its charter.

Thus the case of Illinois Central R. R. Co. v. Stone, cited above, was reversed on appeal. The act of incorporation of the company provided that the president and directors might "adopt and establish such a tariff of charges for the transportation of persons and property as they may think fit," and the same "alter and change at pleasure." It was held that this did not deprive the State of its power to act upon the rea-

sonableness of the tolls and charges so adopted and established.²⁹ "This power of regulation is a power of government, continuing in its nature, and if it can be bargained away at all, it can only be by words of positive grant, or something which is in law equivalent. If there is a reasonable doubt, it must be resolved in favor of the existence of the power. In the words of Chief Justice Marshall, in *Providence Bank v. Billings*,³⁰ 'its abandonment ought not to be presumed in a case in which the deliberate purpose of the State to abandon it does not appear.'³¹"

Crawfordsville, Ind. W. W. THORNTON.

²² *Stone v. Illinois Central R. R. Co.*, 116 U. S. 347; *Stone v. Farmer's Loan etc. Co.*, 116 U. S. 307; *Stone v. New Orleans etc. R. R. Co.*, 116 U. S. 352.

²⁹ 4 Pet. 514, 561.

³¹ *Stone v. Farmer's Loan etc. Co.*, 116 U. S. 307, 325, 326.

WEEKLY DIGEST OF RECENT CASES.

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²³ *Fry v. State*, 63 Ind. 552; *S. C. 30 Am. Rep. 233*; *Chicago etc. R. W. Co. v. Fuller*, 17 Wall. 560; *Olcott v. County Board etc.* 16 Wall. 678; *Chicago etc. R. R. Co. v. Iowa*, 4 Otto 155; *Reik v. Chicago etc. R. W. Co.*, 4 Otto 164; *Chicago etc. R. W. Co. v. Ashley*, 4 Otto 179; *Winona v. Blake*, 4 Otto 180; *Blake v. Winona etc. R. R. Co.*, 19 Minn. 418; *S. C. 18 Am. Rep. 345*; *Beekun v. Sar. & S. R. R. Co.*, 3 Paige 45; *S. C. 22 Am. Rep. 679*; *Hudson v. State*, 4 Zab. 718; *Munn v. Illinois*, 94 U. S. 113; *S. C. 16 Am. L. Reg. 526*; *Carton v. Illinois Central R. R. Co.*, 59 Iowa 148; *S. C. 44 Am. Rep. 672*; *People v. Babcock*, 11 Wend. 587; *Illinois Central R. R. Co. v. People*, 108 Ill. 541; *S. C. 1 Am. & Eng. R. R. Co's 188*; *Tilley v. Savau-nah, etc. R. R. Co.*, 5 Fed. Rep. 611; *Huserman v. Burlington etc. R. R. Co.*, 16 Am. & Eng. R. R. Co., 46; *Cincinnati etc. R. R. Co. v. Cook*, 37 Ohio St. 263; *S. C. 6 Am. & Eng. R. R. Co's 317*; *Attorney General v. ChicagoF etc. R. W. Co.*, 35 Wis. 425; *People v. Boston etc. R. R. Co.*, 70 N. Y. 569.

²⁴ *Georgia R. R. & Banking Co., v. Smith*, 70 Geo. 694; *Re R. R. Commrs.*, 15 Neb. 679; *M. R. Com. v. Yazoo etc. R. R. Co.*, 21 Am. & Eng. R. R. Cas 6; *Merrill v. Boston & Lowell R. R. Co.*, 21 Am. & Eng. R. R. Cas. 48.

²⁵ *Chicago etc. R. R. Co. v. People*, 69 Ill. 11; *S. C. 16 Am. Rep. 599*; *Wabash etc. R. W. Co. v. People*, 105 Ill. 236.

²⁶ *Sloan v. Pacific R. R. Co.*, 61 Mo. 24; *S. C. 21 Am. Rep. 397*. See *State v. Richmond etc. R. R. Co.*, 73 N. C. 371; *S. C. 21 Am. Rep. 473*; *Philadelphia etc. R. R. Co. v. Bowers*, 4 Houst. 506; *Farmer's Loan etc. Co. v. Stone*, 18 Cent. L. Jr. 472; See *Illinois Central R. R. Co. v. Stone*, 10 Fed. Rep. 468; *S. C. 18 Am. Rep. 416*; *Hamilton v. Keith*, 5 Bush. 458.

²⁷ *Railroad Co. v. Natchez R. R. Co.*, 21 Am. & Eng. R. R. Cas. 17; See *Laurel Fork etc. R. R. Co. v. West Va. Transportation Co.*, 25 W. Va. 324.

²⁸ *Ruggles v. People*, 108 U. S. 526; See *U. S. v. Ruggler*, 11 Am. & Eng. R. R. Cas. 49.

1. AGENCY.—Principal and Agent—Brokers—Compensation—Wagering Contracts—Margins.—In the buying and selling of stocks upon margins, the brokers employed to conduct such transactions (under the law of Pennsylvania) are regarded as being engaged in wagering contracts, which the law of that State does not recognize, and they cannot recover in assumpsit for services rendered, or excess over the margin, where the bona fides of the transactions show them to have been of a wagering nature. *Stewart v. Garrett*, Md. Ct. App., May 14, 1886. Atl. Rep., Vol. 4, 399.

2. AMBASSADORS AND CONSULS.—Act Fixing Salaries—Effect of Subsequent Acts Appropriating Less for Services.—According to the settled rules of interpretation, a statute fixing the annual salary of a public officer at a named sum, without limitation as to time, should not be deemed abrogated or suspended by subsequent enactments, which merely appropriated a less amount for the services of that officer for particular fiscal years, and which contained no words which expressly, or by clear implication, modified or repealed the previous law. *United States v. Langston*, S. C. U. S., May 10, 1886. S. Ct. Rep., Vol. 6, 1183.

3. CORPORATION.—Consolidation—Existence—Laws—States—Contract—Policy—Const. Art. I, 6, § 7—Conflict of Law—Foreign Court—Decree—Property—Although consolidating corporations of

two States are to be taken as one, yet that one has no legal existence in either State except by the laws of that State. No State will enforce a contract made elsewhere, repugnant to its policy, or injurious to its interest: and a contract made in New York for the issue of bonds and the creation of a mortgage by a corporation, in contravention of the constitutional prohibition of a fictitious increase of corporate debt, or without notice in Pennsylvania, will not be enforced. The decree of a foreign court cannot determine the validity of a mortgage on property in this State, or transfer any title. *Pittsburg etc. Co's. Appeal*, S. C. Penn., May 31, 1886. *Atl. Rep.*, Vol. 4, 386.

4. **CRIMINAL LAW.**—*Evidence of Merchant as to Sale of Boots to defendant, relevant when—Practice Impeaching Witness as to Contradictory Statements—Effect of Failure to Object when Instructions are Given—Motion for New Trial based upon Previous Expression of Opinion by Juror.*—Evidence of a merchant to the effect that he had sold defendant boots and shoes and that the latter wore a number six, where there is other evidence showing that certain tracks found in the dust, where the crime is alleged to have been committed, were of that size is relevant. *State v. Bobb*, 76 Mo. 501. To impeach a witness as to contradictory statements alleged to have been made, his attention must be called to the time, place and person involved in such statement. He may be recalled by way of rebuttal to explain what was said. 1 Green, Ev. § 462. Where a defendant fails to object to the giving of instructions at the time, and for the first complaint of them in his motion for a new trial, the Supreme Court will not consider them (Henry C. J., dissents from this point.) Where the motion for a new trial is based on the fact that one of the jurors had expressed an opinion previous to the trial, of the defendant's guilt, and the affidavit of the person with whom the conversation was had, shows that the juror said: "From what he knew and heard he had both formed and expressed an opinion, and from his then knowledge and information he believed the defendant was guilty and that he would be in favor of sending him up for ten years," and where the jurors affidavit shows that he did have a conversation with such person, but that he did not use the language attributed to him; that he said "from what I have heard, I do not believe that I can be one of the jurors, because if the evidence should turn out like I heard it was, I think he ought to be sent up for ten years," where such juror further states that he never talked with any witness about the case; that he had conversed with no one about the facts except his wife and above affiant; that his wife told him what she had heard from another lady, and that it was the information thus received from his wife to which he had reference in the above conversation, and where such juror is accepted, without objection on the part of defendant, after an examination in open court, with full knowledge on the part of defendant's attorney as to above conversation—Such juror is competent, and the information the juror had, was received from mere rumor, and he was without prejudice or bias. *State v. Reed*, S. C. Mo., June 7, 1886.

5. ———. *General Verdict on Two Counts—General Instruction where there are Two Counts—Stealing and Receiving Stolen Property—Conviction on Either Count.*—On an indictment containing two counts; one for stealing, the other for

receiving stolen property, it is improper, though not reversible error, for the court to instruct the jury that if they found the defendant guilty they must designate upon which count of the indictment they so found. A general verdict in such cases would be sustained, and it is often difficult to determine of which offense the party is guilty when there is no doubt of his guilt of one or the other. A general instruction that possession of property, which is shown to have been recently stolen, if unexplained, is evidence of guilt, is not erroneous, the court not being asked to confine the instruction to the first count of the indictment. Where the defendant is found in possession of stolen property, and the proof shows his possession to have been a guilty possession, slight circumstances may authorize a jury to determine whether he has been guilty of the theft, or of receiving the property knowing it to have been stolen. A conviction for receiving stolen property is good, although a conviction for stealing would have been sustained by the same evidence, if the jury so found. *Cook v. State*, S. C. Tenn., June 12, 1886.

6. **DEED.**—*Construction.*—Where the premises of a deed contain an express grant to a man and his heirs for a term of years, then the limitation for a term will qualify and lessen the grant in fee. The intention of the parties to a deed is to be ascertained from the entire instrument, not from any particular words or phrases without references to the contract, and the instrument shall operate according to the intention, unless it be contrary to law. It is plain that the grant in this case is for a term of years. *Berridge v. Glassey*, S. C. Penn., May 1886. *Pittsburg L. Jour.* (N. S.) V. 16, 452.

7. **DIVORCE.**—*Domicile of Wife—Evidence—Jurisdiction of Parties—Residence—Denial Construed—Cohabitation.*—The general rule is that the domicile of the wife follows that of the husband. This is based upon the unity of husband and wife, and generally implies continuing, though temporarily interrupted, cohabitation. Proof of the domicile of the husband is sufficient, *prima facie*, to establish that of the wife. A divorce procured in Salt Lake City while neither of the parties was a resident of the territory, is null and void. To give the court jurisdiction in an action for divorce, at least one of the parties must be a *bona fide* resident of the State or territory where the action was brought. A denial in the language of the petition "that defendant denies that said marriage was unlawful and wrongful, and denies that he has cohabited with L. W. S.," etc., "in a state of adultery," is not a denial of the cohabitation. *Smith v. Smith*, S. C. Neb., May 27, 1886. *N. W. Rep.* Vol. 28, 296.

8. **EJECTMENT.**—*Both Parties Claiming Under Common Source—Plaintiff may prove Common Source by Defendant—Secondary Evidence—Practice—Waiver of Insufficiency of Answer.*—1. In ejectment where plaintiff and defendant claim through a common source of title, it is sufficient for the plaintiff to deduce his title from the common source of title. It is sufficient for plaintiff to show prior possession as owner, either in himself or grantor, and if it appears that defendant holds under the common grantor it is unnecessary to go further: the title of the common grantor is acknowledged, and so far, the rule that the plaintiff must recover on the strength of his own title is departed from. Hence, unless the defendant can trace his title or right to the true owner, if such

common grantor is not the true owner, or can show a better title to the interest of such grantor, the plaintiff must prevail. 2. Plaintiff may prove the common source of title by the defendant. 3. A sufficient foundation for the introduction of secondary evidence is laid where it is shown that the original deeds are lost or not in control of the party, and where it appears that the public records have been destroyed by fire, resort to secondary evidence to establish what the lost records would show is permissible, and the abstract and index to the record of deeds required to be made by §§ 3816 and 3819, Rev. Stat. Mo., 1879, are competent evidence for this purpose. 4. Where answer of defendant only denied the "material allegations" of petition, and where no objections at trial are taken, the Supreme Court refused to consider it. 78 Mo., 57; 81 Mo., 275. *Smith v. Lindsey*, S. C. Mo., June 7, 1886.

9. **ESTOPPEL—Judgment—Res Adjudicata—Mortgage—Consideration—Extension of Time—Vendor and Vendee—Bona Fide Purchaser—Lis Pendens.**—Matters that have been adjudicated in a former suit will not be considered in a second action. Where, at the time of the execution of a promissory note by the husband, he agreed that his wife should execute a mortgage on certain real estate possessed by her, to secure the same, which mortgage, a few days afterwards, was duly executed and acknowledged, and by reason of which the credit on the note was extended two years, held, that there was a sufficient consideration for the mortgage. Where a person purchases real estate while an action is pending to subject the property to the payment of a certain debt, the purchaser is chargeable with notice of the claim, and, whatever the form of the decree under the issue made by the pleadings, takes subject to same. *Nelson v. Bevins*, S. C. Neb., May 27, 1886, N. W. Rep. Vol. 28, 381.

10. **EVIDENCE—Admissions—Judgments—Conclusiveness—Laches.**—When the admission of a party is the foundation of a claim asserted against him, the whole of his statement must be taken together. The unreversed judgment of a court of competent jurisdiction is conclusive, and cannot be collaterally attacked. *Wimblish v. Breeden*, 77 Va., 324. A case in which, from the lapse of time, death of parties, destruction of records, and loss of papers, there can no longer be a safe determination of the controversy, and the status should not be disturbed. *Perkins v. Lane*, S. C. App. Va., May 6, 1886, Va. L. J. Vol. 10, 411.

11. — **Declarations as part of Res Gestæ—Declarations of the engineer of a railroad train, made five minutes after an accident occurred, and after a child who was run over by the train had been removed from under the car, and carried away a quarter of a mile or more, are not admissible in evidence, against the defendant railroad company, as part of the res gestæ, for the purpose of showing the negligence of the engineer.** *Durkee v. Central, etc. Co.*, S. C. Cal., May 18, 1886, Pac. Rep., Vol. 2, 180.

12. **FIXTURES—Mortgagor and Mortgage—Vendor and Vendee.**—In determining the character of chattels annexed to the freehold—whether they are removable or irremovable as fixtures—the same rules prevail as between mortgagor and mortgagee, as between vendor and vendee, with possibly a more liberal application in favor of the mortga-

gee; and the time of annexation, whether before or after the execution of the mortgage—is immaterial, except that when an article is annexed subsequently, and is of doubtful nature, stronger evidence of an intention to change its character is required. To convert a chattel into a part of the realty, or an irremovable fixture, there must be—first, actual annexation to the land, or to something appurtenant thereto; second, application to the use or purpose to which that particular part of the realty is appropriated; and, third, an intention by the party annexing it to make a permanent accession to the freehold; though a chattel which is permanently annexed, and which cannot be severed without material injury to the premises, becomes a part of the realty, irrespective of the intention of the party annexing it. An upright steam engine, resting on brick or plank on the ground, and sustained in place by its own weight, being connected by a band with a gin in a house about eight feet distant, and used to furnish motive power for ginning cotton, both for the owner and for other persons for toll, being erected by the mortgagor subsequent to the execution of the mortgage, and having a house erected over it on sills resting on the ground, so that it cannot be removed without breaking or removing the house, is *prima facie* a chattel, but becomes a part of the realty if so intended by the party erecting it; and the question of intention under these circumstances, by which its character is to be determined, must be submitted to the jury. *Tillman v. Delaney*, S. C. Ala., May 9, 1886.

13. **HOMESTEAD—Abandonment—Writing not Necessary—Removal—Intent—Husband's Intent Governs.**—There may be an abandonment (without any writing) of a homestead which will terminate its existence and exemption. An actual removal from a homestead, without any intent to return to it as a home or place of abode, constitutes an abandonment. As head of the family, it is for the husband to determine and fix the domicile of the family, including that of the wife; so that when he and his wife remove from a homestead, he having no intention of returning, that fixes the character of the removal as an abandonment. *Williams v. Moody*, S. C. Minn., June 1, 1886, N. W. Rep. Vol. 28, 510.

14. **HUSBAND AND WIFE—Wife's Separate Estate—Business—Constable.**—Where a *feme covert*, her husband having been sold out by the sheriff, carries on his business with her separate estate, gives him money with which to buy a horse, which not being sufficient, he borrows more as her agent, the horse having been levied on for his debt, there is no fact sufficient to constitute legal fraud, and the constable who made the sale, after receiving notice that the horse was hers, was liable. *Tiddins v. Jones*, S. C. Penn., May 24, 1886, Atl. Rep. Vol. 4, 383.

15. **JOINT TENANTS AND TENANTS IN COMMON.—Adverse Possession—Co-Tenant—Evidence—Presumption.**—Although the possession of a tenant in common is not necessarily adverse to his co-tenant, it may yet be regarded as such where one holds possession under a claim of entire ownership, and his co-tenant has knowledge of it. It is not necessary to show by direct and pointed evidence that the co-tenant has such knowledge. It is sufficient if it is not shown otherwise, and the circumstances are such that it may reasonably be

presumed that the co-tenant has such knowledge. *Knowles v. Brown*, S. C. Iowa, June 9, 1886, N. W. Rep., Vol. 28, 409.

16. **JURY.—Question of Fact—Attorney—Employment—Interest—Mortgage.**—Where an attorney received payment of interest on a mortgage, evidence of his employment by the mortgagee, to whom he never accounted, in a prior transaction, and of the fact of his acting as such at the time, was sufficient to put to the jury. *McMahon v. Bardinger*, S. C. Penn., March 8, 1886, Atl. Rep., Vol. 4, 379.
17. **LIEN.—Landlord and Tenant—Devise—Infant—Laches—Guardian and Ward—Insolvency—Equity.**—The lien given by statute to a landlord or his assignee, on the crops grown on the rented premises, for the rent of the current year (Code, § 3467), only attaches when the relation of landlord and tenant exists between the parties; and although this relation may be either created by express contract, or implied from the conduct of the parties towards each other, it will not be inferred from occupation merely, when the relative position of the parties to each other can, under the circumstances of the case, be referred to any other distinct cause. Where lands are devised to infant children, their father being appointed executor and trustee, with power to manage and control the property for them; whatever may be his liability to them, in a proper proceeding, for rents and profits, the relation of landlord and tenant does not exist between them, and they have no statutory lien on the crops raised by him, received and sold by his administrator. As a general rule, laches will not be imputed to an infant, and his rights are not waived by a failure to assert them promptly. But there are cases in which his rights may be lost by the failure of his guardian to assert them, leaving him only the personal liability of his guardian for indemnity. Although the statute contemplates that all personal property, not specifically exempted, shall be included in the administrator's inventory, and that a selection of exemptions may be made from the property so inventoried; yet a selection may be made from property not included in the inventory, and even before an inventory is returned. Where an infant's guardian selected for him, as exempt, all the personal property included in the inventory, which was appraised at \$400; and the administrator afterwards received and sold other personal property, and the estate being afterwards declared insolvent, accounted for the proceeds on settlement of his accounts as the administrator of the insolvent estate; on which settlement the infant was represented by a guardian *ad litem*, and no additional claim of exemption was made; the surety on the administrator's official bond is not liable to the infant for the loss of any additional exemptions to which he might have been entitled. To justify the removal of the settlement of an insolvent estate into equity, requires a clear and strong case—a case requiring relief which the probate court, on account of its want of equitable jurisdiction, cannot grant. *Hardin v. Pulley*, S. C. Ala., May 9, 1886.
18. **MALICIOUS PROSECUTION.—Probable Cause—Case at Bar.**—Upon complaint of R., B. is taken before a justice and adjudged guilty of petit larceny, and sentenced; upon appeal, this judgment is reversed and B. is adjudged not guilty, and is discharged. B. then brings an action for malicious

prosecution against R. *Held*, that the judgment of the justice is only *prima facie* evidence of probable cause for the prosecution. *Womack v. Circle*, 32 Gratt. 324, overruled. *Blanks v. Robinson*, Sup. Ct. App. Va., April 8, 1886, Va. Law Jour., Vol. 10, 398.

19. **MASTER AND SERVANT.—Liability of Employer for Acts of Agent or Contractor—Trespass—Liability of Employer for Tort of Employee—Intent with which Act Done.**—The defendants were authorized by the land agent to guard certain lots, reserved for public uses, against trespassers, but had no right or authority to grant permits to parties to take timber therefrom. The defendants, nevertheless, supposing they had such authority, gave permits to certain parties to take off the hemlock bark and timber upon those lots, and these contracts were assigned to other parties, who subsequently peeled the bark, and cut down and carried away a portion of the timber. In an action of trespass against the defendants, *held* that, having authorized the commission of the trespasses, they were liable for the damages caused thereby. An employer is responsible for the wrong done by a contractor or his servants in the execution of a wrongful or illegal act, though not of a legal act. The intent of the defendants was entirely immaterial. *State v. Smith*, S. Jud. Ct. Mass., May 25, 1886, Atl. Rep., Vol. 4, 412.
20. **MORTGAGE ABSOLUTE.—Deed—Defeasance—Evidence.**—To convert a deed absolute on its face into a mortgage, by parol testimony, such testimony must be clear and specific, of a character such as will leave in the mind of a chancellor no hesitation or doubt; and, failing this, the effort to impeach the legal character of the deed must be regarded as abortive. *Lance's Appeal*, S. C. Penn., May 24, 1886, Atl. Rep., Vol. 4, 375.
21. **MUNICIPAL CORPORATIONS.—Taking Land for Sewer Purposes—Nuisance—Consequential Damages.**—Commissioners appointed by the court to appraise the damages for the taking of land for sewer purposes by an incorporated village have power to award damages only for the actual taking of land, and not consequential damages resulting from a nuisance created by the discharge of sewage, when the village charter prescribes no rule for the assessment, and does not determine what shall constitute elements of damage. *Stewart v. Rutland*, S. C. Vt., June 10, 1886, Atl. Rep. Vol. 4, 420.
22. **NEGLIGENCE.—Defective Highway—Necessary Elements to Sustain Action for Injuries, Facts must Warrant Instructions—Punitive Damages, when Recoverable—Opinion of Witnesses as to Condition of Highway Inadmissible—Condition is Fact for the Jury.**—1. To maintain an action for injuries caused by a defect in a highway it must appear affirmatively, and the burden of proof is upon plaintiff to show that the road was a highway; that the defect actually existed; that defendant was in fault for not repairing, and that plaintiff's injuries were caused by such defect. *Shearm. & Red. on Neg.*, § 321 (3d ed.). 2. It is error to give an instruction, that plaintiff can recover, and for the jury to award punitive or exemplary damages, where the facts in evidence do not warrant it. 62 Mo. 326; 51 Id. 816; 59 Id. 27. 3. Where there is nothing in the evidence to show that defendant's

failure to remove certain obstructions on the highway which contributed to the cause of the injury, was either wanton or malicious, it is improper to award punitive damages. 4. Witnesses cannot give their opinion as to whether a roadway was in such condition as to afford a safe and convenient track for the passage of wagons and travelers, as that is not matter of expert testimony, and the jury must find this fact. *Brown v. Cape Girardeau Plank Road Co.*, S. C. Mo., June 7, 1886.

23. PRACTICE—Continuance—Absence of Witness—Materiality—Exceptions—Skeleton Bill—Insertion of Evidence.—Held, in an action upon a fire insurance policy to recover loss, that admissions by the plaintiff that the property was of much less value than the damages claimed, were material, and that in the circumstances of the case the court erred in refusing a continuance on the ground of the absence of a witness. In a skeleton bill of exceptions, directions given to the clerk in regard to the insertion of the evidence in these terms, "Clerk, here insert the evidence," is not sufficient, and the evidence inserted must be stricken from the abstract. *Parks v. Council Bluffs, etc. Co.*, S. C. Iowa, June 10, 1886, N. W. Rep., Vol. 28, 424.

34. ———. Motion to Quash Execution, Must be Made in County Where Judgment was Rendered.—Where a judgment is obtained in S. county and an alias execution is issued thereon, directed to the sheriff of county B., returnable to the Circuit Court of the former county, and the sheriff of County B. levied the execution upon lands in that county and advertised the same for sale, and where the defendant files a motion in the Circuit Court of County B., to quash the levy, the Circuit Court of County B. has no jurisdiction to hear such motion, the proper forum being County S., where the judgment was obtained. 17 Mo., 603; 23 Mo., 19; 11 Mo., 411; 44 Mo., 416; 65 Mo., 446. *Mellier v. Bartlett*, S. C. Mo., June 7, 1886.

25. SALES—Conditional Sale—"Satisfactory"—Obligations Imposed by the Word—Warranty—Conditions—Must be Observed Before it may be Availed of.—If an article is delivered to a purchaser, to be retained and paid for by him if satisfactory, the purchaser may repudiate the sale if such article prove *bona fide* and in fact unsatisfactory. If, accompanying a sale, there is a warranty that the article, if set up in a certain manner and location, and operated a certain way, will prove satisfactory, and if such warranty is accepted as part of the contract of sale before advantage can be taken of it, the purchaser must have tested it after it has been set up in such manner and location and tested in that way. *Exhaust, etc. Co. v. Chicago, etc. Co.*, S. C. Wis., May 15, 1886, N. W. Rep., Vol. 28, 343.

26. TELEGRAPH AND TELEPHONE COMPANIES—Principal and Agent—Error in Transmission—Evidence—Purchase on Faith of Telegram—Condition Against Liability—Burden of Proof.—The principal may maintain an action against a telegraph company for an error in transmitting a telegram from his broker. Evidence by the plaintiff that a telegram, as received, directed him to purchase at a certain price, is competent as tending to show his good faith in making the purchase at the

price, and that he acted upon the dispatch in making his purchases. Where a telegram is written upon a form provided by the telegraph company, which contains a printed condition to the effect that the company "shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery, of any unrepeatable message, whether happening by negligence of its servants or otherwise, beyond the amount received for sending the same," the plaintiff, to recover from the company, must show that the mistake was caused by the fault of the defendant, and that it might have been avoided, if the defendant's instruments had been good ones, and if the defendant's agents had possessed the requisite skill, and exercised the proper care and diligence in respect to the transmission and receipt of the message in question. *Akin v. Western, etc. Co.*, S. C. Iowa, June 10, 1886, N. W. Rep., Vol. 28, 419.

27. VENDOR AND VENDEE—Carrier—Instructions—Delivery.—Where goods, ordered and contracted for, are not delivered directly to the purchaser, but are delivered by the vendor to a carrier, with proper instructions, for transportation as directed by the purchaser, the goods when delivered to the carrier are at the risk of the purchaser and the property is vested in him, subject to the vendor's right of stoppage *in transitu*. An instruction by a purchaser to the vendor to ship goods to care of certain shipping merchants, who were agents and managers of a certain well known steamship line, "for their next steamer," means that the goods are to be transported by a ship of their line, and not by any ship which would accept freight from them. A change in direction to the carrier by the vendor relates back to and qualifies the original delivery of goods to the carrier by the vendor; and when such a change in direction is a departure from the instructions given by the purchaser, and the goods are lost *in transitu*, the vendor cannot recover their value from the purchaser. *Wheelhouse v. Parr*, S. J. Ct. Mass., May 8, 1886, N. Eng. Rep., Vol. 2, 150.

28. ———. Warranty—Description—Mistake—Deceit.—When there is no bad faith, or willful misrepresentation or imposition by a vendor, and no warranty of the quantity of land conveyed, the delivery and acceptance of the deed, payment of part consideration and delivery of bond for the balance, close the transaction, and the vendee is precluded from setting up a deficiency in the quantity of land as against his bond. In this case it is held that a deficiency of 1.67 foot in a line of 20 feet is not so gross as to be evidence of deceit. It is a mere mutual mistake, with equal opportunity to both parties to have had corrected, which will not be relieved against. In an action for purchase money of land the defendant cannot resist on the ground of failure of title to part of the land sold, if he has disabled himself from placing his vendor *in statu quo* by conveying the title to a third party. *Rodgers v. Olshoffsky*, S. C. Penn., May 1886, Pitts. L. J. (N. S.), Vol. 16, 456.

29. WILL—Ademption of Legacies—Intention—Evidence.—In the matter of ademption of legacies, whether the advance made was intended as an ademption or not can only be gathered from the circumstances surrounding each individual case; the law in regard to the same being well settled, and the only difficulty being in its application to a given state of facts for which purpose parol evi-

dence may be adduced. *Wallace v. Dubois*, Md. Ct. App., March 10, 1886, Atl. Rep., Vol. 4, 402.

80. **WILL.—Testamentary Capacity—Evidence—Undue Influence—Insanity.**—On the question of undue influence the proponent of the will may show that nominal legacies to heirs other than children were inserted at the suggestion of the person who wrote the will, because he erroneously supposed it necessary to the validity of the will. When portions of a deposition are read by one party for the purpose of contradicting the witness who gave it, the other party may read from the same deposition so much as pertains to the same subject—and tends to explain, qualify or limit what is so read. The practice of requiring an executor, upon the issues of insanity and undue influence, to call all the subscribing witnesses to the will, if alive, sane and within the jurisdiction, should not be departed from without good cause. Whether a party shall be allowed to put leading questions to his own witness is determined by the presiding justice while the examination of the witness is going on before him, and is not matter of exception. The common-law rule forbidding a party to discredit his witness has no application when the party, by legal intendment, has no choice, as in the case of an attesting witness. Upon the issues of insanity and undue influence, declaration of the testator tending to show the state of his feeling toward relatives, to whom he gave only a nominal sum, may be received. A request for instructions to the jury, which, in effect, assume as matter of law what should be left to the jury as matter of fact, is properly denied. A request for instructions, which in effect require the proponent of a will to explain why the testator made it as he did, is properly denied. *Whitman v. Morey*, S. C. N. H., March 12, 1886, East. Rep., Vol. 5, 187.

81. ———. **Life-Estate—Power of Disposition—Remainder.**—The testator left the following will: "After my lawful debts are paid and discharged, I give, bequeath, and dispose of as follows, to-wit: To my beloved wife, Margaret Jones, all that is in my possession at the time of my decease; and also my wife have right to sell the estate, if that will be her choice. And after my wife's decease, the property to be parted to my dear children in equal shares." Held, that Margaret took, under the will, only an estate for life in the property of the testator, with power to sell such life-estate, if she chose to do so, and her children took, in equal shares, a vested remainder in fee in such property. *Quere*. See *Jones v. Bacon*, 68 Me. 84; *Howard v. Carusi*, 8 Sup. Ct. Rep. 575; *McClellan v. Turner*, 15 Me. 436; *VanHorn v. Campbell* (N. Y.), 3 N. E. Rep. 316. *Jones v. Jones*, S. C. Wis., May 15, 1886, N. W. Rep., Vol. 28, 177.

QUERIES AND ANSWERS.*

[Correspondents are requested to draw up their answers in the form in which we print them, and not in the form of letters to the editor. They are also admonished to make their answers as brief as may be.—Ed.]

QUERIES.

2. In Texas an administrator bought land with funds belonging to the estate he then represented, and caused the deed to be made to him personally, and

held the property as his own. Can the county court, where the administration is pending, declare the trust and vest the title in the heirs in a proceeding for partition of the estate? TEXAS.

3. Husband and wife living together, wife gives husband money (not for household expenses), there being no contract to repay; under laws of Michigan can wife maintain action against husband as for money had and received. SUBSCRIBER.

Milwaukee, Wis.

4. A. and P., lumber and material men, contract with D. to furnish material to fence a certain lot in town (owned by D.); the material was furnished, as per contract, and the fence erected, but before paying for the material, and within ten days after the improvements are finished, D., (who is insolvent,) secretly conveyed the property to E., who is an innocent purchaser for value. Will the fact that E. is an innocent purchaser, defeat the right of A. and B. to a lien as material men in Missouri, under § 3172, R. S. Mo? See also §§ 3174, 3178, R. S. Mo. C. B. A.

5. In Iowa, at a sale of school land, A. purchased 80 acres, and on paying one third in cash, received from the county auditor a contract for a deed. A. assigns his contract to B., but A.'s wife does not sign the contract of assignment. The land was never occupied by A. as a homestead. Can A.'s wife claim and have assigned to her dower on the death of A., or will the mere assignment of the school land contract by A. cut off her dower interest? Cite authorities. R. F. M.

6. A. B. C. and others, sign a petition for dramshop license under the provisions of § 5442, R. S. 1879, amended 1883, petition is filed in advance of time required by law. A. B. and C. desire afterwards to have their names erased from, or held for naught, in said petition. Will the filing of a counter-petition or written order to the court by them for this purpose before action had in original petition, effect this? No strict rule of pleading required in county courts. H.

QUERIES ANSWERED.

Query No. 48. [22 Cent. L. J., 551.] A. sues B. for work and labor alleging an indebtedness of \$45.75, after all payments and set-offs. B. makes general denial thereto, then produces account book and offers to prove full payment. Query: Is such evidence admissible under the Kansas code which requires set-off to be especially pleaded. J. M.

Answer.—When the action is not based on the original agreement, but is brought for balance after deducting payments and set-offs, the truth of plaintiff's averment is put in issue by denial and proof of payment allowed, it not being new matter. Bliss on Code Pleading, § 357. But in a suit on original agreement, proof of payment is treated as new matter, and evidence of it cannot be allowed under a denial. Bliss on Code Pleading, § 358; *Stevens v. Thompson*, 5 Kans. 305; *Clark v. Spencer*, 14 Kans. 398. I can not see how the question of set-off enters into the matter.

A. W. L.

Query No. 46. A. owned a mill property in his own name and right worth \$8,000 and upon which there was an outstanding mortgage of \$2,000 held by C. A. and his wife, B., in March, 1882, conveyed to D., by warranty deed, the undivided one-half thereof for \$8,000, and received the purchase money. In October, 1882,

A. and his wife, B., conveyed the other undivided half to H., subject to one-half of the outstanding mortgage. Shortly afterwards he, A., paid one-half the amount of mortgage (in order to make his title good to D.), but the payment was indorsed by C. as a general credit of that amount. Afterwards C. foreclosed, and the whole mortgage premises were bid in by B., the wife of A. Can she hold the title thus acquired as against D., the purchaser of the undivided one-half under a warranty deed, made by her and husband? The husband being insolvent since the conveyance. Cite authorities. W.

Indiana.

Answer.—The decisions upon the proposition as to whether a *feme covert* is bound by the covenants in a warranty deed given by her husband in which she joins to convey or release her dower are conflicting; most of the cases examined hold, that while the covenants (under the circumstances stated above) estop a woman from setting up any claim of title she had at the time she signed the deed, she is not, however, estopped from setting up an after acquired title. This is the law in New York, as shown in *Jackson v. Vanderheyden*, where it was held that "a covenant of warranty does not estop the wife from setting up a subsequently acquired interest in the lands in the conveyance of which she had joined. This same doctrine is followed in New Hampshire and is the settled rule there, 6, N. H., 117.

"Although competent to join with her husband in executing a conveyance of her land, a wife's covenant's of warranty and of title though in the same deed are not binding upon her." 8 Washburn on Real Property, 260.

When a wife joined with her husband in a deed by relinquishing her rights of dower in the granted premises, though it estops her from claiming dower, it would not prevent her from claiming a subsequent by acquired title. 8 Washburn on R. P., 114, also 50 Illinois 37 *Dean v. Shelby* 57 Pa. St. 426, 6 Iowa 187 and 30 Iowa 431, opposed to this doctrine are *Hill v. West* 8 Ohio 222 and *Nash v. Spofford*, 10 Met. 192.

S. L. LAX.

RECENT PUBLICATIONS.

THE ADJUDGED CASES ON DEFENCES TO CRIME. Vol. V., including special defenses to crimes against the property and persons of individuals, viz.: Forgery; Fraud and False Pretenses; Larceny; Receiving Stolen Property; Robbery; Abduction; Seduction; Assault; Assault and Battery; Assault with Intent; False Imprisonment; Rape and Homicide. With notes. By John D. Lawson. San Francisco: Sumner Whitney & Co., Law Publishers and Law Booksellers. 1886.

This is the concluding volume of the series which Mr. Lawson has prepared with so much labor, and such thorough knowledge and diligent investigation of the subject in hand.

We reviewed the fourth volume of this series in a former number of the JOURNAL (vol. 22, p. 479), and we can only add our conviction of the value of the work, and repeat what we have already said, that it "will doubtless prove of great value to the counsel for the defense."

COMMENTARIES ON THE LAW OF ESTOPPEL AND RES JUDICATA. By Henry M. Herman, Counsellor-at-Law, author of the "Law of Executions," "Chat-tel Mortgages," etc. "*Omne jus quo utimur vel ad personam pertinet, vel ad res, vel actiones.*" In

two volumes. Jersey City, N. J.: F. D. Linn & Company. 1886.

This is not a new edition of the author's former work on this subject, nor yet a reproduction of it in an improved form. It is more properly, as he explains in his preface, a new work on the same subject, the production of which he conceives is justified by the immense growth of case law on the topics treated, which has taken place within the fifteen years that have elapsed since the publication of his first work. The book is manifestly the result of great labor, the author having cited no less than sixteen thousand cases, the treatment is thorough and conscientious, and the arrangement very good. It is divided into three books, the first devoted to Estoppel by Judgment, or other matter of record; the second to Estoppel by deed or other written matter; the third to estoppel *in pais* and equitable estoppel. The matter contained under these topics are judiciously subdivided into twenty chapters, of which the first treats of the general principles of law controlling the subject; the second of Estoppel by record; the third of personal judgments as between parties; the fourth of judgments *in personam*; the fifth of judgments *in rem*; the sixth of judgments of courts of limited jurisdiction; the seventh of foreign judgments. The eighth, which opens the second book, treats of Estoppel by deed or other writing; the ninth is devoted to the subject of recitals; the tenth to title by Estoppel; and the eleventh to leases by Estoppel. The third book opens with the twelfth chapter, which treats of Estoppels *in pais* and Equitable Estoppels; in the thirteenth are considered Equitable Estoppels in their relations to landlord and tenant, vendor and vendee, bailor and bailee; the fourteenth specially applies the doctrine of Estoppel to mortgages; and the fifteenth to the title to land. The sixteenth chapter treats of the doctrine of Equitable Estoppel as applied to written instruments; and the seventeenth to the doctrine as affecting or applied to election, ratification, acquiescence, as well as to certain personal relations as principal and agent, etc. The eighteenth chapter treats of the application of the doctrine to the matters of boundaries, easements, possession, partition, etc.; and the nineteenth to the doctrine as affecting corporations. Finally, the twentieth chapter shows how Estoppel can be made available, when it must be pleaded specially and when it can be given in evidence under the general issue.

The work is well worthy of Mr. Herman's high reputation, and we heartily commend it to the profession.

JETSAM AND FLOTSAM.

WOMEN'S RETORTS.—Lawyers not unfrequently receive the most provoking retorts from women whom they are trying to confound. A counsel defending a prisoner on trial, before an English court, for stealing money, began his cross-examination of the principal witness, a woman, by saying:

"Tell me, my good woman, what sort of money had you?"

"I had eight shillings in silver, and a sovereign in gold."

"Tell me, my good woman," continued the lawyer, with a sneer, intended to confuse the witness, "did you ever see a sovereign in any thing else than gold?"

"O, yes, sir," answered the woman, with a calm smile; "I saw Queen Victoria, God bless her!"

"Madam," said a coarse lawyer, baffled in his attempt to make a cool witness contradict her statements, "you have brass enough to make a saucepan."

"And you have sauce enough to fill it," she retorted.

JUDGE AND PARSON.—Lord Chancellor Kenyon was so noted for his penuriousness that a wit said: "In his lordship's kitchen the fire is always dull, but the spits are always bright." "Spits!" rejoined a witty friend, "in the name of common-sense don't talk of Kenyon's spits, for nothing turns upon them!"

An Irish Chief-Justice, St. George Caulfield, was also notorious for his parsimony. Though a gentleman of fortune, he was never known to give a dinner party but once. A gentleman, holding an important government office, happened to pass near the chief-justice's residence, and the penurious judge was obliged to invite him to become his guest.

The official accepted, and the neighboring gentlemen were invited to meet him at dinner. Among them was the witty rector of the parish, who, being asked to return thanks, when dinner was over, did so in words as impertinent as irreverent.

"We thank the Lord, for this nothing less
Than the fall of Manna in the wilderness;
In the house of famine we have found relief,
And known the comforts of a round of beef;
Chimneys have smoked that never smoked before,
And we have dined where we shall dine no more."

The chief-justice pretended to enjoy the joke, and on a subsequent day, asked the parson to take a frugal dinner with him. When the covers were taken off, there was nothing in the dishes.

"May I ask you, reverend sir, to say grace?" asked the chief-justice, with a malicious smile. The parson, rising to the occasion said:

"May He who blessed the loaves and fishes
Look down upon these empty dishes;
For if they do our stomachs fill,
'Twill surely be a miracle."

In the preface to "Fortescue's Reports," which consists of thirty-one folio pages, it is said that "the grand divisions of law is into divine law and the law of nature; so that the study of law in general is the business of men and angels. Angels as well as men may desire to look into both the one and the other, but they will never be able to fathom the depths of either." This classification of law students it will be observed leaves out the "third estate"—devils. The omission is probably correct, as those personages are generally supposed to know from experience much more of the penalties of the law than is entirely agreeable to them.

LEGAL.—A legal adjustment of differences was sometimes very difficult for a man to obtain in the early days of California, as it is elsewhere at times, owing to local peculiarities.

Two Mexicans who had been lucky in digging, disputed the possession of an aged mule, not worth her keeping. The case was brought before a learned magistrate named Muggins, who, before listening to the trial, demanded that each claimant should pay three ounces of gold-dust for "cost of court."

Each party was then allowed to state his side of the case in his native language, of which Judge Muggins did not understand a word. This done, his Honor informed them, through an interpreter, that the case must be decided by a jury.

Two ounces more having been paid to meet the "extra expense," twelve good men and true were summoned. These persons decided that the evidence was so conflicting that neither man owned the mule, but that, in strict justice, the plaintiff and defendant should draw straws for the bony beast. The foreman

furnished the straws without extra cost, and amid a breathless silence, the Mexicans drew lots.

The die was cast, and the case decided, but when the winner went proudly forth to claim his quadruped, it was discovered that a more subtle "Greaser" had stolen the mule.

UNPRINCIPLED.—Lord Chancellor Thurlow was noted for rough mental vigor, coarse manners, shocking profanity, and hard drinking. He had little principle, and considered politics as a game by which clever men advanced themselves. The tricky nature of the man, and his shrewdness, also, are shown by the manner in which he procured a horse, when he began the practice of the law. He was so poor that he was perplexed as to how he should secure one on which to ride the rounds of the courts.

As his perplexity did not include the slightest scruple as to the morality of the means, he went to a horse-dealer, and, in the tone of a man who could buy every horse in the stable, said: "Show me, sir, a horse that you can recommend for riding, and if I like him after trial, I'll take him at your own price."

The young barrister was immediately mounted on the best saddle-horse in the stable. He rode away, and the trial, which the dealer thought might extend until night, lasted for several weeks. When the dealer again looked upon his property, the horse had carried Thurlow to every town in the circuit. With the animal, the owner received this note: "The horse, though he has some good points, does not altogether suit me."

Once, while Thurlow was Lord Chancellor, an attorney appeared before him to make proof of a death. "Sir, that is no proof," answered the Chancellor to every statement made by the lawyer.

"My lord," at last exclaimed the vexed attorney, "it is very hard that you will not believe me. I knew the man well. I saw him dead and in his coffin. He was my client."

"Good heavens, sir!" sneered the rude, brutal Chancellor. "Why did you not tell me that before? I should not have doubted the fact one moment, for I think nothing would be more likely to kill a man than to have you for an attorney."

Yet this rough, tricky, immoral man was for years the despot of the House of Lords, and the personal confidant of George the Third, the most religious of all the Georges. He secured the sovereign's favor by his uncompromising advocacy of the royal prerogative, and his strong denunciations of the rebellious Americans.

In public, he shed tears at the approach of the king's insanity, but in the royal cabinet, he treated his feeble-minded master as if he was a boy.

Once, when Thurlow had brought to the king a number of acts of parliament for him to read and sign, the sovereign showed some dullness of perception.

"Your majesty," said the coarse chancellor, "it's all nonsense trying to make you understand these acts, and you had better consent at once to all of them."

The world moves. The English would not now endure a George III., much less a George IV., nor would they tolerate for a single parliament the insolence and immorality of a Thurlow. Within a few weeks, the career of a popular leader, a man of wealth and position, has been terminated, because he stood morally, though not legally, convicted of one gross immorality.

The Central Law Journal.*ST. LOUIS, JULY 16, 1886.***CURRENT EVENTS.**

DEATH OF JUDGE DAVID DAVIS.—By the recent demise of Judge David Davis, of Illinois, for many years one of the Justices of the Supreme Court of the United States, who died at Bloomington, in the seventy-first year of his age, the legal profession has lost one of the most honored and distinguished of its members. Eminent as he had been at the bar, and prominent and successful in political life, Judge Davis was most distinguished upon the bench. For the judicial office he was singularly fitted by nature, as well as the training of his long professional life. Calm in his temperament, and impartial in his judgment, always ready to hear and to do justice to both sides of any question, he possessed the qualities of the perfect ideal judge, the very qualities which unfitted him for the struggles of partizan politics. Few men have ever held political office who had so little of the partizan politician in their nature, and very few men have ever held judicial office whose fairmindedness and sense of justice were so little marred by political or personal predilections. His career has been an honor to the country, his State, and the profession.

FAITH IN THE ADMINISTRATION OF THE LAW.

—In sentencing Jaehne, the convicted New York Alderman, some month or two ago, Judge Barrett "improved the occasion," (to use an antique clerical phrase,) by delivering a short but very sensible discourse, over the head of the prisoner, to the community at large, on the faith or want of faith of the public in the administration of the law. He said:

"The saddest thing of all about your case is the doubt which pervaded many good and honest minds of your conviction. There was not a doubt of your guilt. It was universally conceded, when the evidence was in, that the case against you was clear, convincing and

overwhelming. It was not a doubt of your guilt, but a doubt of your conviction of guilt. That doubt was the doubt of the virtue of the people themselves to maintain their common laws. It was a cynical doubt of everything which is good. It was a doubt as to the virtue of our jury system, as to the zeal of our public prosecutors, as to the fidelity of the detective branch of the police. These doubts have been dissipated, and the lesson is a good one—the lesson of an increase of faith in the good in our cities and in our laws, of an increase of faith in the validity of our institutions, and the efficacy of impartial laws in those institutions. There is also another lesson, and that is a lesson not of supporting faith, but of the destruction of faith—for you and such as you have had a vital faith in the supremacy of evil, and in the impossibility of working out good results, believing that the very corruption of which you have been convicted is almost universal. That faith will be lessened by your conviction, and the other and better faith will be increased."

It will be observed that Judge Barrett's remarks apply chiefly to urban populations, and to crimes of dishonesty. They are equally true with reference to the rural districts, and to general crime, including crimes of violence. No matter how remote or unsophisticated the community may be, the belief is general, that if a rich man or a "big" man commits a crime he will escape punishment. This results from a want of confidence of the people in themselves and in each other, as well as in the law and its officers. People are very ready to believe that juries will not convict, or in other words, that they themselves will fail to discharge their duty when the occasion for its performance shall arise.

This distrust, added to the want of confidence in the officers of the law, and the popular idea of its general uncertainty is one of the chief sources of the prevalence, in some sections of the country, of lynch law, and in all others of a strong tendency to it whenever an offence of unusual atrocity is committed.

For example, in a southern city, less than a year ago, a man committed a murder, a very atrocious crime, but he was arrested, examined, fully committed to jail for trial upon evidence amply sufficient to convict. Two nights afterwards he was taken out by

armed men and put to death. The question is, why was this done? Why cannot the people, for these armed men were a part of the people, trust their own laws which they have made, their own officers whom they have elected, their own juries to be taken out of their own number? The answer is, they distrust themselves and each other. Their experience and observation have taught them that lapse of time, with its softening influences, will so tone down the public sentiment, that when the legal delays, prolonged as far as zealous counsel can prolong them, shall have been exhausted, a jury will be impanelled who will either acquit outright, or assess a very moderate term of imprisonment.

In the country as in the city, the small criminals only are caught and caged, the greater, break the net and escape. There are exceptions, such as Tweed, Ward, Jaehne, but it is noteworthy that these are pecuniary offences. As to crimes of violence—When and where was any man bearing the port and similitude of a gentleman hanged for murder? We cannot recall a single instance later than that of Dr. Webster, of Boston, now nearly fifty years ago. And how many such men in the United States, have, within those fifty years, committed murder?

DIVORCE LAW—THE QUEEN'S PROCTOR—SIR CHARLES DILKE.—Our attention has recently been attracted to the attempt of Sir Charles Dilke, to re-enter the scandalous Crawford v. Crawford and Dilke divorce suit. This case is again pending upon the intervention of the Queen's Proctor. It seems that this officer, acting under the direction of the Attorney-General, filed a plea alleging that the decree was pronounced contrary to the justice of the case, with other allegations which the court regarded as surplusage. Mrs. Crawford also filed her petition, asking to be allowed to support her former admissions. Sir Charles Dilke, too, applied to be restored to his position in the suit to defend himself against the Crawfords, both husband and wife. The court refused the application of Sir Charles Dilke, as well as that of Mrs. Crawford, upon the ground that it was not

competent for it, under the statutes, to grant (in effect) a new trial, but its duty was confined to hearing what the Queen's Proctor, as a public officer, had to adduce against the correctness of the decree pronounced in the case. Sir Charles Dilke appealed from this decision. The *Solicitor's Journal* of a recent date (June 19,) says on this subject:

"The appeal by Sir Charles Dilke from the decision of Sir James Hannen in the Crawford-Dilke case will settle an interesting question on the practice as to intervention by the Queen's Proctor—viz., whether such intervention is to be virtually equivalent to a new trial. It is not necessary to speculate on the result of the appeal, but we may point out that the practice as to intervention is, to some extent, an excrescence upon the original statute (20 & 21 Vict. c. 85) by which the Court of Divorce was established. The Matrimonial Causes Act, 1860 (23 & 24 Vict. c. 145), first provided that every decree for a divorce should, 'in the first instance, be a decree *nisi*, not to be made absolute till after the expiration of such time, not less than three months from the pronouncing thereof,' as the court should direct, and this interval was extended to six months by the Matrimonial Causes Act, 1866 (29 & 30 Vict. c. 32), s. 3. Sec. 7 of the former Act then goes on to enable any person, within the specified period, 'to shew cause why the said decree should not be made absolute by reason of the same having been obtained by collusion or by reason of material facts not brought before the court,' and on cause being thus shewn, the court may make the decree *nisi* absolute, or reverse it, or require further inquiry.'"

We are of opinion that there is a lesson for us, on this side of the water, in the legislation cited in the foregoing extract. We do not generally favor the "law's delay," but we think that in divorce cases the practice of rendering a decree of divorce *nisi*, not to be made absolute for six months after its rendition, would be a wholesome check upon the unseemly haste with which re-marriage so often follows legal separation. The delay would in many cases give time for reflection and possibly afford a *locus penitentiae*—not that the parties have not already had plenty of repentance, but probably not of the right sort, nor for the proper reasons. The whole subject of divorce is, at best, unpleasant, ex-

hibiting, as it often does, the most revolting vices and the most poignant misery incident to modern society. It is the policy of our laws to make marriage as easy as is consistent with proper precautions against the hasty union of persons who, from nonage, ought not to be married; with reference to divorce there should be a reverse policy, it should be treated as, at the best, a sad necessity, and never granted until every other happier solution has become manifestly impossible. Under the practice of most of our States, the proceedings in divorce cases is unduly summary. A petition is filed, an answer, or very frequently a default, a few depositions taken, a few witnesses examined, and a final decree follows, often at the same term of the court, severing forever the bonds of a relation, which most people believe was instituted by God himself, not to be severed, save for one cause only.

"It is a solemn thing to be married" said a grave father to his daughter. "Yes," was the pert reply, "but it is a deal solemnner not to be." More serious than either the responsibilities of matrimony, or the forlorn *status* of celibacy, is the act of severing the marital relation. It is a mere platitude and truism to say that a dissolution of marriage bonds should not be lightly sought; that it should not be lightly granted, is an admonition which cannot be too often, or too seriously impressed upon our legislatures and courts. That the former need such admonition is manifest from the long list of statutory causes of divorce which so steadily grows under legislative manipulation; and that the latter require similar cautions is equally clear from the liberal construction they give to divorce statutes, and especially from the enormous aggregates of grists, that the "divorce mills," as the newspapers suggestively call them, are constantly turning out.

We think, therefore, that the six months post-divorce period of probation might well be borrowed from our English friends, for it is a practice worthy alike of commendation and imitation.

NOTES OF RECENT DECISIONS.

VOLUNTARY ASSIGNMENT IN FAVOR OF CREDITORS—EXTRA-TERRITORIAL OPERATION OF—ATTACHMENT—COMITY—CAN ONE STATE BE REQUIRED OR EXPECTED TO ENFORCE THE LAWS OF ANOTHER STATE.—We publish, in the current number of the JOURNAL, two cases involving the question whether an insolvent debtor can transfer by a general assignment of his property for the benefit of his creditors, personally situated in another State, so as to defeat the liens of attachments levied upon such property by his creditors. One case was decided in Massachusetts,¹ the other in Texas.² The cases were similar in all legally essential points, but the courts arrived at conclusions precisely opposite to each other.

The facts in the Massachusetts case were, that the debtors, residents of New York, assigned to a trustee for the benefit of their creditors, all their property, including certain assets, the legal *situs* of which was Boston. Afterwards, the plaintiff, a creditor, and resident of Boston, caused an attachment to be levied on the Boston assets. The Supreme Judicial Court held that the assignment was inoperative, as against an attachment duly issued in accordance with the laws of Massachusetts.

This decision is based upon the principle, that the laws of one State cannot be executed in another, except by comity, which does not require that they should be so executed when it would be in contravention of the public policy of the State, or without the sanction of its laws, or injurious to the best interests of its citizens. It is the settled policy of Massachusetts, re-affirmed in this ruling, that no voluntary assignment for the benefit of creditors, the only consideration of which is the acceptance of the trustee, is valid against attachments, except so far as assented to by creditors, and that assent must be shown affirmatively.³ The rule seems to be well es-

¹ *Faulkner v. Hyman*, 8 J. Ct., Mass., N. Eng. Rep. Vol. 2, 181.

² *Welder v. Maddox*, 8 C. Texas; Texas Law Rev., Vol. 6, 371.

³ *Widgery v. Haskell*, 5 Mass., 145; *Swan v. Crafts*, 124, Mass. 453; *Pierce v. O'Brien*, 129 Mass. 314; *Ingraham v. Geyer*, 18 Mass., 146.

tablished in that State, that its courts are not bound to enforce a foreign contract, and will not enforce it against the interests of citizens of the State.⁴

The Massachusetts rule as to assignments for the benefit of creditors, as established in *Widgery v. Haskell*,⁵ is commented on by Mr. Justice Story,⁶ with manifest doubt as to the value of the case as establishing a principle of law, though he has no doubt it was rightly decided upon its own circumstances. However that may be, it *did* certainly establish the principle that an assignment for the benefit of creditors, whether made within or without the State, must receive the assent of the creditors, or it will not be valid. This doctrine is believed to be peculiar to Massachusetts. The general rule as to the jurisdiction of personal property is thus stated by Mr. Justice Story:⁷

"It is well settled as a doctrine of international jurisprudence, that personal property has no locality, and that the law of the owner's domicile is to determine the validity of the alienation thereof, unless there is some positive or customary law of the country where it is found, to the contrary." In a later case, however, the Supreme Court of the United States modifies this *dictum*.⁸ Mr. Justice Davis says:

"The theory * * * that the voluntary transfer of personal property is to be governed every where by the law of the owner's domicile, proceeds on the fiction of law that the domicile of the owner draws to it the personal estate he owns, wherever it may happen to be located. But this fiction is by no means of universal application, and, as Judge Story says: 'yields whenever it is necessary for the purposes of justice that the actual *situs* of the thing should be examined.' It has yielded in New York on the power of the State to tax the personal property of one of her citizens, situated in another State, and and always yields to 'laws for attaching the

estates of non-residents, because, such laws necessarily assume, that property has a *situs* entirely distinct from the owner's domicile.'"⁹

Judge Davis proceeds: "If New York cannot compel the personal property of Bates, (one of her citizens) to contribute to the expenses of her government, and if Bates had the legal right to own such property there, and was protected in its ownership by the laws of the State; and as the power to protect implies the power to regulate, it would seem to follow that the dominion of Illinois over the property was complete, and her right perfect to regulate its transfer, and subject it to process and execution in her own way, and by her own laws."

So far as comity and inter-State relations of parties are concerned, the Massachusetts case¹⁰ proves too much, and can hardly be regarded as an authority upon that point either way. The criterion by which the validity of a voluntary assignment is to be judged in that State is, not the citizenship of parties, nor the *situs* of the property, but the affirmative assent of the creditors; with that assent the assignment is good, whosoever may be the parties, or where the *situs* of the property; without it, the assignment is invalid. The ruling upon comity in that case, it would appear, therefore, was an *obiter dictum*.

The Texas case,¹¹ similar in some respects, is very different in others; the facts were, that Spiro, a citizen of Missouri who also carried on business in Texas, executed, under the laws of his domicile, a general voluntary assignment of all his property, including his Texas assets, but excluding his statutory exemptions; that the assignee, having complied with the Missouri law by giving bond, &c., took possession of the Texas property but did not record the assignment in Texas; that afterwards, at the instance of a creditor, the defendant, sheriff of the county, levied an attachment on the goods. The Supreme Court of Texas held that the assignment so executed in accordance with the laws of Missouri passed the title to the goods, and that the attachment was invalid. For the grounds

⁴ *Ingraham v. Geyer*, *supra*; *Blake v. Williams*, 6 Pick. 286; *Fall etc Co. v. Croade*, 15 Pick. 11; *Martin v. Patter*, 11 Gray 47; *Green v. Van Buskirk*, 5 Wall. (U. S.) 307.

⁵ *Supra*.

⁶ *Halsey v. Whitney*, 4 Mason, C. C. 216.

⁷ *Black v. Zacharie*, 8 How. (U. S.) 514.

⁸ *Green v. Van Buskirk*, 7 Wall. 150.

⁹ *People ex rel v. Commrs. of Taxes*, 23 N. Y. 225.

¹⁰ *Faulkner v. Hyman*, *supra*.

¹¹ *Weider v. Maddox*, *supra*.

of this decision, the reader is referred to the opinion itself, which appears in full in this number of the JOURNAL.

It may be remarked that in the view which the Supreme Court of Texas takes of this case, there is a departure from that usually taken in cases involving the same principle. The court holds that the right which it enforces is a common law right, not a right acquired or held under the law of Missouri, consequently that the principle of comity does not operate in the matter at all. It would seem however, that the assignment was made under the law of Missouri, according to its forms, and the limitations, as to bonds, responsibility to courts, &c., prescribed by the laws of that State. Hence, in our view, the Supreme Court of Texas, in this case, does enforce the common law as modified by the statutes of Missouri, or in other words, the law of Missouri and therefore the principle of comity *does* come into play.

That, however, is not material, for the ruling can be sustained upon the principle of comity. The assignment seems to be in accord with the law of Texas, contravenes no law, custom, or rule of public policy of that State, and is therefore good under the rule of comity on that subject, which may be thus expressed: "If a general voluntary assignment for the benefit of creditors be made according to the law of the domicile of the assignor, it will be valid to pass all the personal property of the assignor wherever situated, unless its operation is limited or restrained by some local law or policy of the State where the property is found." ¹²

¹²Hanford v. Paine, 32 Vt. 442; Ockerman v. Cross, 54 N. Y. 29; Chaffee v. Fourth National Bank, 71 Me. 514.

REFRESHING MEMORY — RECOLLECTION INDEPENDENT OF MEMORANDA.

1. General Principles of the Practice.
2. Conflict as to Whether Memory of Fact Should be Independent of Memoranda.
3. Independent Recollection Unnecessary.
 - (a) Rule Stated and Illustrated.
 - (b) Limitations on Rule.
 - (c) Greenleaf's Rule.

4. Independent Recollection Necessary.
5. Summary of the Conflicting Views.
6. Arguments in Favor of both Views.

1. *General Principles of the Practice.*—It is a well settled principle in the law of evidence that a witness may, under proper circumstances, refer to written or printed memoranda, documents and papers, to refresh and assist his memory, concerning facts about which he is testifying.¹

But this practice is attempted to be confined within certain limits, though not always accurately prescribed, yet, perhaps of sufficient definiteness to meet most, if not all, ordinary requirements. This practice is largely discretionary with courts. They are required to take great care to guard against forgery, interpolation, etc., thus preventing the abuse of the right.² The chief objection to it being that the paper referred to operates upon the mind of the witness like a leading question. But it is rendered necessary by the frailty of human memory which, as every person knows, is such that very few witnesses are able to testify as to particular dates, numbers, quantities and sums after any considerable lapse of time, without reference to papers or memoranda.³

The witness, with his memory thus quickened and refreshed, is enabled to testify with greater clearness and accuracy than without the use of the paper, even though he remembers quite distinctly the general facts concerning which he is giving evidence. In cases involving long accounts this practice is rendered indispensable and the authorities concur in sustaining it.⁴

¹ Ford v. Commonwealth, 130 Mass. 64; S. C. 39 Am. Rep. 426; Queen v. Langton, 22 Q. B. D. 296; 1 Green. on Ev. (14th Ed.) §§ 436-439 and notes.

² Harrison v. Middleton, 11 Gratt. (Va.) 527, 544; Merrill v. Ithaca, etc. R. R. Co. 16 Wend. (N. Y.) 600; Chapin v. Lapham, 20 Pick. (Mass.) 467.

³ Feeter v. Heath, 11 Wend. (N. Y.) 477, 485.

⁴ Wise v. Phoenix Ins. Co. (N. Y. 1886) 4 N. E. Rep. 634; Affirming S. C. 31 Hun. 87; Lawson v. Glass, 6 Col. 134, 135; Howard v. McDonough, 77 N. Y. 592; McCormick v. R. R. Co., 49 N. Y. 308; Driggs v. Smith, 36 N. Y. Super. Ct. Rep. 283; Commonwealth v. Jeffs, 132 Mass. 5; Commonwealth v. Ford, 130 Mass. 64; S. C. 39 Am. Rep. 426; State v. Miller, 58 Iowa, 154, 209; Cooper v. State, 59 Miss. 264, 272; Robertson v. Lynch, 13 Johns. (N. Y.) 451; Clough v. State, 7 Neb. 320; McCausland v. Ralston, 12 Nev. 196, 217; Kent v. Mason, 1 Bradwell (Ill. App.) 466, 471; Coffin v. Vincent, 12 Cush. 98; Rambert v. Cohen, 4 Esp. 213; Jacob v

While most of the authorities are uniform on the general rule of practice, there is, however, considerable discord on some of the points which frequently arise. Much of this conflict arises from a failure, in many instances, to properly restrict the use of the memorandum, resulting from a misapprehension of the true principles governing the practice. It must be remembered that the paper has a distinct office. It is of itself but mere hearsay evidence and used solely for the purpose of aiding the memory, and it can in no proper sense supplant the witnesses testimony.⁵ It must be strictly confined to this purpose.

2. *Conflict as to Whether Memory of Fact Should be Independent of Memoranda.*—There are two conflicting views presented by the decisions with respect to this practice. Even in the decisions of the same State this discord is apparent. An attempt will be here made to fully state these conflicting positions, to harmonize as much as possible, and finally, to point out, as near as may be, the true principles which underlie the practice.

One class of cases holds that it is sufficient to authorize a use of the memorandum, if after looking at it, the witness testifies to its genuineness and accuracy, either from having made it himself, when the facts to which it relates were fresh in his memory, or from having verified it immediately, or very soon after it was made. In other words, in such case, the witness will be permitted to swear to the fact, yet not because he remembers it, but because of his confidence in the correctness of the memorandum. While the other class is to the effect that the witness must have a present recollection, wholly independent of the memorandum, of the transaction mentioned in it, although the inspection of the paper may alone awaken this recollection.

3. *Independent Recollection, Unnecessary.*—(a) *Rule Stated and Illustrated.*—As consistent with the first view, that an independent recollection of the fact is unnecessary, the rule has been frequently laid down that where a witness has so far forgotten the facts of the transaction that he cannot recall them, even after looking at the memorandum; yet,

if he testifies that he once knew them and made a memorandum of them at the time or soon after they transpired, which he intended to make correct, and which he believed to be correct, such memorandum may be used to refresh his memory, although he has no present recollection of them.⁶

Hence, under this rule, where check-slips are made by a clerk in the ordinary course of business, showing the number of cars shipped and the descriptive mark of the goods, they are admissible with the testimony of the clerk that they were truly made by him, and that the goods were marked and shipped as thereby indicated, although the witness has no present recollection of the transaction.⁷

And where the point is to prove protest and notice, a notary may refer to an entry in his book where it was his habit to make such entries at the happening of the event, although he has no independent recollection of the fact in question, his belief being based altogether upon such entry.⁸ Likewise of a notary's clerk who had forgotten his entry of notice to an endorser.⁹

The same rule has been held to apply to a memorandum of a gambling transaction;¹⁰ so to notes of evidence of counsel;¹¹ so to the entry of a bank clerk;¹² so to the entries of charges for penalties of a town clerk.¹³

And it has also been held that under like

⁶ Howard v. McDonough, 77 N. Y. 502; Costello v. Crowell, 133 Mass. 352, 355; Abbott's Trial Ev., p. 322, par. 38; Wernag v. C. & A. R. R. Co., (Kansas City Court of App.) 22 Cent. L. J. XXXV. Mo. Add., 20 Mo. App.

⁷ Shiedley v. State, 23 Ohio St. 130.

⁸ Bank of Tennessee v. Cowan, 7 Humph. (Tenn.) 70. "To require that a notary shall particularly recollect every specific case when he protests commercial paper and directs notice to the parties entitled thereto would be to defeat recovery to a great extent upon such instruments, for in the very nature of the thing it is impossible for a notary to retain such recollection when the amount of business done by him is extensive. It is sufficient in such cases, if the statement be contained in his notary book, and it was his habit to make such entries at the happening of the event in such case; his belief based upon such entry is good evidence and should be received." See Bullard v. Willson, 5 Mart. (La.) (N. S.) 196; Mangham v. Hubbard, 8 B. and C. 16.

⁹ Halge v. Newton, 1 Rep. Const. Court, 423.

¹⁰ State v. Rawls, 2 Nat. & McCord (S. C.) 384; approved in Halsey v. Sinsbaugh, 15 N. Y. 485, 487.

¹¹ Rogers v. Burton, Pick. 106, 118; Clark v. Vorce, 15 Wend. 193.

¹² Bank v. Boraef, 1 Rawle, 152.

¹³ Corp. of Columbia v. Harrison, 2 Rep. Const. Court, 213.

Lindsey, 1 East. 227; Kensington v. Inglis, 8 East. 273; Horne v. McKenzie, 6 Cl. and Fin. 628; Burton v. Plummer, 2 A and E. 341; Rex v. Duchess of Kingston, 20 How. St. Tr. 619.

⁵ Henry v. Lee, 2 Chitty, 124.

circumstances a witness may refresh his memory from corporation books,¹⁴ or from lists made by another which were signed and sworn to by the witness.¹⁵

Dr. Wharton says that this is the prevailing rule: "The fact that the witness has no independent recollection of the notes, does not exclude the testimony, as to the facts stated in the notes, when he states that it was his uniform and unvarying practice to make notes of the events of the character noted immediately after the occurrence of the events, and the memoranda are part of the notes in question. * * In such case it is, of course, necessary that the notes relied on should be produced in court."¹⁶

(b.). *Limitations on Rule.*—This rule is strictly confined to cases where the "uniform and unvarying practice" is to note the fact immediately after the event.¹⁷

The memorandum must have been "presently committed to writing" by the witness,¹⁸ "while the occurrences mentioned in it were fresh in his recollection,"¹⁹ "written contemporaneously with the transaction,"²⁰ or "nearly so with the fact deposed to." The fact that the memoranda are made in the regular course of business is not alone sufficient, unless contemporaneous with the transaction to which it relates.²¹ Some cases restrict the rule to entries made in the regular course of business,²² but others hold that it is applicable to every species of memoranda.²³

The rule also requires the memorandum to be an original entry and not a copy;²⁴ that it be

made by the witness himself,²⁵ or where it is made by another, that it be verified by the witness soon after it is made, and that he knows from his own personal knowledge of the transaction that the facts therein recorded are correct: at least it is believed that no case has extended it farther.²⁶

(c.) *Greenleaf's Rule.*—Mr. Greenleaf states a rule which is not only in harmony with the view under consideration, but which seems to go farther. He says: "Where the writing in question neither is recognized by the witness, as one which he remembers to have before seen, nor awakens his memory to the recollection of anything contained in it; but, nevertheless, knowing the writing to be genuine, his mind is so convinced, that he is on that ground enabled to swear positively to the fact."²⁷ This rule has not escaped severe criticism. It was strongly condemned by Chief Justice Whiteman, of Maine, in *Bradley v. Davis*.²⁸ All the cases cited by Mr. Greenleaf in support of it, were where the witness could recognize the genuineness of his own handwriting, although he was not able to recall ever having written it, or the purpose for which it was written. If this rule is meant to be confined to proving signatures in the attestation of instruments it is correct, but if applied to cases where the purpose is to refresh the memory of a witness as to facts contained in a written document, it cannot stand as sound law.

4. *Independent Recollection Necessary.*—

"original entries, attested by a man who makes them, may be read to the jury, though he remembers nothing of the facts they record," *Halsey v. Sinsebaugh*, 15 N. Y. 487, approves this distinction also the case of *State v. Rawls*, *supra*, and holds that *Lawrence v. Barker*, 5 Wend. 301; *Feeter v. Heath*, 11 Wend. 485; *Calvert v. Fitzgerald*, 1 Litt. Sell. Cas. 388, and *Jumta Bank v. Brown*, 5 Searg. and R. 235, which announce a contrary rule, are bad law and quotes and follows the rule laid down in *Cowen and Hill's* note to *Phillips on Ev.* (note 528 to p. 290) "that an original memorandum made by the witness, presently after the facts noted in it transpired and proved by the same witness at the trial, may be read by him, and is evidence to the jury of the facts contained in the memorandum, although the witness may have totally forgotten such facts at the time of the trial." *Guy v. Mead*, 22 N. Y. 465 approves these cases. See also, *Davis v. Field*, 56 Vt. 429; *Jones v. Stroud*, 1 E. C. L. R. 96; 2 Car. and P. 196; *Fisher v. Kyle* Mich. 455.

²⁵ See cases in last last note.

²⁶ 1 Green. on Ev. § 487.

²⁷ 1 Green. on Ev. § 487.

²⁸ 26 Maine, 55.

¹⁴ *Mattocks v. Lyman*, 16 Vt. 113.

¹⁵ *Davis v. Field*, 56 Vt. 426.

¹⁶ 1 Whart. on Ev. § 518 and Cases in N. 1.

¹⁷ 1 Whart. on Ev. § 518.

¹⁸ *Lord Holt* in *Lindwell v. Sandwell*, Comb. 445; *S. C. Holt*. 295.

¹⁹ *Lord Ellenborough* in *Barrrough v. Martin*, 2 Camp. 112.

²⁰ *Ch. Justice Tinsdall* in *Stemkeller v. Newton*, 9 Car. & P. 313.

²¹ *Chaffee v. U. S.* 18 Wall. 516; *Ins. Co. v. Weide*, 9 Wall. 677; *S. C.* 14 Wall. 375; *Nicholls v. Webb*, 8 Wheat. 326, 337.

²² *Bank v. Culver*, 2 Hill, 581; *Merrill v. Ithaca etc. R. R. Co.* 16 Wend. (N. Y.) 586, 599; *Davis v. Field*, 56 Vt. 429.

²³ *Guy v. Mead*, 22 N. Y. 465. See *Russell v. Hudson R. R. Co.* 17 N. Y. 134.

²⁴ *Cowen J.*, in *Merrill v. The Ithaca Oswego R. R. Co.* 16 Wend. 586, 599, after a full examination of the English and American authorities gives the result that

The doctrine just stated and illustrated is not supported by all cases. The rule that the evidence must be given of the fact wholly independent of the memorandum, as above indicated, has been adopted by numerous decisions. Thus, it is said, in support of this principle, that if the witness has no recollection of the transaction, separate and distinct, of the memorandum, or if, upon inspecting the paper his memory is not awakened to the fact, he will not be permitted to use it, although he may have perfect faith in its correctness. In other words, it is contended that the paper must be used for the sole and distinct purpose of refreshing the memory, and not for the purpose of enabling the witness to gain entirely new and original information from it;²⁹ and whether a memorandum can be used for this purpose depends upon whether the witness, after examining it, can state the fact from memory;³⁰ that the witness may inspect it provided after doing so he distinctly recollects the facts to which it relates, independent of it.³¹ He must swear to the fact from memory,³² for it is his recollection, and not the memorandum, that is the evidence.³³ Hence, if he cannot speak to the fact any farther than as finding it stated in the written entry, his testimony will amount to nothing. It is not enough for him to swear that he made the memorandum himself, which he believes to be true, and that he relies upon it without present recollection of the fact.³⁴ "If, after

looking at the paper, the witness cannot speak from his recollection merely, his testimony, so far as he cannot speak from recollection, is inadmissible."³⁵ "If the paper fails to revive and refresh his recollection, and thus constitute its present knowledge, he cannot testify."³⁶

In one case a witness, to identify and distinguish certain articles in a ship yard—which articles had been attached—selected them himself, but they were marked on the schedule by another person: at the trial he could not, after reading the schedule, distinctly recollect from memory that the articles were in the yard, but only by reference to the paper; his testimony was rejected.³⁷

This view has also been taken by the Supreme Court of the United States in a very recent case. The memorandum in question had been made by the witness twenty months before its date. The witness testified that he had no present recollection of the transaction, or no remembrance of it otherwise than as stated in the paper, but that he knew it took place because he had so stated it in the memorandum, as it was his duty to do, and because his habit was never to sign a statement unless it was true, and that he was willing to positively swear that it was true. The trial court admitted the evidence, but on appeal the Supreme Court reversed this ruling.³⁸

Many other cases hold substantially the same rule.³⁹

²⁹ *Erie Preserving Co. v. Miller*, 32 Conn. 444; S. C. 52 Am. Rep. 607.

³⁰ *Watts v. Sawyer*, 55 N. H. 39.

³¹ *Feeter v. Heath*, 11 Wend. (N. Y.) 477. This case is disapproved in *Halsey v. Sinsebaugh*, *supra*.

³² *Doe v. Perkins*, 3 T. R. 409; S. C. 3 Durnf. & East. 749; *Tanner v. Taylor*, cited in last case. In the first case it is said that if the witness cannot swear from memory after inspection, and knows no more than what he finds entered in the book or paper, the original must be produced. In this case the witness testified from extracts made by himself from the original books—some entries in which were made by the witness and some by another. The witness confessed upon cross-examination that he had no memory of his own of the specific facts contained in the entries; but that the evidence that he was giving was founded altogether upon the extracts. His testimony was rejected. It is claimed in *Merrill v. Ithaca*, *supra*, that the rule of these cases only relate to copies and not original, and hence the confusion results from a misapprehension of the cases.

³³ *Henry v. Lee*, 2 Chitty. 124; *Hill v. State*, 17 Wis. 675. See *Pinshower v. Hanks*, 1 West. Coast Reprtr. S. C. Nev. 309; S. C. 18 Nev. 99, 105.

³⁴ *Lawrence v. Barker*, 5 Wend. 301, 305, relying on

Tanner v. Taylor, and *Doe v. Perkins*, *supra*. This case is disapproved in *Halsey v. Sinsebaugh*, *supra*. See *Cameron v. Blackman*, 39 Mich. 108, 109.

³⁵ *Harrison v. Middleton*, 11 Gratt. (Va.) 527, 543. "The doctrine established by the authorities seems to be that if the witness, after looking at the paper, to recall the facts, can speak from his own recollection of them, and not merely because they are stated or referred to in the paper, his evidence will be admissible, notwithstanding the manner in which his recollection was revived, and no matter when or by whom the paper was made, nor whether it be original or a copy, or an extract, nor whether referred to by the witness in court or elsewhere." Citing 4 Phil. on Ev. (Cowen v. Hill's, notes,) part. 2 p. 784.

³⁶ *Ackler v. Hickman*, 63 Ala. 494, 498; S. C. 35 Am. Rep. 54.

³⁷ *Glover v. Hunnewell*, 6 Pick. 222, 224. See also *Ludewig v. Lyon*, 8 Mo. App. 567; *Berry v. Jourdan*, 11 Rich. (S. C.) 67, 78; *Coffin v. Vincent*, 12 Cush. 98, 101.

³⁸ *Maxwell's Exe. v. Wilkinson*, 118 U. S. 656; S. C. 5 S. C. Reprtr. 691, S. C. 29 Reporter, 577.

³⁹ *Nolin v. Parmer*, 21 Ala. 66, 70; *Memphis etc. R. Co. v. Maples*, 63 Ala. 601; See *State v. Collins*, 15 S. C. 375; S. C. 40 Am. Rep. 697, for full discussion of

5. *Summary of the Conflicting Views.*—

From this examination of the authorities it is seen that there are two distinct classes of cases on the question under consideration: 1. Where the witness, by referring to the memorandum, has his memory quickened and refreshed thereby, so that he is enabled to swear to an actual recollection. All authorities concur that if the paper produces this effect, it may be used. 2. Where the witness, after referring to the memorandum, undertakes to swear to the fact, yet not because he remembered it, but because of his confidence in the correctness of the memorandum. In both cases the oath of the witness is the primary substantive evidence relied upon; in the former, the oath being grounded on actual recollection, and in the latter, on the faith reposed in the verity of the memorandum, in which case, in order to judge of the credibility of the oath and of the reliance to be placed upon the testimony of the witness, all the well considered cases hold that the memorandum must be original and contemporary with the transaction, or nearly so, and must be produced in court. Although at one time limited to transactions in the regular course of business, it is now held, by a few cases, to apply to all kinds of memoranda. The first class of cases permit the use of copies, also memoranda not made by the witness, (but within the limits above pointed out). While a few of the second class sanction the use of memoranda made by a third person, yet it is believed that the best considered cases hold that the paper must be in the witness' own handwriting.

6. *Arguments in Favor of both Views.*—As argument in favor of sustaining the principle of the second class of cases, it is urged that the adverse rule would serve, in many cases, to defeat the ends of justice, and particularly in cases where witnesses are called upon to testify to the language of parties, used upon occasions long previous, for the reason that it is well known that the efforts of memory are seldom equal to the task of recalling, after any considerable lapse of time, even the exact substance of words and phrases; while

it would be comparatively easy at the time or immediately afterwards, to make an accurate record of their import; hence, to exclude such a record, when shown to have been honestly made, would be to reject the best and frequently the only means of arriving at the truth.⁴⁰ And it would seem that this reasoning should apply with greater force respecting memoranda of dates, amounts, lists of articles, etc., made in the regular course of business, for the likelihood of their accuracy, is more obvious. The certainty of the contents being the truth, it is insisted that it is not important whether or not the witness can swear to the fact from memory, for the truth is not effected by that, either way.⁴¹ Therefore, if the witness states that he knows the contents of the writing to be correct, it is claimed that the ground upon which its use is sanctioned, is thereby established,⁴² and the reasons of the contrary rule, which requires an independent recollection, are thus exploded.⁴³

The oath of the witness to the truth of the paper is indisputably the true principle, yet this admission does not necessarily concede that an independent recollection of the fact is not required. On the other hand, it would seem that the reason for insisting upon such recollection is, that the witness may be in a position to swear to the truth of the fact; for it is difficult to understand how he can state absolutely, that he knows a writing to be genuine and wholly accurate, unless he has some remembrance—though it be very slight—of the facts to which it relates. He, of course, can be certain of his own handwriting and can swear to his own signature, but this alone does not warrant him in testifying to the correctness of the statements in the writing. The rule which declares that it is not necessary that an attesting witness to an instrument of writing should recollect the circumstances attending the attestation,⁴⁴ cannot be invoked to support this view, for that

⁴⁰ Halsey v. Vinsebaugh, 15 N. Y. 488. See also Raynor v. Norton, 81 Mich. 210, 212.

⁴¹ Downer v. Rowell, 24 Vt. 343, 346.

⁴² See Cowen and Hill's notes to Phil. on Ev. § 523, p. 750.

⁴³ Downer v. Rowell, 24 Vt. 343, 346; Davis v. Field, 56 Vt. 426.

⁴⁴ 1 Wharton on Ev. § 739; Alvord v. Collins, 20 Pick. 418; Burling v. Paterson, 9 C. and P. 570; 1 Greenl. on Ev. § 437.

rule; Murray v. Cunningham, 10 Neb. 167, 170; Webster v. Clark, 30 N. H. 245, 254; Marcy v. Schultz, 29 N. Y. 346, 351, approved in McCormick v. Penn. Centr. R. R. 49 N. Y. 815.

rule proceeds upon a different principle. There the only fact to be established is the genuineness of the signature, and when the witness testifies to that, he is not required to give evidence as to the contents of the instrument. The supposed analogy of this rule to the one under consideration, has doubtless led to much confusion in the minds of judges and text writers, and has thus introduced discord in the decisions. Indeed, Mr. Greenleaf's rule seems to be based upon this analogy, as a large number of his cited cases are of this character.

Even though the witness states that it is his "uniform and unvarying practice to make notes of the events, of the character noted, immediately after the occurrence of the events," this does not place him in a position to swear to their truth, when he confesses that he has not the slightest independent knowledge of them. He may believe they are true, have perfect faith in their accuracy, but this belief alone does not establish their truth. And if it be admitted that this "uniform and unvarying practice" is sufficient to authorize the witness to swear to their truth, it is obvious that the rule must be confined to memoranda made in the ordinary course of business transactions. If the principles upon which this practice is founded are properly considered, the conclusion will be reached, that under no circumstances should a witness be permitted to give evidence of facts contained in a paper, unless there are grounds, apart from the contents of the paper itself, upon which he will be enabled to base his belief as to their truth and accuracy. This view does not assume that he shall remember the statements in the paper, indeed, he may not remember a single item, yet it does assume that he shall recollect something of the facts to which it relates.

EUGENE MCQUILLIN.

St. Louis, Mo.

COMITY — ASSIGNMENT IN ANOTHER STATE—ATTACHMENT—WHEN LAWS OF ONE STATE WILL BE EXECUTED IN ANOTHER.

WEIDER v. MADDOX.

Supreme Court of Texas, June 11, 1886.

1. *Comity.*—The laws of one State will be enforced in another as to property within such latter State, unless such enforcement contravenes the public policy, or some law, general or special, of that State.

2. *Voluntary Assignments.*—Hence a voluntary assignment made by a citizen of another State in accordance with the laws of that State conveying personalty, situated in this State, to a trustee for the benefit of assignor's creditors will be enforced in this State, although such assignment has not been recorded, nor has the trustee executed a bond in this State in accordance with its laws: *Semble*, it would be otherwise if the assignment were not voluntary, but the effect of the operation of law, or otherwise compulsory.

3. *Effect upon Title.*—Such an assignment so made in conformity with the laws of the assignor's domicile passes to the assignee the title to personal property situated in this State, unless the operation of such assignment is limited or controlled by some law of this State.

4. *Attachment.*—Such an assignment so made in conformity with the laws of the assignor's domicile is good as against an attachment levied after the assignee had taken possession: *Semble*, it would be equally good if the attachment had been levied before such possession had been taken, so that such levy was subsequent to the execution of the assignment, because it is the assignment which passes the title, not the delivery.

Hyde Jennings, Carter & Wynne, for appellants; *Hogsett & Greene*, for appellees.

STAYTON, J., delivered the opinion of the court: On April 27, 1882, M. Spiro, who was an insolvent person residing in the State of Missouri, in accordance with the laws of that State made a voluntary assignment of all his property for the benefit of his creditors, except such as by the laws of the State in which he resided, was exempted from forced sale. The assignment was such as, under the laws of this State regulating assignments by insolvent debtors, would be held valid if made by a person here resident, unless vitiated by the fact that the exempt property must be ascertained by the laws of State of Missouri. The assignment expressly covered a stock of goods situated in Fort Worth, Texas, at which place, as well as at the city of St. Louis in the State of Missouri, Spiro was doing a mercantile business at the time the assignment was made. The goods in Fort Worth were seized by the appellee, Maddox, who was the sheriff of Tarrant county, on the next day after the assignment was made, under attachments issued in suits instituted against Spiro by some of his creditors. This action is brought by the assignee appointed by the deed of assignment, against Maddox and the sureties on his official bond as sheriff to recover

the value of the property. The laws of the State of Missouri regulating voluntary assignments by insolvent debtors for the benefit of their creditors is fully pleaded in the petition, and the assignment seems to have been made in conformity thereto. The petition alleges that the assignee qualified by giving bond and doing such things as were required by the laws of Missouri to authorize him to administer the estate, and that he had so qualified and was in possession of the goods, through agents, at the time the sheriff made the seizure. It is also alleged that the sheriff was notified of the right of the assignee at the time he made the seizure, and further that Spiro did not owe and was not indebted to any citizen of Texas.

The defendants filed general demurrers to the plaintiff's petition, which were sustained and the cause dismissed. The grounds, on which the court based its judgment, do not appear in the record, but the brief of counsel for appellees submits propositions in support of the ruling, which we may regard as the grounds upon which the court below acted. These propositions are as follows:

First. "An assignment to be valid in Texas must be filed and recorded as other instruments."

Second. "The assignee, before taking possession of the property, shall give bond payable to the State of Texas which shall be deposited with the county clerk."

Third. "The laws of a State have no force beyond its territorial limits, and if permitted to operate in another State it is only when neither the State nor any citizen thereof would suffer an inconvenience from the application or enforcement of such law."

Fourth. "The rule that the law of the domicile of the person making the transfer of personal property will control, is subject to many exceptions, and the law of the place where the property is situated will be looked to, and control when the ends of justice require it."

Fifth. "It would only be on a principal of comity that the courts in Texas would enforce an assignment made in Missouri under the laws of said State, and not then when it would thereby prejudice any citizen of this State."

Sixth. "An assignment of property for the benefit of creditors made under the insolvent debtor's law of a particular State, which law also makes provision for the administration of the estate assigned according to its own law and in one of its own courts, and places the assignee under the control of said court, is inoperative to vest in the assignee the title to property situated beyond the limits of the State in whose courts said estate is to be administered. In such case the assignee is virtually a receiver, and cannot act beyond the jurisdiction of the court under the control of which he acts."

The assignment in question is what is properly termed a voluntary assignment. It was not made

in obedience to a law which compelled the assignor to make it, or which exacted from the creditor a surrender of any demand against the debtor in consequence of it, or as a condition to be allowed to take benefits under it. The right to make such assignments, if made *bona fide*, is not derived from statutes, but existed at common law, and now, in most of the States of the Union, laws have been enacted to regulate, control and secure the faithful execution of the trust by the named assignee. The assignee acquired title and authority through the assignor whose act is in the nature of a contract, and the acceptance of it by the assignee imposes upon him a relation of trust and confidence as to creditors and the assignor. Such assignments are termed voluntary assignments from the fact that they are the products of a will acting without legal compulsion, and to distinguish them from such transfers as are made solely by operation of law, or by an assignor under legal compulsion. The one has effect as other contracts, while the other has effect solely by force of the law which makes or compels the assignor to make the assignment. The difference it is important to observe when considering the effect to be given to an assignment in a State other than that in which it is made. If it be an assignment under a compulsory statute, it exists alone by force of the law which cannot operate extra-territorially.

The law is compulsory if it required the assignment to be made even at the request of creditors, or if it provides for the discharge of the claims of creditors, without their consent, upon the voluntary surrender by the debtor, under the terms of the law, of all his property for the benefit of creditors. State insolvent laws which compel the insolvent debtor to surrender his property to an assignee to be administered under the direction of a court for the benefit of creditors, and which compel the creditor to release the debtor on such full surrender, are instances of these classes.

In America such assignments are held inoperative upon property, real or personal, not situated within the territory over which the laws that make or compel the debtor to make them, have dominion, as are discharges of the debtor attempted to be made under them, inoperative as to persons not resident of the State under whose laws they are made. Wharton on Conflict of Laws, 390, 390a; Story's Conflict of Laws, 410-416; Burrill on Assignments, 303; United States v. The Bank, 4 Robertson, 414; Hutchinson v. Peshine, 16 N. J. Eq., 170; Felch v. Bugbee, 48 Maine, 9; Walters v. Whillock, 9 Fla., 95; Ogden v. Saunders, 12 Wheaton 213; Harrison v. Sterry, 5 Cranch. 302; Willets v. Waite, 25 N. Y., 583; Holmes v. Remsen, 20 Johns. 265; Abraham v. Plestero, 3 Wendells, 538; Dalton v. Currier, 40 N. H. 247; Saunders v. Williams, 5 M. H., 214; Black v. Williams, 6 Pick., 285.

It seems, however, to be everywhere admitted that a general voluntary assignment for the benefit of creditors, made by an insolvent debtor in

accordance with the laws of the place of his domicile, will pass all his personal property wherever situated, unless the operation of such assignments is limited or restrained by some law of the State in which the property is situated. *Hawford v. Paine*, 32 Vt., 442; *The United States v. The Bank of the United States*, 8 Robinson, 414; *Rosenthal v. The Mastin Bank*, 17 Blatchford, 323; *Law v. Mills*, 18 Pa. St., 185; *Whipple v. Thayer*, 16 Pick., 25; *Black v. Zacharie*, 3 Howard, 514; *Green v. Van Bushkirk*, 7 Wall., 150; *Story's Conflict of Laws*, 383-390, 410-416; *Burrill on Assignments*, 301, 302, 306, 307; *Walters v. Whitlock*, 9 Fla., 86; *Holmes v. Remsen*, 20 Johns. 265; *Saunders v. Williams*, 5 N. H., 214.

That a voluntary conveyance of personal property made in accordance with the law of the domicile of the assignor is valid elsewhere is the general rule, cannot be denied, and when it is claimed not to be so in a given case, the law of the *situs* must be looked to; for it is the right of every sovereignty to determine what shall be requisite to the transfer of the property, real or personal, situated within its territory, and what remedial rights in reference to it shall exist. The laws of a State which will control such questions are ordinarily those made for the government of its own citizens in making contracts and asserting rights.

This is well illustrated in cases in which a controlling effect was given to the law of the place where the property was situated. The following are cases of that character: *Green v. Van Bushkirk*, 5 Wall., 307; *S. C.*, 7 Wall., 141; *Guillander v. Howell*, 35 N. Y., 657; *Oliver v. Towns*, 2 Martin, (U. S.) 93; *Rice & Danbaum v. Curtis*, 32 Vt. 460.

There are expressions to be found in many opinions from which the inference may be drawn that effect is to be given to such voluntary assignments by courts in States other than that in which they are made, only as a matter of comity; that it rests in the discretion of such courts to give or deny effect to such assignments as they may or not appear injurious to the rights of citizens of the State whose laws the court administers, and within whose limits the property may be situated. This seems to us to confer upon courts a power too little restricted, undefined and unlimited to be tolerated in any country governed by laws. What upon such a matter is to be deemed injurious to the rights of citizens of the State in which the property is situated should be the subject of legislation, and not of judicial discretion. *Story's Conflict*, 390; *Guillander v. Howell*, 35 N. Y., 659.

That the assignment was made in the State of Missouri is a matter of no importance, as its validity does not depend upon any local law of that State, but is based upon the common law right of an insolvent debtor to make an assignment of all his property subject to the payment of his debts, for the benefit of his creditors. It is not denied that the assignment is valid in the State of Missouri, and its form and manner are such as to

make it valid here even under statutes in this State regulating such assignments, unless invalidated by the fact that it makes the kind of property and its value which is reserved from the operation of the deed, to depend upon the laws of Missouri regulating exemptions. The laws of this State provide that an assignment of this character shall "provide for a distribution of all his (the assignor's) real and personal estate other than that which is exempted from execution," but it does not provide that the measure of the exemption shall be furnished by the laws of this State. The same general policy of permitting insolvent debtors who make such assignments, to except from their operation such property as is exempted from execution, prevails in this State and in the State of Missouri.

It cannot be said that the reservation made in the deed of assignment under consideration, is in violation of the laws of this State, nor that it could prejudice the right of any citizen of this State who may be a creditor. Such a reservation would neither enlarge nor diminish the general fund to which creditors might resort through the ordinary process of the law, to collect their debts, and were those creditors here, they would have no superior right to be paid out of the proceeds of the property here situated had there been no assignment made, unless they had acquired liens. All creditors, wherever resident, have equal rights in this respect.

Exemption laws have application to persons resident of the State in which they exist; and when an assignment conveys property in that and another State, it would seem that the exemption should be measured by the law of the domicile. If this were a compulsory assignment dependent upon a statute of the State of Missouri, it is evident that the courts of this State would not give effect to the law of Missouri regulating exemptions. *Bryant v. Young*, 21 Ala. 264; *Newell v. Hayden*, 8 Clark, (Iowa) 143; *Helfernstion v. Cave*, 3 Clark, (Iowa) 289.

Whether a deed of assignment made in another State by a person there domiciled, is sufficient to pass title to property here situated, must be determined by the same rules which relate to instruments transferring property for other purposes. If the instrument be such, in form and manner of execution, as is required by the law of this State to pass title thereon, the title to property here situated must be held to pass to the assignee by it in the absence of some law in force here prohibiting such transfers. When an assignee accepts the trust created by such an instrument, the title to the property passes to him for the purposes of the trust—he becomes liable for it whether he has complied with the requirements of the laws of this State made to secure the due execution of the trust or not, and for an invasion of his right to the possession, he may have his action. This right is generally conceded to the person who has title.

The recording of the deed of assignment is re-

quired by the laws of this State for the purpose of giving notice to all persons of its existence, but there is no intimation in the statute that without such record the assignment, if made in this State, would be void.

An assignee is also required by the laws of the State to give a bond, but it has never been held that the giving of such a bond is necessary to the validity of the assignment. So far as we are advised, it has been very generally held in cases of voluntary assignments made by non-resident debtors, embracing property in a State or States other than that of the domicile, that the assignment will be deemed valid if it be sufficient under the law of the domicile, and under the law of the country in which the property is situated, to pass title, notwithstanding the law of the *situs*, intended to regulate the due administration of trust property, be not not complied with; that such laws are only intended to affect, and do only affect, assignments made by persons residents of the State in which they exist. *Hanford v. Paine*, 32 Vt. 443; *Ockerman vs Cross*, 52 N. Y. 32; *Chaffe v. National Bank*, 71 Me. 524.

The fact that the assignee is required by the laws of the State of Missouri to administer the estate in his hands under the direction of a court of that State, can have no bearing upon the question of the validity of the assignment.

As delivery is not necessary in this State to the transmission of title to personal property, we have not deemed it necessary to consider the right of the assignee growing out of the possession he is alleged to have had at the time the goods were seized, nor have we deemed it necessary in this opinion to consider the averment that the assignor was not indebted to any citizen of Texas; for if it should appear that he was so indebted, it would not change the result in the absence of some law of this State prohibiting the voluntary assignment of personal property here situated, by its owner resident elsewhere.

It is also unnecessary to consider what remedies creditors might have in this State to enforce the due execution of the trust in so far as it affects property here.

From the averments of the petition we are of the opinion that the property was not subject to the attachments levied upon it, and that the court below erred in sustaining the demurrer to the petition, and for this reason the judgment will be reversed, and the cause remanded.

Robertson, J., did not sit in this case.

a law of one State to be executed in another, when it would be against the public policy of the latter State or would be injurious to the best interests of its citizens.

2. Voluntary assignments in trust for creditors, the only consideration of which is the acceptance of the trust by the assignee, are invalid against attachments, except so far as assented to by creditors.

3. Such assent is not to be presumed, but must be shown by some affirmative act.

4. A voluntary assignment made in New York and valid there, is not valid in this State against an attachment, if such assignment is one which, if made between citizens of this State, would be inoperative for want of compliance with legal requisitions.

5. Where a partnership, having its usual and principal place of business in Boston and principally composed of citizens of this State, is the attaching creditor, the fact that some of its members are citizens of New York and that it has a place of business in that State, where the indebtedness was contracted, do not render such an assignment made in New York valid here, as against the attachment sued out here by the partnership.

Appeal from a judgment of the Superior Court of Suffolk County for plaintiffs, in an action of attachment. Affirmed.

In the Superior Court, plaintiffs demurred to the claimant's statement of his claim to the funds in the hands of a trustee. The demurrer was sustained and judgment ordered for plaintiffs as against claimant. The trustees were charged, and defendant defaulted, and judgment was entered on the default. The claimant appealed.

The facts are stated in the opinion.

DEVENS, J., delivered the opinion of the court:

The plaintiffs, on December 24, attached as property of the principal defendants certain debts due to them from the persons in this commonwealth named in the writ as trustees. Prior to this attachment, which was on December 20, 1884, the defendants had assigned to the claimant all the property of their co-partnership, by a general description thereof, which would include these claims, in trust to pay certain preferred debts in full, and afterwards to pay their remaining debts proportionally to their respective amounts, so far as the residue should suffice for that purpose. The assignment was made in the City of New York, by the defendants, who were residents and carried on business there, to the claimant, also a resident there.

By the admission of the demurrer it is conceded that it was recorded there on December 22, 1884, and is in all respects valid by the laws of the State of New York.

It is to be observed that this assignment was not executed or assented to by any of the creditors named therein, or by other creditors of the defendants for whose benefit it purports to have been executed. It is the contention of the claimant that even if the plaintiffs could be deemed a Massachusetts partnership doing business solely in

COMITY — VOLUNTARY ASSIGNMENT — ATTACHMENT — PARTNERSHIP — EXECUTION OF LAWS OF ANOTHER STATE.

FAULKNER v. HYMEN, MYERS, CLAIMANT.

Supreme Judicial Court of Massachusetts.

1. Comity between different States does not require

this commonwealth, the assignment would be valid against them. The law of any State has no force or effect, *proprio vigore*, beyond its territorial limits. Whatever extra-territorial vitality it may have, is owing to the comity which should prevail between different States or nations. That comity does not require that it should be executed elsewhere when it would be against the public policy of the State where the remedy is sought, or would be injurious to the best interests of its citizens. It certainly would be unjust to creditors, residents of this State, if they were to be deprived of the benefit of an attachment they had lawfully made, or other lien they had lawfully acquired on the property of their debtors here situate, by an assignment which, if made here between citizens, would be inoperative for want of compliance with legal requisitions, even if such assignment was valid in the State where it was made, and sufficient to transfer property under its control. *Green v. Van Buskirk*, 5 Wall. 308 [72 U. S. bk. 18, L. ed. 599]; *s. c.*, 7 Wall. 140 [74 U. S. bk. 19, L. ed. 109]; *Cunningham v. Butler* [*post*]; *Dehon v. Foster*, 4 Allen, 545.

It has repeatedly been held in this Commonwealth and by a long series of decisions, that voluntary assignments in trust for the benefit of creditors, the only consideration of which is the acceptance of the trust by the assignee, are invalid against attachments, except so far as assented to by creditors; in which case, being good at common law, they will protect the property from attachment to the extent of the amount due the creditors thus assenting. This for the reason that there is no adequate consideration, unless with the assent of creditors, without which no insolvent debtor should be allowed to so dispose of his property as to place it beyond their reach.

It has further been held that such assent is not to be presumed, but must be shown by some affirmative act, such as presenting claims, accepting a dividend, or distinctly becoming a party to the written assignment. *Swan v. Crafts*, 124 Mass. 453; *Pierce v. O'Brien*, 129 Mass. 314.

The rule in Massachusetts on this subject appears to us to rest upon a sound reason. The earliest case on the matter is that of *Widgery v. Haskell*, 5 Mass. 145.

That has been repeatedly affirmed, and we see no reason for changing it, in view of decisions made elsewhere, as we are urged to do by the claimant.

But if the assignment made in New York would be inoperative against the plaintiffs if they were residents of Massachusetts, it is urged that they must be dealt with as if they were all residents of New York. By the writ it appears that, of the nominal plaintiffs, four are citizens of Massachusetts, two of New Jersey, and one of New York, having their usual place of business in Boston.

The claimant alleges that "several" of the partners are residents of New York, but does not deny that several are citizens and residents of Massa-

chusetts. Nor do his allegations deny that the usual place of business of the plaintiffs is in Boston, although it asserts that they have a place of business in New York, where the indebtedness was contracted.

A partnership is not a legal entity, having, as such, a domicile, although for purposes of taxation and for other purposes it may be treated by statute as having a locality. *Ricker v. Am. Loan Co.*, 140 Mass. 346 [1 New Eng. Rep. 733].

Nor does the allegation of the claimant undertake to establish its *situs* in New York. The allegation that the firm has a place of business in New York is entirely consistent with its having its principal place of business in Boston. The right of the plaintiffs to recover cannot be defeated upon the ground that their firm, as such, is to be treated as if it had solely a residence in New York. It must be determined what the rights of the plaintiffs are, in view of the fact some of them are citizens of New York and others of Massachusetts and New Jersey. If some of the plaintiffs would be precluded from holding the assigned property by attachment as against the assignment, it is urged that all are necessarily so. If a suit were brought by New York plaintiffs alone, it may be that they could not be heard to deny the validity of the assignment, because as citizens of that State they would be bound by its laws, even here. *May v. Wannemacher*, 111 Mass. 202.

If brought by Massachusetts creditors alone, it is equally true, as the assignment is not valid by the law of this Commonwealth, that the attachment would prevail. All the parties are necessarily compelled to join in the action, and the New York plaintiffs are under no disability to sue here. The principle of comity cannot require us to enforce a foreign law, differing from our own, against the just rights of our own citizens and to their prejudice, because, if we fail so to do, the residents of another State would incidentally obtain a benefit which they could not otherwise. It cannot be required of us to deny our own citizens their lawful rights for the sake of denying to residents of New York that which we could not accord them only by reason of our respect to the legislation of another State of which they are residents, if they had brought suit alone. Considering the fact that the other plaintiffs are residents of Massachusetts, the fact that some are residents of New York, places us under no duty to enforce the New York law on the subject of assignments.

The view we have taken of the case renders it unnecessary to determine whether the right of the actual plaintiff in interest, is in any respect superior to that of the nominal plaintiffs.

Judgment for plaintiff affirmed, charging trustees.

RAILROAD— NEGLIGENCE — NON-LIABILITY OF RAILROAD COMPANY FOR NEGLIGENCE OF AN INDEPENDENT CONTRACTOR FOR CONSTRUCTION.

HITTE v. REPUBLICAN VAL. R. CO.

Supreme Court of Nebraska, May 26, 1886.

Railroad — Negligence — Injuries by Construction Contractor—Running Trains.—When a railroad corporation enters into an agreement with a contractor to build a portion of its railroad, the locomotives, cars, etc., used in such construction, and run exclusively under the direction and control of the contractor until the road is completed and turned over to the corporation, the railroad company will not be liable for damages occasioned by the negligence of the persons running such locomotives and cars.

Error from Nemaha county.

Stevenson and Murfin, for plaintiff. Marquette & Deweese, for defendant.

Cobb, J., delivered the opinion of the court.

This action was brought in the district court of Nemaha county, by the plaintiff in error against the defendant in error, for damages alleged to have accrued to the plaintiff in error, as administrator, for the negligence of the servants and employees of the defendant railroad company, by means of which the intestate of plaintiff in error was run over and killed by the cars of the defendant. There was a trial to a jury, which, by direction of the court, found a verdict for the defendant.

There is but one question presented by the record in this case, to which it is deemed necessary to direct our attention, and that is whether, under the law, and the facts as shown by the evidence preserved in the bill of exceptions, the defendant was responsible for the manner of running and operating the train at the time and place of the accident. It appears from the testimony of plaintiff's witnesses that the railroad was being built; that the plaintiff's intestate was run over and killed, or rather, in the language of the witness C. C. Donald, "while they were laying the iron or surfacing." This witness, as well as others, speaks of the train, by which Hitte was killed, as a construction train. I assume it, then, to have been clearly proved by the plaintiff's own witnesses, that the road was being constructed, and had not been finished or opened for business or traffic at the time of the injury. From the evidence of the defendant it appears that part of its road, lying between Nemaha City and Tecumseh, was built by John Fitzgerald under contract with the defendant company; that the said road was unfinished, and being constructed, at the time of the said injury; that the engine and cars by which said injury was inflicted were in the care and custody of, and were being run, operated, and managed by, the servants and hired men of the said John Fitzgerald, and not of the defendant. The following clauses of

the contract between defendant and the said John Fitzgerald are deemed material as showing the contractual relations between said company and said contractor, in reference to the responsible use of the engine and cars through which the injury in question occurred:

"This indenture and agreement made this first day of October, 1880, by and between the Republican Valley Railroad Company, party of the first part, and John Fitzgerald, party of the second part, witnesseth, that the party of the second part, in consideration of the covenants, promises, and agreements of and in behalf of the party of the first part, will, and hereby does agree, covenant, and promise, to and with said party of the first part, to construct—that is, to grade, bridge, and lay track over—that part of the Republican Valley Railroad as now located, from a part on the Nebraska Railway at our near Nemaha, in Nemaha county, Nebraska, to a point in the north-west quarter of section 59, 15 N. R. 14; and, provided said party shall desire it, from the latter point, on a line hereafter to be decided upon, to a point on the Atchinson & Nebraska Railway, at or near Tecumseh, a distance of 33 miles. * * * All work must be done in strict accordance with the specifications hereto attached, which specifications are a part of this contract, and under the directions and to the satisfaction of the engineer in charge of said railroad to be constructed, whose orders in all matters relating to this contract the second party agrees implicitly to obey. * * * The party of the first part agrees to furnish the necessary cars. * * * The party of the first part agrees to attend to the usual and common repairs of engine and cars necessary during their usage by the party of the second part, but party of the second part will be held responsible for any damages or breakage done to said trains through neglect or disobedience of established rules, by itself, agents or employees, or through defects in the road while constructing the same. * * *"

The greater part of the brief of plaintiff in error is devoted to a discussion of alleged errors on the part of the court in refusing to instruct the jury upon the question of negligence, in its several respects and bearings, as applicable to the defendant, and of contributory negligence, as applicable to the plaintiff's decedent. I do not feel called upon to express any opinion as to whether there was any evidence of negligence in the running and management of the construction train which caused the injury, as the case turns upon the question of the responsibility of the defendant for the running and management of said train at the time of the injury.

The case of *Hughes v. R. Co.*, 39 Ohio St. 461, cited from 15 Am. & Eng. R. Cas. 100, was brought by Hughes against the railway company "for that, in constructing its railroad through her lands, the defendant had wrongfully piled large quantities of waste dirt upon her arable lands, not embraced within the right of way, to her damage," etc.

An issue of fact having been joined, a jury was impaneled, and the plaintiff offered testimony. After the plaintiff closed her testimony, the court, on motion of defendant, directed the jury to return a verdict for the defendant, which was done accordingly. The judgment on this verdict was affirmed in the Supreme Court. It appears from the report of the case, that the work of building this road was done by contractors, under a contract with the railroad company, containing provisions substantially the same as those herein quoted from the contract between the defendant company and the contractor Fitzgerald. In the opinion the court say: "The work of constructing a railroad is not corporate work, unless it be done by a corporation through its agents and servants; and a person may contract with a railroad company to construct its road, without becoming its agent or servant. This proposition, therefore, resolves itself into a single question: May a railroad corporation, having power to contract as fully as a natural person in relation to its corporate business, enter into a contract with another person for the construction of its road, without retaining control over the mode and manner of doing the work? We can see no reason to doubt it. Of course, any condition imposed upon the right to construct its road must be performed, and the company cannot shift its responsibility for the performance. But this is no new principle, nor one applicable to railroad corporations alone. Where a right is possessed by a natural person, and a duty is attached to the exercise of the right, such duty must be performed. Such natural person cannot relieve himself from liability through the intervention of an independent contractor. On the other hand, where the law exempts a natural person, as employer, from liability for the wrongful act of his contractor, it will also exempt a corporation, as employer, from liability for the wrongful act of its contractor." To the same purpose are the cases of *Hunt v. Pennsylvania R. Co.*, 51 Pa. St. 475, and *McCafferty v. Spuyten Duyvil R. Co.*, 61 N. Y. 178, cases cited by counsel for defendant.

In the case at bar, Fitzgerald was clearly an independent contractor. He had the use of the engine and cars of the defendant as a part of the consideration for the work performed by him; and if the engineer and fireman of the train which did the damage were borne on the pay-rolls of the defendant while working on the contract, as claimed by counsel for plaintiff, which does not fully appear from the evidence, doubtless their compensation was fully accounted for by the contractor to the company. I conclude, therefore, that the train, consisting of an engine, tender, and one or two flat cars, which struck and killed plaintiff's decedent, was not being run by, nor under the control or management of, the defendant company; and that the defendant is not bound to respond to any damage, if any, suffered through, or by reason of the negligence of the engineer,

conductor, or other person in charge of the said train.

The plaintiff contends that the court erred in in admitting the contract between defendant and Fitzgerald to be read in evidence—First, because said contract was not proven: and, secondly, because it was immaterial, irrelevant, and incompetent.

As to the first ground of objection, it will be seen, by reference to the bill of exceptions, that the execution of the contract by Fitzgerald on his part, was fully proven by the testimony of the witness Deweese; and the defendant, having acted under the contract, and claimed the benefit of its provisions, would be estopped to deny any of its obligations; and even as against a stranger, I think it may introduce the contract as the best evidence of the terms and relations which, at the time of the occurrence upon which the action was based, existed between defendant and contractor.

As to the second ground, we have seen that the contract or contractual relation between the defendant and the contractor was not only material and relevant, but that, even admitting for the sake of argument that the plaintiff's decedent was killed through the negligent management of the train in question, in our opinion, the question of the liability of the defendant therefor would turn upon the said work being done by the defendant through his servants and employees, or by an independent contractor. The contract upon which the road was built and paid for, then, was neither immaterial nor irrelevant.

The judgment of the district court is affirmed.

NOTE.—The liability of a railroad company for injuries to persons or property, sustained in the construction of its road by reason of the negligence of employees, can arise only where the relation of master and servant exists between the company and the employee.¹

It has been said that "The test which determines whether the relation is that of master and servant, or of contractor and contractee, is whether the employer retain the power of selecting, directing and discharging the workmen, the retention of which power makes him responsible as a master and the surrender of which relieves him of liability as such."² But "The true test by which to determine whether one who renders service for another does so as a contractor or not, is to ascertain whether he renders the service in the course of an independent occupation, in which he represents the will of his employer only as to the result of the work, and not as to the means by which it is accomplished."³

A provision that the work shall be under the general supervision of an engineer or architect furnished by the employer,⁴ or the retention of power to dis-

¹ Sec. 254, Woods' Ry. Law, note.

² *Pierce on Railroads*, 286, citing, *Brackett v. Lubke*, 4 Allen, 138; *Forsyth v. Hooper*, 11 Allen, 419.

³ *Cunningham v. I. K. Co.*, 51 Tex. 503; *Barry v. St. Louis*, 17 Mo. 121; *Eaton v. E. & N. R. Co.*, 59 Me. 590; *Paek v. N. Y.*, 8 N. Y. 232; *Kelley v. N. Y.*, 11 N. Y. 432; *Gourdier v. Cormack*, 2 E. D. Smith, 254; *Callahan v. B. & M. R. Co.*, 23 Iowa, 562.

⁴ *Kelly v. Mayor*, 11 N. Y. 432; *Robinson v. Webb*, 11

charge incompetent workmen,⁵ or to terminate the contract if the work is unsatisfactory,⁶ or the right to detain a sum of money to indemnify the employer against the negligent acts of the contractor or his employees,⁷ does not make the relation that of master and servant.

The railroad company is responsible for the negligence of employees, where it retains immediate superintendence and control over the details of the work, though as between the parties the relation of contractor and contractee may be said to exist;⁸ or where it authorizes an unlawful act or nuisance;⁹ or the injury is a necessary result of the work contracted to be done;¹⁰ or where it employs an incompetent contractor.¹¹

A positive obligation imposed by law upon the railroad company can not be shifted upon a contractor.¹² The duty to fence its tracks is of this nature.¹³

Where a boy received injuries from the negligent construction of a turn-table, the road being yet in the hands of contractors to build the same, and being operated by them for general traffic purposes without authority, it was held that the railroad was not liable for damages.¹⁴

Where an unaccepted road is operated by contractors in carrying passengers, the contractors only are liable for any injuries such passengers may receive.¹⁵ And where an employee of a contractor to build an embankment injured in such work, the contractor, and not the railroad company is responsible for negligence causing the injury, though the track, cars and motive power are furnished by the company.¹⁶

Bush 464; Steel v. S. E. R. Co., 16 C. B. 550; Painter v. Mayor, 46 Pa. St. 213.

⁵ Cuff v. N. & N. Y. R. Co., 35 N. J. L. 17; Robinson v. Webb, 11 Bush. 464; Reddie v. L. & N. W. R. Co., 4 Exch. 244; Hobbitt v. L. & N. W. R. Co., Id. 254.

⁶ Wray v. Evans, 50 Pa. St. 103; Schular v. H. R. R. Co., 33 Barb. 653.

⁷ Blake v. Ferris, 5 N. Y. 48; Tibbets v. K. & L. R. Co., 63 Me. 437; St. P. W. Co. v. Ware, 16 Wall. 536.

⁸ R. R. Co. v. Hanning, 15 Wall. 649; L. S. I. Co. v. Erickson, 39 Mich. 492; Camp v. Churchwardens, 7 La. Ann. 321; Cincinnati v. Stone, 5 Ohio St. 38.

⁹ P. W. & B. R. Co. v. P. & H. S. T. Co., 23 How. (U. S.) 300; Robinson v. Webb, 11 Bush. 464; Eaton v. E. & N. A. Ry. Co., 39 Me. 520; Cuff v. N. & N. Y. R. Co., 35 N. J. L. 17; Congreve v. Morgan, 6 Duer, 495; Diggert v. Schenck, 23 Wend. 446; Vanderpool v. Husson, 28 Barb. 196; Norton v. Wiswall, 26 Barb. 618; King v. N. Y. C. & H. R. Co., 65 N. Y. 181; Storrs v. Utica, 17 N. Y. 104; Clark v. Fry, 8 Ohio St. 358; Ellis v. S. G. O. Co., 22 Eng. L. & E. Rep. 198; Chambers v. C. L. I. & T. Co., 1 Disney (O.), 327.

¹⁰ Robbins v. Chicago, 2 Black, 418; Water Co. v. Ware, 16 Wall. 566; Matheny v. Wolfs, 2 Duv. (Ky.) 137; McCafferty v. S. D. & P. M. R. Co., 61 N. Y. 178; Garman v. S. & I. Ry. Co., 4 Ohio St. 399; Hale v. S. E. Ry. Co., 6 H. & N. 488; Lockwood v. Mayor, 2 Hilt. 66.

¹¹ Cuff v. N. & N. Y. R. Co., 35 N. J. L. 17; Robinson v. Webb, 11 Bush. 460.

¹² Veazie v. P. R. Co., 49 Me. 119; Hilliard v. Richardson, 3 Gray, 349.

¹³ C. St. P. & F. R. Co. v. McCarthy, 20 Ill. 385; I. C. R. Co. v. Finnegan, 21 Ill. 646; R. R. I. & St. L. R. Co. v. Heflin, 65 Ill. 366; H. & G. N. R. Co. v. Meador, 50 Tex. 77; Gardner v. Smith, 7 Mich. 409; B. C. & E. S. R. Co. v. Austin, 21 Mich. 390; Nelson v. V. & C. R. Co., 26 Vt. 717; Clement v. Canfield, 28 Vt. 302. But see Clark v. H. & St. J. R. Co., 36 Mo. 202.

¹⁴ K. C. Ry. Co. v. Fitzsimmons, 18 Kas. 34.

¹⁵ U. F. R. R. Co. v. Hause, 1 Wy. 27; Cunningham v. I. R. E. Co., 51 Tex. 503; Meyer v. M. P. R. Co., 2 Neb. 320.

¹⁶ O. Ry. & Bk. Co. v. Grant, 46 Ga. 417; Felton v. Deall, 33 Vt. 365.

But in Illinois a railroad company was held liable for damages to lands trespassed upon by the employees of an independent contractor, constructing the road;¹⁷ and in another case it was intimated that the railroad company would be responsible for the killing of stock by a construction train operated by such a contractor.¹⁸

The distinction between the liabilities of owners of real and personal property for the wrongful acts of contractors and their servants, if such ever existed, has been generally overruled.¹⁹

¹⁷ O. & St. L. R. Co. v. Woolsey, 85 Ill. 370. See also Lowell v. B. & L. R. R. Co., 23 Pick. 24.

¹⁸ West v. St. L. V. & T. R. Co., 63 Ill. 545.

¹⁹ Pack v. Mayor, 8 N. Y. 222; Kelly v. Mayor, 11 N. Y. 432; Blake v. Ferris, 5 N. Y. 48; McCafferty v. S. D. & P. M. R. Co., 61 N. Y. 178; Robinson v. Webb, 11 Bush. 464; Reddie v. L. & N. W. Ry. Co., 4 Exch. 244; Hobbitt v. Same, Id. 254.

WEEKLY DIGEST OF RECENT CASES.

ALABAMA,	5, 6, 16, 18, 23, 24
CALIFORNIA,	13
FLORIDA,	1, 7, 14, 19
INDIANA,	3
MAINE,	12, 27, 28
MARYLAND,	9
MASSACHUSETTS,	8
MICHIGAN,	11
MISSOURI,	2, 4, 10, 17, 20
NEW JERSEY,	25
NEW YORK,	21, 29
PENNSYLVANIA,	26
VERMONT,	15, 22, 30

1. CORPORATION.—Master and Servant—Agency—

A road master of a railroad company, or a conductor on a train, are not so far agents of the railroad company as to be legally authorized to employ physicians or surgeons to attend upon an employee who is injured by the cars of the company, unless they are specifically charged with that duty. The conductor's direction to the physician or surgeon to extend such medical aid, or his promise that the same when rendered shall be paid for by the company, do not render such company liable for the same, unless there is proof that he is authorized so to do. A contract by a road master, conductor or other agent without authority, may be ratified by the corporation, and so become binding upon it. The action of the General Manager may, by his ratification of such a contract made by a subordinate agent, render the corporation liable thereon. *Peninsular etc. Co. v. Gary*, S. C. Fla., June Term, 1886.

2. CRIMINAL LAW.—Burglary in Dwelling-house—

What Constitutes § 1309 R. S. 1879.—Stealing a keg of beer from an ice-house or beer cellar which formed the basement of a building above, but without any internal communication between such basement and the building above, where it appears that there was but one way of ingress and egress from such ice house or basement and that, by way of a door up the outside, and further that the occupants in the building above neither owned, nor had control over such ice-house, beer cellar or basement or the business or uses to which it was applied—such stealing is not "a larceny committed

in a dwelling house" within the meaning of § 1809 R. S. 1879 of Mo. *State v. Clark*, S. C. Mo., June 21, 1886.

8. ———. *Jurisdiction—Crime Committed Partly in One County and Partly in Another—Constitutionality of Statute—Conspiracy—Evidence.*—A conspiracy to take the life of the deceased was formed in Martin county. Pursuant to that conspiracy he was seized and bound. After such seizure he was taken into the country of Orange and there killed. *Held*, that, under the statute of Indiana providing that where a crime is committed partly in one county, and partly in another, the jurisdiction is in either, the courts of Martin county had jurisdiction. A statute providing that when a crime is committed partly in one county and partly in another, jurisdiction is in either, is constitutional; and where the assault is made in one county, and the killing done in another, the court of the county where assault was committed has jurisdiction. A conspiracy may be proved by circumstantial evidence. *Archer v. State*, S. Ct. Ind., May 24 1886, N. East. Rep. Vol. 7, 225.

4. ———. *Time Necessary to cool heated Passion—Instruction as to Dangerous Weapons—Excluding of Instruction as to Reasonable doubt, when Proper.*—1. If the passion had time to cool, the killing is not reduced to manslaughter, though in fact the passion had not cooled. 2 *Bish. Crim. Law*, § 783. Six hours held sufficient time. 2. An instruction which recites that if etc., "by means and use of a dangerous weapon, towit a wooden club," is not objectionable as telling the jury that the club was a dangerous weapon, but, as it should be, this question is left to the jury. 3. When a court has properly instructed as to "reasonable doubt," it may, properly exclude an instruction that if the jury find that defendant is guilty of some grade of offence, and if they entertain a reasonable doubt as to which grade of offence the defendant is guilty of, they will acquit him of the higher degree and convict him of the lower. S. C. Mo., June 21, 1886. *State v. Grayor*.

5. *DEED—Presumption—Statute of Limitations.*—When a deed has been recorded within twelve months from its date, but the certificate of probate or acknowledgment is substantially defective (Code, § 2154), a certified copy is not admissible as evidence without further proof. Under the rule laid down in *Hutchings v. White*, 40 Ala. 253, if the deed has been recorded in the proper office for more than twenty years, the presumption will be indulged that its execution was legally proved or acknowledged; but the court is unwilling to extend the rule to deeds which have not been recorded twenty years. In ejectment, or the statutory action in the nature of ejectment, the plaintiff must recover, if at all, on the strength of his own title; and when he fails to make out a *prima facie* case, the defendant is not required to adduce any evidence, nor will erroneous ruling on evidence offered by the defendant, work a reversal. *England v. Hatch*, S. C. Ala., July 2, 1886.

6. *EQUITY—Married Woman.*—1. A decree of the chancellor relieving a married woman of the disabilities of coverture as to her statutory or other separate estate (Code, § 2781), although it does not confer on her a general power to contract, expressly authorizes her to "buy" and "to be sued as a *femme sole*;" and she is personally bound by

a contract of purchase made by her, and may be sued at law. *Parker v. Reynolds*, S. C. Ala. July 2, 1886.

7. *EQUITY PRACTICE—Parties.*—A co-complainant who alleges that he had disposed of all his interest in the property in dispute before the commencement of the suit is an improper party thereto. When some allegations in a bill show a case entitling a complainant to relief, but are contradicted by other allegations in the same bill, and it is impossible for the court to determine the true nature of the case sought to be made by the bill, a demurrer thereto should be sustained. It is the duty of the attorney, on an appeal to this court, to see that the transcript of the proceedings in the court below is properly made up by the clerk. *Bridger v. Trasher*, S. C. Fla., June Term, 1886.

8. *EVIDENCE.—Parol Evidence—Damages—Measure of Damages.*—The rule which excludes parol testimony for the purpose of varying a written contract is confined to the parties to the contract, or their privies, and does not prevent strangers thereto from introducing such evidence. The rule that the measure of damages in trover is the value of the property at the time of the conversion is applicable to negotiable paper. If property pledged is delivered by the pledgee to the pledgor to sell or dispose of as his agent and to account to him for the proceeds, the pledgee's title is preserved and he can recover it of any person wrongfully obtaining possession thereof; but if the pledgee gives the property to the pledgor to dispose of for himself, upon the promise to give the pledgee part of the sum realized, the pledgee's lien is lost. *Kellogg v. Thompson*, S. J. C. Mass., May 20 1886. N. Eng. Rep. Vol. 2, 170.

9. *EXECUTORS AND ADMINISTRATORS—Bonds—When Responsible to Unknown Heirs Discovered after distribution of Estate—Descent and Distribution—Posthumous Heirs—When they Inherit, etc.* § 134, Art. 93, of Code—*Executors and Administrators—Bond—Heir Suing for Share of Estate—Evidence.*—Where executors or administrators fail to follow the statute provisions in regard to the distribution of estates, their bonds are responsible to an absent heir for his portion of the estate, although his whereabouts were unknown at the time, if he appear within 12 years, or before limitations run. Sec. 184 of article 93 of the following Code allows posthumous children of an intestate to inherit as other heirs, but says that no other posthumous child shall. This, however, does not refer to posthumous children of collateral relatives who were born before the death of the intestate from whom they inherit. An heir suing an executor's bond for his portion of an estate, which was not set aside in the distribution thereof, must show what that portion would have been, and cannot presume the death of another who has been for years unheard of. Ct. of App. Md., April 30, 1886. Atl. Rep. Vol. 4, 679.

10. *HUSBAND AND WIFE—Common Law Status of, as to property and Debts of Wife—Separate Property of Wife Under Statute.* At common law the personal property of the wife in possession at the time of her marriage, vested immediately and absolutely in the husband, by the marriage, and upon his death it went to his representatives, (2 Kent. Com. 11th Ed., 129) but as to choses in action, they are not vested absolutely in the husband, but

he has power to sue for, and recover or release and assign them, and when reduced to possession, it is evidence of conversion of the same to his own use, and the money becomes, in most cases absolutely his own. 2 Kent. Com. pp. 116, 117. The husband also became possessed of the wife's real estate. 2 Kent. 110, 111. He became liable to pay her antenuptial contracts, but if they are not recovered during coverture he is discharged while her liability therefor is revived. In such case when the husband was sought to be made liable by the creditor, he must, in general, sue the husband and wife jointly. 1 Chitty on Pl. (16 Am. Ed.) pp. 65-6; 42 Mo. 304. But in no case could the wife be sued upon a mere personal contract made during coverture, and judgment thereon is a mere nullity. The husband's marital rights and seizin in the wife's fee simple real estate, during coverture, became liable to seizure and sale, for the husband's debt. Where real estate is purchased with the separate money or means of the wife and as such is, the proceeds and profits thereof, her separate property within the meaning of §§ 3296, 3296, R. S. Mo. 1879, it may be subjected to the payment by her creditors of her antenuptial debts, such as a note made jointly with her husband before marriage. By § 3296 the husband's common law marital interest in his wife's real estate is not exempt from liability to the payment of a joint and several antenuptial debt of both husband and wife, for the exempt debt contemplated by that section, are the sole debts of the husband. S. C. Mo., June 7, 1886. *Conrad v. Howard*.

11. INSURANCE.—*Contract to Maintain other Insurance*.—The policy provided that the insured should maintain insurance on the property, to the extent of four-fifths of the value, and in case of failure so to do "the assured shall be a co-insurer to the extent of such deficit, and in that event shall bear his, her, or their proportion of any loss;" but that in case the insurance exceeded such four-fifths, the assured should not recover from the company more than its *pro rata* of the cash value of the property. The insured failed to maintain other insurance to the extent of four-fifths, the deficiency being about \$10,000. *Held*, that the company was not a co-insurer with the insured of the deficiency so as to make the company bear \$5,000. of the amount, but that the insured was an insurer of the extent of the whole \$10,000. and must contribute to that extent with the company. *Chesboro v. Home Ins. Co.*, S. C. Mich., *Ins Law Journal*, Vol. 15, 515.

12. JUDGMENT.—*Foreign Judgment—Bar to Pending Action—How Pleaded—Identity of Items—Parol Evidence*.—A judgment in the Supreme Court of New York, between the parties to a suit in this State, in favor of the plaintiff, for the same cause of action, is a bar to the further prosecution of the action in this State, although the latter was pending when the former was commenced. Such judgment may be pleaded specially in bar, or may be proved under the general issue. In the action in New York two of the items declared on, were in part mis-described. *Held*, that the misdescription was amendable, and that parol evidence was admissible to prove that such items are identical with those declared on in this action. *Whiting v. Burger*, S. J. Ct., Me. June 14, 1886. *Atl. Rep.* Vol. 4, 694.

13. LIBEL AND SLANDER.—*Pleading—Prima Facie Case—Privileged Publication—Actionable Words*

—*Exceptions—General Charge to Jury—Objections how Made—Bond for Costs—Evidence of Plaintiff's Social Condition—Damages*.—In an action for libel, it is not necessary for the plaintiff either to allege or to prove, in making out his *prima facie* case, that the publication complained of, was not privileged. This is a matter of defense, to show absence of legal malice in the publication. The publication in a newspaper, by a teacher in a school for the preparation and education of persons seeking to become teachers, of and concerning a pupil therein, that "by her conduct in class, by her behavior in and around the building, and by her spirit as exhibited in numberless personal interviews, she has shown herself tricky and unreliable and almost destitute of those womanly and honorable characteristics that should be the first requisites in a teacher," constitutes a libel, and the words used are unambiguous and actionable. An objection to the general charge of a court should specifically point out wherein the objection lies. The California Statute (Acts 1871, p. 553, § 1) requiring an undertaking for costs, in actions for damages for libel, does not deprive the court of jurisdiction in case such undertaking is not filed; and the object of the statute is effected if, when the objection is made, an undertaking be executed, and the defendant thus secured the costs and charges which may be awarded to him. In an action for libel, it is competent for plaintiff to show his or her condition in life, not merely from a pecuniary standpoint, but as to family and family connections, as bearing upon the question of damages. *Dixon v. Allen*, S. C. Cal., May 18, 1886. *Pac. Rep.* Vol. 2, 179.

14. MANDAMUS.—*Pleading—Evidence*.—The pleading in mandamus make an issue of fact as to whether certain names appearing on a petition under the act of 1883, Chapter 3416, for a permit to sell liquors, and necessary to constitute a majority of the registered voters of the election district, are the authorized signatures of the persons represented by such names. Upon such an issue a person of a name similar to one so appearing on such petition was called as a witness in behalf of the respondents, and testified that he was a registered voter of the election district, but that he neither signed nor authorized any one to sign his name to the petition, and it was shown that but one similar name appeared on the list of registered voters of the district, and there was no evidence in rebuttal of his testimony, except that the original petition was admitted in evidence without proof of the genuineness of such signature either by any witness thereto or by other legal testimony: *Held*, That the signature was not valid as that of a legal petitioner under the statute. The applicant for a permit to sell liquors should, before making the affidavit required by the statute, know of his own knowledge that the petitioners have signed, and did so in the presence of two witnesses, and should have such personal knowledge of the circumstances of their signing as will enable him to swear in good faith that none of the means prohibited by the statute have been used in procuring their signatures. The testimony is the case held to, not only establish that a majority of the registered voters of the district did not sign the petition, but also to show otherwise a *prima facie* case violative of the statute. *State v. County Commrs.* S. C. Fla., June Term, 1886.

15. PARENT AND CHILD.—*Wages of Minor*.—When a minor son makes a contract for his services on

his own account, and his father knows of it, and makes no objection, the father cannot recover of the employer, wages which he has paid to the son; and in such a case the question is not whether the son was emancipated or not, but whether the father knew of the contract, and made no objection. *Atkins v. Sherbino*, S. C. Vt., June 22, 1826. Atl. Rep. Vol. 4, 704.

16. **PARTITION—Remainder—Infant Practice.**—A tenant for life may maintain a bill in equity for the partition of lands, and it is the better practice to make all the persons having an interest, tenants for life and remainder-men, parties to the suit. If a remainder-man is not made a party to the suit, his rights are not affected by any decree that may be rendered; and if an infant remainder-man is made a party, but is not properly brought before the court, the decree will be reversed on error, no matter how the question may be presented. When the complainant is the father of an infant defendant, whose mother is dead, service of process should be made on her general guardian, if she has any; and if process is served on the person who is averred to be her guardian, but the bill is not sworn to, and there is no affidavit of the fact that he is such guardian, and no proof of the fact, the infant is not properly before the court. Where the defendants who have answered are actually present in court, either in person or by their solicitors or guardians *ad litem*, at the allowance of an amendment, they shall be deemed to have notice thereof; but the entries of record, made at the time, must show their presence, and when they do not, recital in a subsequent decree *pro confesso*, taken before the register, is not sufficient. At common law, a tenant in common was not liable to his co-tenant for use and occupation, unless there was an actual eviction, or an agreement to pay rent; and the English statute (4th and 5th Anne.) changing this rule, having been enacted after the settlement of this country, is not of force with us. For rents actually received one tenant in common is liable to account to his co-tenant; but, when the rents were received from a tenant to whom necessary advances to make a crop were supplied, such advances, and other necessary costs and expenses incurred, must be deducted from the gross amount received. *Gayle v. Johnson*, S. Ct. Ala., July 2, 1886.

17. **PARTNERSHIP—Participation in Profit and Loss Merely Does not Constitute.**—A mere participation in profit and loss does not necessarily constitute a partnership. Thus, where one party, owner of certain cattle, agrees with another that he shall be interested in a partnership portion of the profit and loss of the venture, such an agreement alone does not constitute the parties partners in the goods, as between themselves, but only partners in the profits and losses. *Donnell v. Harshe*, 67 Mo. 170; 68 Mo. 242, 80 Mo. 352; 45 Mo. 524; *Alford v. De La Torree*, (Eng. H. C. Ch.) 3 Cent. L. J., 75; *Story on Part.*, § 27; *Clifton v. Howard*, S. C. Mo., June 7, 1886.

18. **PLEADING—Improperly Sustaining Demurrer to Special Plea—When Error Without Injury and When Not.**—Improperly sustaining a demurrer to a special plea is error without injury, when the record affirmatively shows that the defendant had the benefit of the same defense under the general issue; but the principle does not apply to an erroneous overruling of a demurrer to a bad

special plea, whereby the plaintiff is compelled to take issue on it. In delivering the opinion of the court on this point, Stone, C. J., said: "The principle invoked is applied, and rightly applied, where a demurrer has been improperly sustained to a special plea that is sufficient in law, and yet the record affirmatively shows that under the general issue the defendant could, and did, obtain the benefit of the defense he sought to set up by his special plea. In such case, if there is error, it is without injury. *Phoenix Ins. Co. v. Moog*, 78 Ala. The question is very different in such a case as this. Overruling the demurrer was a judicial determination that the plea was sufficient. Plaintiff was thereby left without discretion. He must go out of court under the ruling on the demurrer, or he must take issue on the plea. Taking issue on it he stakes the fate of his case on its truth or falsity. And if the jury find the averments of the plea to be proved, the defendant is entitled to a verdict, whether the plea be good or not. *Mudge v. Treat*, 50 Ala. 1; *Betancourt v. Eberlin*, 71 Ala. 461. It results that if the jury found the plea to be true as averred, the defendants were entitled to a verdict, and the only redress open to plaintiffs is to have a review of the ruling on the demurrer." *Montgomery, etc. R. Co. v. Chambers*, S. C. Ala., Dec. Term, 1885-86.

19. **PLEADING AND PRACTICE—Foreign Judgment.**—A judgment of a court of record valid under the laws of the State where recorded is valid here. A plea to an action on a judgment of another State that the debt for which such judgment was rendered had been paid, is a defense existing anterior to said judgment and on motion should be stricken from the record. When a suit is brought in the courts of this State upon a judgment rendered in another State, the defendant can plead in bar that the court in which said judgment was recovered never acquired jurisdiction of his person. A transcript of the proceedings and judgment in a suit in the Superior Court of Massachusetts, which does not show that a summons to the defendant to appear was ever issued or that the defendant appeared in person or by attorney to said suit, is inadmissible in evidence against the defendant named therein. A return by the sheriff, on another paper in the cause, that he had served a summons on the defendant, no summons appearing in the transcript, is insufficient to authorize the conclusion that such summons in fact existed or was served. *Drake v. Granger*, S. C. Fla., June Term, 1886.

20. **PRACTICE—Costs—Court has no Power to Render Judgment for Costs at a Subsequent Term to Final Disposition of Cause.**—Defendant, a railroad company, being summoned as garnishee, made answer that it was not a debtor to the execution defendant. Plaintiff then filed a denial, setting up facts which, if true, made the railroad company a debtor to the execution defendant. To this the company replied by putting in issue the matters stated in the denial. Subsequently the company, by leave of court, filed a supplemental answer, stating that while it was not indebted to the execution defendant at the time of the service of the garnishment, still there was a dispute pending between them, which resulted in litigation, and to save costs, etc., it agreed to pay him \$100 by way of compromise. The company brought the money into court and asked to be discharged. The execution defendant, though brought into court, made no claim for the money, and the sup-

plemental answer not having been denied by plaintiff, the court gave judgment, discharging the garnishee, with \$5 costs for filing answer. At a subsequent term the court, on motion of plaintiff, entered a judgment in favor of plaintiff and against the garnishee for all costs in the case, *held* the judgment against the garnishee for costs was void, that the judgment discharging the garnishee was a final and complete disposition of the cause. 58 Mo., 217; 69 Mo., 174; 70 Mo., 870. A court may at a subsequent term re-tax costs under a judgment made before, (28 Mo., 583) but that is a different thing from rendering a judgment for costs. *Jackson v. St. Louis & San Francisco Ry. Co.*, S. C. Mo., June 7, 1886.

21. **PROMISSORY NOTES.**—*Consideration—Compounding Felony.*—Plaintiff seeks to recover the amount of a promissory note, given upon the settlement of a claim by defendant that plaintiff's son, while in the employ of defendants, had stolen his money, and alleged that the note was given to compound a felony, and was extorted from plaintiff by threats. The judge refused to charge, as requested by defendant, "that if the compounding of a felony entered into, and formed a part of the consideration of the note, the plaintiff could not recover;" and also, "that if the motive of the plaintiff in giving the note was in part for the purpose of compounding a felony, he could not be entitled to recover." *Held*, error, and that if the consideration of the note was in any way affected by the compounding of a felony, or it entered into the same, or such a motive actuated the plaintiff in any respect, then the contract was illegal, and should not be upheld. *Haynes v. Rudd*, N. Y. Ct. App., June 1, 1886, N. East Rep., Vol. 7, 288.

22. **REPLEVIN.**—*When Lies—Animals.*—The gist of the action of replevin is the detention, not the taking. Thus, the defendant carried on a farm on shares, and his father, while assisting him at haying, seized the cattle in contention *damage feasant*; but, instead of driving them to the public pound, yarded them on the premises. The cattle broke through the defendant's defective fence. Both the defendant and his father refused to deliver them up on demand, *Held*, that defendant was a wrong-doer, and liable in an action of replevin. *Rowe v. Hicks*, S. C. Vt., June 16, 1886, Atl. Rep., Vol. 4, 563.

23. **RULE IN SHELLEY'S CASE.**—*When in Force in Alabama—Rights Thereunder.*—The "Rule in Shelley's Case," as at common law, prevailed in this State until the 17th January, 1853, when the Code of 1852 became operative; and the deeds and wills which took effect before that date, are governed by it; and a deed executed in 1841, by which lands were conveyed to a trustee, "for the purpose of providing a permanent domicile and home for the said Jane C. M., a married woman," "and such family as she may have for their use and benefit during her natural life, and at her death to descend to and be equally divided among and between her heirs," under the operation of the rule in Shelley's case, vested the entire estate in Mrs. M.; and if her children took any present interest, as members of her "family," their right to sue for it was not postponed until her death. *McQueen v. Logan*, S. C. Ala., Dec. Term, 1885-86.

24. **SET-OFF—Of Damages—Measure of Damages.**—In an action to recover the price of guano sold and delivered by plaintiffs to defendant, the latter

may set off or recoup the damages sustained by him on account of the plaintiff's failure and refusal to deliver the full quantity stipulated for, when it was too late to procure it elsewhere. Plaintiffs having notice that the guano was intended for use by defendant in raising a cotton crop on his plantation in the county, the measure of the defendant's damages for the breach is the difference between the cotton crop raised on the land on which the guano was used, and that raised on the adjoining land, of the same quality and cultivated in the same manner, on which no guano was used. When an agent makes a contract for the benefit of his principal, but without disclosing his name, the principal may sue on it in his own name. *Bell v. Reynolds*, S. C. Ala., July 2, 1886.

25. **TAXATION.**—*Law Creating Classes of Property for Taxation Constitutional—Railroad and Canal Property Constitute Such a Class—Franchises Taxable.*—A law which taxes a class of property separately is not unconstitutional, if it embraces all property of that class, and applies to it uniform rules, and taxes it according to its true value. The property of railroad and canal companies constitute a legitimate class of property for the purposes of taxation, a class which, in order to deal with it fairly in the matter of taxation, must be treated separately. Franchises are property, and, as such, are taxable. *State Board of Assessors v. State*, Ct. Err. & App., N. J., May 29, 1886, Atl. Rep., Vol. 4, 578.

26. **VENDOR AND VENDEE.**—*Deed—Delivery—Extension—Time—Equity—Adverse Title.*—Where a deed for land was delivered to a third person, to be delivered to the purchaser of the land on condition that a note for part consideration should be paid within ten days, and the vendor extended the time from May 23d until Saturday, May 26th, and on May 28th made a further extension, but when, on June 2d, the purchaser tendered the money to the third person, he was informed that the vendor had given notice neither to receive the money nor deliver the deed, *held*, that vendor's conduct was calculated to throw vendee off his guard, and, under the circumstances, the condition was well performed within five days after the last postponement; that it was error to hold that the parties had done no more than make propositions to each other, which either were at liberty to withdraw at the expiration of the ten days; that the promise of May 28th, viewed in the light of preceding circumstances, was not void; that the proceeding was not premature; and that it was not a case where the plaintiff claims to recover possession of land under adverse title, distinct from defendant's grant. *Baum's Appeal*, S. C. Penn., May 28, 1886, Atl. Rep., Vol. 4, 461.

27. **WATERS AND WATER-COURSES.**—*Artificial Flow—Prescriptive Right—Exceptions—Statement of Evidence by Court.*—A right to the artificial flow of water through a water-course can be acquired by prescription. Exceptions do not lie because the presiding judge in his charge to the jury called attention to certain testimony, but made no mention of other testimony on the same point. The attention of the court should be called to the matter before the jury retire. *Murchie v. Gates*, S. C. Me., June 17, 1886, Atl. Rep., Vol. 4, 698.

28. **WAYS.**—*Estoppel—Report of Committee Affected by Relationship to Parties.*—One member of a committee appointed by the court, upon an appeal from the doings of county commissioners,

was a brother of one of the original petitioners, and a distant relative of another; but was appointed with the consent of the petitioners, and presumably with their knowledge of the relationship. *Held*, that the petitioners, having knowingly taken their chances for a favorable report, were estopped from raising the objection that the committee were not disinterested. *Robinson v. County Commrs.*, S. J. C. Me., June 5, 1886, Atl. Rep., Vol. 4, 556.

29. *WAYS—Railroads in Streets—If Used by Individual for Private Purpose Exclusively, a Nuisance.*—Defendants, under a contract with a street railroad corporation, took a branch road abandoned by it, having flat rails, and reconstructed it with T rails, and used it exclusively for carrying their machines, etc., to their factory. *Held*, that the construction and maintenance by an individual of a railroad upon the highway for private purposes constitutes a nuisance for which any person sustaining special injury may bring action, and the contract with the railroad furnished no defense to such suit, as it was an attempt by the railroad to transfer its franchise to an individual for the purpose of enabling him to operate the road exclusively for the purpose of his private business. *Fanning v. Osborne*, N. Y. Ct. App. June 1 1886, N. East. Rep. Vol. 7, 307.

30. *WILL—Legacy—Interest—Accord and Satisfaction—Principal and Agent—Ratification—Payment of Legacy.*—Legacies, unless otherwise controlled by the will, draw interest after one year from the probate of the will; and the rule is not affected by the fact that the executor is unable to gather in the assets and pay the legacy within the year. When there is a dispute between an executor and a legatee as to the amount of interest due on a legacy, on account of the expense and delay caused by a long litigation carried on for the protection of the property of the estate, an acceptance by the legatee of a sum less than the one due on the legacy is an accord and satisfaction, if the payment is made upon the express condition that it shall be in full for the balance due, and the money accepted without protest against such condition. The Baptist State Convention was a legatee, and the money was paid to its treasurer. *Held*, that the convention, by accepting and using the money, with knowledge of all the facts, ratified the acts of the treasurer in receiving it, if there were doubt as to his authority. *Vermont etc. Convention v. Ladd*, S. C. Vt. June 19, 1886. Atl. Rep. Vol. 4, 634.

QUERIES AND ANSWERS.*

[Correspondents are requested to draw up their answers in the form in which we print them, and not in the form of letters to the editor. They are also admonished to make their answers as brief as may be.—Ed.]

QUERIES.

7. A. executes a quit claim deed to B., conveying a certain tract of land, the deed bearing date of December 21, 1884. B. conveys the same land by quit claim deed to C., this deed bearing date of December 23, 1884, but the certificate of acknowledgment bears date of December 16, 1884, seven days prior to the date of the deed itself. Did C. derive any title from B., the

deed being acknowledged prior to the date of the deed from A. to B., i. e., under the circumstances should the date of the deed or the date of the acknowledgment be presumed to be the date of delivery? Please cite authorities. X. Y. Z.

8. Suit on note. Answer of payment; to sustain which the defendant testifies to the fact of the payment, with the attendant circumstances, and, over the objection of the plaintiff, testifies that he knows the payment was made, because he sold a horse on the same day to A., and thus got the money with which the payment was made. He then offers to prove by A., as an independent fact, the sale of the horse, and the payment to him of a certain sum of money for the horse by A. Can such evidence be received over the objection of the plaintiff? "W."

9. A farmer having a large quantity of stock, advertised them for sale at public auction. Nothing was said in the advertisement about how the stock would be sold, other than that they would be sold at public auction, on the day named, and upon a credit of nine months. At the sale a fine mare, which had been recently bred to a fine horse, upon the insurance plan, was offered for sale. The owner of the horse was present, and it was agreed between him and the farmer that the mare might be put up for sale with the understanding that, if she proved to be with foal, and had a colt, that the purchaser should pay for the season of the mare to the horse. This agreement was publicly proclaimed by the auctioneer when the mare was put up for sale, and it was stated by him that she was to be sold upon the condition that the purchaser should pay the owner of the horse for the season if the mare should have a colt. The mare was sold, and the purchaser executed his note to the farmer for the amount of his bill. The mare proved to be with foal, and had a fine colt. The owner of the horse then went to the purchaser of the mare, and demanded his pay for the season of the mare to the horse. The purchaser refused to pay the same, claiming that he was not close to the auctioneer when the mare was put up for sale, and didn't hear the statement made by him, and never knew such a statement was made. Upon this state of facts can the owner of the horse recover? Please cite authorities. SUBSCRIBER.

10. A. loses his house, which was insured, by fire. The Insurance Company believed that A. either did or procured the burning thereof, refuses payment of loss. A. sues to recover the amount claimed under the policy. The company answers, setting up as their defense A's guilt in regard to the fire. What is the quantity of proof required at the company's hands to release it from liability? Must it establish A's guilt "beyond a reasonable doubt," as would be required of the State in a criminal prosecution for the crime, or must it simply show it by "the preponderance of testimony," only, as is the rule in other civil cases? . . .

QUERIES ANSWERED.

Query 33. [22 Cent. L. J. 287.] — In executing a writ of attachment against real estate, the statute requires the officer to leave a copy of the writ, a description of the property, and a notice that it (property described) is attached, with an occupant, if there is one. Is a tenant who uses the premises attached as a place of business, but who does not lodge there, an occupant within the meaning of the statute? Please cite authorities. STUDENT.

Answer.—The dictionaries define an occupant as one in possession. It is not a technical legal word, and the courts have adopted the same definition, regardless of the question of evidence, unless the context of the law necessitated a different construction. *People v. Sup. of Alleganey Co.*, 36 How. Pr. 544; *Abbott v. Upham*, 13 Metc. 172; *Carpenter v. Vall*, 36 Mich. 226; *Leahler v. Chapin*, 12 Nev. 65; *Hussey v. Smith*, 1 Utah, 331; *Shelby v. Houston*, 38 Cal. 410; *Coffield v. McClelland*, 83 U. S. 381; *Comstock v. Beardsley*, 15 Wend. 348. In the case stated the law does not require the occupant to lodge on the premises. S. S. U.

Query 49. [22 Cent. L. J., 574.] A, implement dealer, contracted with a manufacturer of implements that the company should furnish A. goods. The agreement was that A. was to sell goods, and when cash was paid the amount, less commissions, was to be remitted to the manufacturer of implements, and when goods were sold on time (which right A. had), the notes were to be sent to manufacturing company with A.'s personal guaranty written on the back of notes, which in each instance A. did, but it turns out that some of the notes are not good. Now, at the time of making the contract, A. gave security for the faithful performance. Now, as the principal has sent in all money and notes, as per contract, can the fact that some of the notes are not paid make the surety of A. liable when there is nothing in the contract that all notes should be paid, it only stipulating that all money received and notes taken should, "less commission," be sent into the house—the notes with A.'s personal guaranty on notes, which was done in all cases? Please answer and cite authorities, etc.

C. P. JOHNSON.

Answer.—If case is fully and correctly stated in the query, the surety cannot be liable. The law cannot be better stated than it was by Chief Justice Kent, as long ago as 1805, in *Ludlow v. Simond*, 2 Caines Cases in Error, 57. He says: "It is a well-settled rule, both at law and in equity, that a surety is not to be held beyond the precise terms of his contract, and except in certain cases of accident, mistake or fraud, a court of equity will never lend its aid to fix a surety beyond what he is fairly bound to at law." See also *Chase v. McDonald*, 7 Harris & Johnson, 193; *People v. Chalmers*, 60 N. Y., 154; *Kingsbury v. Westfall*, 61 N. Y., 360. It is unnecessary to multiply authorities. An intelligent use in any moderately good law library of the time expended in writing the "query," would have given all the necessary information.

Query 51 [22 Cent. L. J. 599].—A. rides a bicycle on a public road, in the county, at a rapid rate of speed, up to within twenty-five feet of the face of a team of horses traveling towards him, does not turn out, and by this act, frightens the team; and in the fright the harness, which is sound and good, breaks, making it impossible for the driver to control them. A. jumps from his bicycle, seizes the horse next to him, calls to the driver to jump out and seize the other horse. Driver jumps out, but before he can get the other horse's head, A. lets go his hold, voluntarily, the team runs away, B., riding in the carriage, is thrown out and seriously injured. Has B. a cause of action against A? Cite authorities. Has any correspondent a reference to a case of injury caused by a bicycle?

A. L. B.

Answer.—A bicycle is a carriage, 28 Eng. R. Moak, 748. See also *People v. Greenfield*, 138 Mass. 1. There is little question that a bicycle rider on the street is entitled to the same rights that any driver of a vehicle

is, no greater, no less. The horse is not a sacred animal. If A. L. B. will apply to Mr. Charles Pratt, Boston, Mass., he will undoubtedly receive a copy of brief containing all the bicycle cases. Mr. Pratt is counsel for the League of American Wheelmen, and very willing to help all cyclists. C. T. C.

RECENT PUBLICATIONS.

TAE AMERICAN PROBATE REPORTS.—Containing recent cases of general value decided in the courts of the several States on points of Probate Law. With notes and references by Wm. W. Ladd Jr. Vol. IV. New York: Baker Voorhis & Co., Law Publishers, 66 Nassau Street. 1886.

This is the fourth volume of a collection of cases which cannot fail to be of great value not only to the specialist whose practice lies chiefly, or altogether in courts of Ordinary, to whom they would seem absolutely indispensable, but also to the general practitioner who must frequently appear in those courts. Upon such occasions it would assuredly be of great assistance to have at hand a collection of this character of cases, bearing upon almost every question that can be presented to a Probate Court. The cases, seventy seven in number, are evidently selected with great care, and many of them carefully annotated. We commend this series to the profession, as well worthy of a place in the library of every practitioner.

JETSAM AND FLOTSAM.

A GOOD FIELD FOR BAD LAWYERS.—"Yes," said the old fellow who had been beaten for Superior Court Judge at the last election. "Yes, bad lawyers always make good judges. Most bad lawyers are given to conscience and honesty."

"Well—Judge—"

"That's all right. I'm a bad lawyer. That's why I wanted to be a judge. It saves you a lot of trouble and teaches you your business when other lawyers fill you up with the facts and figures of the law. A good lawyer can never be trusted on the bench. He's always liable to give a decision against the cleverest lawyer in the case, just to show his smartness. A bad lawyer on the bench doesn't take law so much as justice into consideration, and no defendant or plaintiff ever yet was injured by a common sense decision. It is a fallacy of our great republican form of government that the voice of the people spoken through the ballot-box purifies the men elected, and that the election of a lawyer to the bench destroys all the weakness of human nature he may have had before. In the divine government purification precedes election. In human government election precedes purification. I don't believe a lawyer's any more honest when they make him a judge than he was before. They call him a lawyer until he becomes a judge, then he is spoken of as a distinguished jurist."

WOMEN AS LAWYERS.—The following facts were furnished by Ellen S. Martin, an attorney at law, of Chicago, to a member of the Philadelphia bar in search of statistics:

"My investigation last year resulted in finding forty-eight women who had been admitted to the bar and engaged in practice or some line of lawyers' work (editing law reports or periodicals) in the United States.

I have heard of others since, but, as it was too late for my purpose, I have not followed them up. Many other women have studied and been admitted, but have not practiced.

"The forty-eight in actual practice are distributed as follows: I give the place of first admission—some have changed location—and give the States in order in which they first admitted women: Iowa, 8; Missouri, 2; Michigan, 6; Utah Territory, 1; District of Columbia, 8; Maine, 1; Ohio, 4; Illinois, 7; Wisconsin, 5; Indiana, 2; Kansas, 8; Minnesota, 1 (from Iowa); California, 3; Connecticut, 1; Massachusetts, 1; Nebraska, 1; Washington Territory, 1; Pennsylvania, 1. Total 48.

"The admission in all these States is to the highest courts, except in the case of Pennsylvania. Women have also appeared as attorneys in several of the local courts of Maryland, and have been admitted to the United States courts in Texas and Oregon—though not to the State courts.

"Women were admitted on their first application, without any change in the law, in Iowa, Missouri, Michigan, Utah, District of Columbia, Maine, Ohio, Wisconsin, Indiana, Kansas, Connecticut, Nebraska, and Washington Territory. In Wisconsin and Ohio, after some women had been admitted, others were refused by other judges, and the legislatures at once passed laws forbidding the exclusion. In Illinois, Massachusetts, Minnesota, and California courts would not admit woman until laws were passed, and the legislature promptly passed them.

"The first admission of a woman occurred in Iowa in 1869, when the statute provided only for the admission of 'white male persons over the age of 21 years.' Both the words 'white' and 'male' soon after drooped out of the statute. In the other States where women were admitted on first application, there existed either the common law on the subject (whatever that may be) or the word 'male,' 'citizen,' or 'voter' was in the statute relating to admission of attorneys."

PAT'S "EVIDENCE."—A man's honest opinion of himself is generally a pretty fair estimate of his powers. As a rule, it is only the most ignorant persons who esteem themselves too highly. The man in the following story unconsciously gave his own opinion of himself. An Irishman accused of horse-stealing was brought before his Honor for a series of questions, whereupon the following conversation ensued:

"What are you here for?"

"For bearglary, I belave they call it."

"What is the testimony against you?"

"An' jist noothing, yer Honor, 'xcept that I told the Justice of the Pace meself that I did it."

"Well, if you've confessed it, I don't see but your chances are good for a verdict against you."

"Sure, yer Honor, no decent court would condimn a man on sich ividence as that!"

But *that* evidence was taken, and the poor Irishman was sent to prison.

ECCENTRIC.—There once lived "down East" a peculiar and original old gentleman named Adams, who was known to all the neighborhood for miles around by his harmless and amusing eccentricities. A lawyer named Somerby, riding out of town early one summer morning, discovered Mr. Adams making his way afield, with the necessary haying tools—a jug and a scythe—and stopped to have a chat with him.

The soil in that part of the country is very thin and sandy, and the hay crop always light, and the good-humored lawyer took occasion to remark upon the fact, and to pity the farmers who were obliged to wring a scanty living from such barren acres.

The old gentleman heard him patiently for a time, but at length broke out:

"Look here, Squire, you're wasting your sympathy. I ain't so poor as you think I am. I don't *own* this farm."—*Boston Record*.

SMITH'S BITTERNESS.—"Say, pa," said Johnny, this paper says that Mr. Smith is a second Ananias. What does that mean?"

Pa (bitterly)—"It means he is a lawyer, my son."

FELT HAPPY.—Lawyer (joyfully)—"How do you feel now?"

Condemned murderer (who has just been reprieved)—"As playful as a child, my boy."

Lawyer (slapping him on the back)—"Ah, I see you have just skipped a rope."—*The Judge*.

PRACTICING BY EAR.—Among the friends of Grover Cleveland when he was practicing law in this city was another attorney, but one of rather different stamp than the man of destiny. The friend was a bright fellow, but with the bump of laziness abnormally developed. He was not a well-read lawyer, and whenever it was necessary for him to use a decision bearing on any point, it was his habit to lounge into Cleveland's office and casually worm the desired information out of his friend's mental storehouse. "Grover" was not so dull as not to appreciate the fact, and to resent the sponging—not so much because the process was worthy of that name, as because he wished to spur his friend on to more energetic work. One day the friend came in on his usual errand, and when Cleveland had heard the preliminaries usual to the pumping process, the latter told his questioner that he had given him all the information on law matters that he was going to. "There are my books," said Cleveland, "and you're quite welcome to use them. You can read up your own cases." "See here, Grover Cleveland," said the friend, "I want you to understand that I don't read law. I practice entirely by ear, and you and your books can go to thunder."

THE Court of Chancery in New Jersey has given an opinion, holding that a witness in that State who swears on the Bible is not bound to kiss the book. A female witness when sworn had laid her hand on the Bible, but refused to kiss it, saying that she had "never kissed the book." She was allowed by the Master to testify, but a motion was subsequently made to strike out her testimony. The law was thus laid down by Vice-Chancellor Bird: "Almighty God, or the Ever Living God, or the like, is called upon by the witness to witness that he will speak the truth. The rest is form. The solemn invocation, affirmation or declaration is the substance. All else is shadow. The witness in this case was sworn with her hand upon the book. There can be no doubt but that if she made a false statement wilfully, she is liable to an indictment for perjury. But it is said that this may be true and yet the conscience of the witness not be bound, which is the object of the oath. There is great force in this. How did the witness herself regard it? She is presumably a witness, for nothing to the contrary appears. She accepted the form of the oath as usually administered, without objections, except kissing the Bible. By this act on her part the court is justified in presuming, without further inquiry, that the witness intended that her conscience should be bound. Speaking from the forum of her conscience, she declared that it was not essential to kiss the book in order to impose upon herself all the obligations of an oath."—*Ex.*

The Central Law Journal.*ST. LOUIS, JULY 23, 1886.***CURRENT EVENTS.**

THE QUEEN'S JUBILEE YEAR.—On the 19th of June the Benchers of the Inner Temple celebrated the beginning of Queen Victoria's Jubilee year, her accession to the throne having taken place on the 20th of June, 1837.

The festivities, as accorded well with the antiquity of the venerable society under whose auspices they were conducted, were of an antique cast, the music was chiefly by the older composers, the songs were strictly "Old English," several of them Shakesperian, and the whole entertainment was in Tony Lumpkin's phrase, "in a concatenation accordingly."

The learned gentlemen have done well and honored themselves in thus honoring their Queen, for very few sovereigns, ancient or modern, have borne as staunchly, as the present Queen of England, "the fierce light that beats upon a throne."

REFORMED PLEADING.—Every now and then there comes up a question whether an innovation in the law is really an improvement, and whether reformation in legal matters, really reforms. Some weeks ago we called attention to the doubt beginning to be entertained whether the "exemption" laws of the several States were really and truly such blessings to the industrious poor as they are generally held to be; and now comes a question whether the reformation of the forms of pleading which has been so general in all the States, has not done more mischief and injury to the due administration of the law than it has prevented. A contemporary says:

"The jury who, in the effort to squelch the defendant's counterclaim, the other day, extinguished the plaintiff himself by their blundering verdict of "no cause of action," afforded an amusing illustration of one of the inconveniences of the free pleading and commonly complex issues which the present procedure invites."

The old common law system of pleading was very faulty in many points of view, en-
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cumbered with many antiquated, obsolete, useless forms, and subjected the unwary to the peril of many snares and pitfalls. It needed, and could well bear, very thorough pruning and many alterations, but it had the root of the matter in it. A case well pleaded on both sides under the old system never failed to present the precise point in issue between the parties.

The case mentioned by our contemporary would indicate that the systems which have supplanted it in most of the States, have introduced an element of uncertainty arising from the fault opposite to that of the older system, that the craving for simplicity and brevity has carried our legislators and courts too far, and produced evils, different but hardly less serious than those which attended the disciples of Chitty. In arguing or deciding any question, the first, last, indispensable matter is to know precisely what that question is, and any system of pleading that does not always disclose it even to the unprofessional juror is faulty, and stands in need of further improvement and reformation.

CRUELTY TO ANIMALS—CHARITABLE AND BENEVOLENT ASSOCIATIONS.—In a case recently decided in Massachusetts,¹ we find the first judicial exposition, which we have seen, of the precise legal *status* of societies for the prevention of cruelty to animals. These very praiseworthy organizations are to be found in most of our States and larger cities, but heretofore there seems to have been no occasion for their position to be judicially defined. It seems that the society in question had paid taxes to the amount of \$205,60, and brought suit to recover it back upon the ground that its property was exempt from taxation, under the statute of Massachusetts which exempted from taxation the property of "literary, benevolent, charitable, and scientific institutions."

The court held that the society was both benevolent and charitable, and adds that it "comes within the definition of a charity. There is no profit or pecuniary benefit in it for any of its members. Its work, in the education of a mankind in the proper treatment

¹ Massachusetts Society for the prevention of cruelty to animals v. City of Boston, Sup. Jud. Ct. Mass., May 1886.

of domestic animals, is instruction in one of the duties incumbent on us as human beings. Those are charitable societies whose objects are to bring mankind under the influence of humanity, education and religion.²

The hospital founded by the institution would, if it were established by a bequest or public or private gift, be treated as a charity. It has a humane, legal and public or general purpose; and whether expressed or not in Stat. 43 Eliz., which is the foundation of our law on the subject of charities, is within the equity of that statute.³ In the case of *University of London v. Yarrow*,⁴ it was held that a bequest for founding and upholding an institution for investigating, studying and curing maladies of quadrupeds or birds useful to man, and for providing a superintendent or professor to give free lectures to the public, was good as a charitable legacy. The fact that the testator showed some interest in the animals themselves and their humane treatment in no way invalidated the gift.⁵

The ruling in this case shows clearly that the functions of this society stand upon the same footing as bequests for public convenience, as for planting shade trees in cities,⁶ or for education, as endowing a professorship, or an agricultural society, or for downright charity as for the relief of decayed merchants.⁶

² *Jackson v. Phillips*, 14 Allen. 539.

³ *Cresson's Appeal*, 30 Penn. Stat. 437; *Townesley v. Bedwell*, 6 Ves. 194; *Faversham v. Ryder*, 27 Eng. Law & Eq. 369.

⁴ 23 Beav. 159.

⁵ *Cresson's Appeal*, 30 Penn. St. 437.

⁶ *Ibid.*

MODE OF EXAMINING WITNESSES.—Every now and then somebody "bobs up serenely" with Sterne's celebrated *dictum*: "They manage these things better in France," which has been a *façon de parler* with travelled people, in England and America, for a hundred years past. This time it is a gentleman who, among other things, admires very greatly the French mode of examining witnesses.

He says: "But the greatest contrast between the French practice and ours is in the introduction of evidence and examination of witnesses. There are no arbitrary and tech-

nical rules of evidence, which more than any one cause impede and delay our administration of justice. No exceptions, and objections, and rulings; no confusing, and coaxing and bullying the witnesses by the different counsel, but a simple, quiet examination by the judge himself. It has been thought more conducive to the ends of justice, more likely to elicit the facts, for the judge, rather than the contending counsel, to examine the witness. And very justly, to my mind. The judge is impartial, the counsel are not. And if the witness is allowed to tell his own story to the judge, to submit only to his interrogations, he is far more likely to tell the truth than when alternately brow-beaten, confused, entangled, and coaxed by the opposing counsel."

Upon this the *Columbia Jurist*, from which we take the foregoing, very justly remarks:

"A sufficient answer to this would appear to be that the endeavors of three examiners are more likely to ascertain the truth than one; that the witness is more likely to tell the truth if he knows that two men are watching to catch him in a lie; that if he is truthful he will not be confused or entangled; and that the examination of the judge if supplementary, will be more effective than if he is the sole examiner. Better bear the ills we have than fly to others that we know not of."

To this we may add, that of all the innovations upon the common law, which have been made, or advocated, or suggested of late years, that which least commends itself to our approval is that which involves the abrogation of the right to cross-examine an adversary's witness. Of course under the French system as indicated in the foregoing extract no such right exists, the counsel has no right even to examine his own witness, nor of course to cross-examine those who may testify at the instance of his adversary. Cross-examination has always been regarded by the most experienced of practitioners as the surest test of truth, the most effective means ever devised by the wit of man for the detection of falsehood. Some very experienced lawyers consider the test of cross-examination infallible. We were once told by a gentleman who had long held the office of prosecuting attorney and of course had extensive experience in handling witnesses of the shadiest type, that

he believed he could, if allowed full scope for cross-examination, detect and expose the most adroit and experienced of perjurers. We are of a different opinion. As the science of the burglar runs well abreast of that of the manufacturer of patent safes and vaults, so the ingenuity of the false witness moves *pari passu* with that of the most adroit of legal practitioners. There are liars who can outwit the most suspicious and most skillful of counsel, hoodwink the judge, and utterly bamboozle the jury.

There have been many improvements in the law of evidence within the last thirty or forty years, such as admitting the testimony of parties to the action, and parties interested in the result; these and any other really valuable and judicious reforms, we accept and zealously support, but we protest against any change which would in any degree tend to diminish the security against perjury afforded by our present practice.

NOTES OF RECENT DECISIONS.

CRIMINAL PRACTICE—COMPETENCY OF JURORS—THE LEGAL EFFECT OF A "REASONABLE DOUBT"—JURY AS JUDGES OF LAW AS WELL OF FACT—DUTY OF COURT AS TO "DEGREES" OF CRIME—PRESUMPTION IN FAVOR OF LESSER GRADE OF OFFENCE AS WELL AS OF INNOCENCE. —In a recent case in the Supreme Court of Vermont,¹ all the foregoing important points of criminal law are discussed, and although the conclusions and rulings of the court evolve no principle which is not familiar to the experienced criminal lawyer, the clearness of the court's views and the precision and lucidity with which they are expressed, are worthy of special note.

The first question grew out of the fact that the jurors had read the newspaper accounts of the (alleged) murder, purporting to give the evidence upon the committing trial.

The ruling of the court upon this point is that if the opinions so formed by the jurors, whether expressed by them or not, did not, in the judgment of the jurors themselves, so bias their minds that they could not try the case impartially upon the evidence given in

court, and return a verdict of acquittal or conviction thereon accordingly as their minds were convinced by it, they were competent. The opinion derived from newspaper information which will, in Vermont, disqualify a juror is thus stated by the court. "It must be an abiding bias of the mind, based upon the substantial facts in the case in the existence of which he believes. Such is the result of our decisions, and of the great majority of the decisions of courts of the last resort in other jurisdictions * * *. Its character must be left largely to the determination of the court before which the trial is had, upon the evidence adduced at the preliminary examination."²

A second question raised in this case was, whether the prisoner was entitled to an instruction, that if the jury entertain a reasonable doubt of his guilt, *it was their duty to acquit*. The trial court was held to have properly declined to instruct in the words we have italicised, but properly charged that if the jury entertained such a doubt, the prisoner was *entitled to the benefit of it*. The distinction is quite thin, for it is not easy to see how he could have the benefit of such a doubt except in the shape of an acquittal. The Supreme Court however regarded the difference as material, and thereupon moralizes as follows: "This is not an age in which the protection of the accused requires any lowering of this degree of doubt, which the law requires to be overcome in order to convict."

The right of the jury in a criminal case to judge of the law, irrespective of the charge of the judge, is thus broadly stated; "There is no qualification of the right of a jury, in a criminal cause, to disregard the law as given them by the court, and adopt their own theory; and they may, in the exercise of this power, with the same propriety adopt a rule of law more prejudicial to the respondent as well as one less prejudicial."

It was farther held to be the duty of a judge upon a trial for murder to explain to the jury the precise difference between murder in the first degree, and murder in the second degree, and that between the latter offence and manslaughter; that it was not sufficient to read or say to the jury after defin-

¹ State v. Meyer, S. C. Vt. 2 N. Eng. Rep. 209.

² State v. Meaker, 54 Vt. 112.

ing murder in the first degree, "that all other kinds of murder shall be murder in the second degree." It is the duty of the judge and the right of the prisoner to have explained to the jury in full the statute definitions of each of the three offences with which he stands charged.

In this case, the Supreme Court found it necessary to decide that it was error for the trial court to express the opinion that if the defendant was guilty at all, he was guilty of murder in the first degree. It is not a little remarkable that trial judges should so far forget what is their function, and what is the duty of the jury as to fall into an error so patent. On the presumptions of innocence, and of guilt respectively of the several degrees of the offence charged, the opinion of the court is singularly lucid and satisfactory.

"Under an indictment for murder, where the jury may convict the respondent of murder in the first degree, second degree, or manslaughter, the State, to convict of murder in the first degree, must first overcome by evidence the presumption of innocence that always shields the respondent till the contrary is proved beyond a reasonable doubt; and when that is overcome, the State must next overcome every reasonable doubt that the crime, which the respondent has committed, is not manslaughter nor murder in the second degree, advancing from the lesser to the greater crime, the presumptions being first in favor of innocence, and then of the lesser crimes in their order.

If, upon a proper explanation of murder in the first and second degrees, the jury might have had any reasonable doubt as to the degree of murder, the respondent was entitled to the benefit of it, as he was to the benefit of the reasonable doubt as to whether he is guilty of any crime at all under the indictment. And it is the duty of the trial judge to so fully instruct the jury upon every degree and kind of crime of which the respondent may be convicted under the indictment, as to give the respondent the benefit of having the evidence considered by the jury, under a full knowledge of the law as to the essential characteristics of each kind and degree of crime, for which a verdict may be returned against him, so that he may have the benefit of every reasonable doubt that may arise, both as to the commission of the crime and as to the kind and degree of it."

WITHDRAWAL OF PLEA OF GUILTY.

The question, whether or not, one who is accused of crime and has entered a plea of guilty to the charge, has the right, as a matter of law and right, to withdraw such plea and enter the plea of not guilty, is one that has seldom been before the courts of last resort, and the adjudged law upon the question is but little. The weight of the learning and adjudications upon the subject seem to leave the whole determination of such an application to the tender mercies of the judicial discretion of the trial court.¹

When, however, a proper showing of facts is made by way of affidavit, it will be universally conceded to be an abuse of judicial discretion to not allow the withdrawal of the plea of guilty and the plea of not guilty entered instead thereof. And this proper showing of facts is sufficiently made when the affidavit discloses that the affiant is not guilty of the crime charged;² that it is the first offense;³ that the plea of guilty has been entered through inadvertence and without due deliberation, or ignorantly;⁴ that it was from the hope that the punishment to which the accused would otherwise be exposed might thereby be mitigated,⁵ or, when the plea is entered through mistake.⁶ The statement is not made that all these averments are necessary to have the application granted, but only, that if all be made, the application will surely be granted, or the trial court greatly abuse a sacred trust.

Cases Granting Application.—In *State v. Stevens*⁷ the question in the case is an application to withdraw plea of guilty. The application is refused by the trial court. The affidavits are in the record, as also a statement by the trial judge, which goes to the truthfulness of the facts alleged in the affidavit; but the difference in statement is upon an immaterial point. In this case the defend-

¹ What is it, that "judicial discretion" can not do? For an excellent article on the subject of "Judicial Discretion," see 17 Am. Law Review, p. 567.

² *Mastronda v. State*, 60 Miss. 87.

³ *Ibid.*

⁴ *People v. McGrory*, 41 Cal. 458; *Gardner v. People*, 11 Cent. L. J. 186; s. c. 4 Criminal Law Mag. 861.

⁵ *People v. McGrory*, *Supra*; *State v. Stevens*, 11 Cent. L. J. 5; *Davis v. State*, 20 Ga. 674.

⁶ *Davis v. State*, *Supra*.

⁷ 11 Cent. L. J. 5; s. c. 71 Mo. 535.

ant entered the plea of guilty under the belief that by so doing a punishment less severe than the maximum would be inflicted. "Viewing the matter then, in either light," say the court, "we feel constrained to say that it would better have comported with the proper exercise of a sound judicial discretion, had the special judge permitted the withdrawal of the plea of guilty, and the entry, in its stead, of the usual plea. * * * Courts have always been accustomed to exercise a great degree of care in receiving pleas of guilty in prosecutions for felonies to see that the prisoner has not made his plea by being misled, or under misapprehension or the like." Thus, it is said by Archbold in regard to this subject, that if instead of pleading not guilty, the defendant enter the plea of guilty, that such is a confession of the offense which subjects him to the same punishment as if he were tried and found guilty by verdict. "But as defendants often imagine that by pleading guilty they are likely to receive some favor from the court in the sentence that will be passed upon them, the judge very frequently undeceives them in that respect, and apprises them that their pleading guilty will make no alteration whatever in their punishment."⁸

Chief Justice Sherwood, after having reviewed the law and discussed the principles as set forth in some of our older books,⁹ concludes his reasons for not sustaining the action of the trial court by a review of the modern authorities, and the conclusion is that, "The court should freely exercise its discretion in proper cases to allow the plea of guilty to be withdrawn and that of not guilty to be entered in lieu thereof. And even where the defendant, after pleading guilty, has moved in arrest of judgment, and that motion overruled, should justice require, the court should permit, before judgment rendered, a withdrawal of the plea of guilty and the substitution of the plea of not guilty."¹⁰

In *State v. Colton*¹¹ the defendant pleaded guilty and moved in arrest of judgment. He also moved that if judgment should not be

arrested that he be permitted to withdraw his plea of guilty; and although the court regarded such a conditional motion as a novel one, yet, however, that it was one to be addressed to the discretion of the common pleas and was proper for their consideration and the consideration of the prosecuting officers.

In *Gardner v. People*¹² the defendant was under age and was unable to speak the English language. He pleaded guilty and was sentenced. He had no counsel. Later in the term, he appeared by counsel and made application for leave to withdraw the plea of guilty, but the application was overruled. The court say, that, "Under the peculiar circumstances of this case, we are of opinion this application should have been allowed, and that it was error to refuse it."

It is well for the courts to guard against imposition, the same as against its own abuse, and one should not be allowed to trifle with the court by deliberately entering a plea of guilty one day, and capriciously withdrawing it the next. "But when there is reason to believe that the plea has been entered through inadvertence and without due deliberation, or ignorantly and *mainly* from the hope that the punishment to which the accused would otherwise be exposed, may thereby be mitigated, the court should be indulgent in permitting the plea to be withdrawn."¹³

In *Sanders v. State*¹⁴ the plea of guilty was forced upon the defendant through fear of mob violence. The counsel of the prisoner urged the plea from the same fear. Upon this plea of guilty, the defendant was sentenced and sent to the State's prison the same day. The relief prayed for in the appellate court is that the judgment entered upon the plea of guilty be vacated, the plea of not guilty entered and the defendant put upon his trial in due form of law. The judgment of the lower court was reversed, with instructions to vacate the judgment, to permit him to withdraw the plea of guilty and plead not guilty to the indictment.¹⁵ If by reason of

⁸ 2 Archbold 334; 2 Hawk, P. C. 469; 2 Hale, P. C. 225.

⁹ Archbold, Hawk, and Hale. *Supra*.

¹⁰ See also 1 Bishop. Crim. Proc. § 485.

¹¹ 4 Foster (N. H.) 143.

¹² 4 Criminal Law Mag. 881; s. c. 17 Cent. L. J. 155.

¹³ *People v. McGrory*, 41 Cal. 458.

¹⁴ 85 Ind. 318; s. c. 16 Cent. L. J. 473; 4 Criminal Law Mag. 359.

¹⁵ As a matter of information we would state that the defendant in this case, receive the same sentence

any side agreement with the prosecuting officer, a defendant under a criminal charge, enters a plea of guilty, a more severe sentence than that agreed upon should not be awarded; and if a sentence more severe than the one indicated be inflicted, the defendant should be allowed to withdraw his plea of guilty, and plead not guilty if he desires.¹⁶

Where there are several indictments or presentments pending against a defendant, and upon arraignment he pleads guilty by mistake, to one when he intended it to be to another, the error may be corrected, notwithstanding the entry has been made on the indictment or presentment and transferred to the minutes of the court.¹⁷

Cases Denying the Application.—In *Conover v. State*¹⁸ the defendant's motion for leave to withdraw his plea of guilty was in writing and showed for cause that he was young and inexperienced in legal proceedings and did not enter the plea nor authorize the same to be done; that he was not guilty, as charged in the indictment. And in passing upon this application the court say: "The appellant's motion was addressed to the sound discretion of the criminal court, and unless the record showed a very clear abuse of such discretion, this court would not be authorized, we think, to review or reverse the decision below on such motion."

In *Mastronda v. State*¹⁹ the defendant pleaded guilty to the charge of unlawful retailing of liquor, but before sentence had been passed upon him he moved the court for leave to withdraw his plea of guilty. The motion was overruled, and upon appeal, the action of the trial court was sustained. "The affidavit filed in support of his motion," say the court, "did not aver that he was innocent of the offense with which he was charged, but disclosed the fact that he was an old offender, who had, upon a previous occasion, pleaded guilty and escaped with the mildest penalty allowed by law. It set forth that he had been induced from this fact to

believe that he would meet with equal leniency on this occasion, and had been, by this expectation, induced to enter his plea of guilty; but that he was now alarmed by a rumor that he was to be more severely dealt with, and, therefore, wished to withdraw his plea and take his chances before a jury. Certainly there was nothing in these statements to commend his application to the favorable consideration of the court. The action of the court properly taught him that the infliction of the lowest penalty for a first offense, instead of conferring a vested right to the same measure of punishment for a second, rather suggests the propriety of so increasing the penalty that it may effectually deter from a recurrence of a third." The argument can be legitimately drawn from this language, that had the affidavit shown that the defendant, instead of being an old offender, was not guilty, and other averments of like import, then and in that case the application should have been granted.

In *United States v. Ray*²⁰ the defendants were indicted for violations of internal revenue laws, to which they entered pleas of guilty. The district attorney did not move for judgment until a subsequent term of the court, at which time the defendants made motion for leave to withdraw their pleas of guilty and substitute therefor the pleas of not guilty. The motion was denied.

In *People v. Lennox*²¹ the defendant was accused by information, of the crime of murder. The defendant entered a plea of not guilty, then afterwards withdrew that plea and entered a plea of guilty, and upon that plea, the trial judge heard evidence and assessed the death penalty as the punishment. "Thereupon, and before the clerk had entered the judgment in the record, the defendant's attorney moved the court to permit the defendant to withdraw the plea of guilty, and to plead not guilty, on the ground that the defendant had been misled in withdrawing the plea of not guilty, and pleaded guilty. The reasons given in the record why the defendant deemed himself misled in pleading guilty, were because his father, a deputy sheriff, and his attorney expressed to him the

upon his pleas of not guilty, as he received upon his plea of guilty.

¹⁶ *State v. Kring*, 71 Mo. 551; s. c. 2 Criminal Law Mag. 721; *State v. Stevens*, 71 Mo. 535; s. c. 11 Cent. L. J. 5.

¹⁷ *Davis v. State*, 20 Ga. 674.

¹⁸ 86 Ind. 99; s. c. 5 Criminal Law Mag. 140.

¹⁹ 90 Miss. 87; s. c. 5 Criminal Law Mag. 460.

²⁰ 15 Reporter 200,

²¹ 21 Cent. L. J. 213; s. c. 6 West Coast Repr. 691; 6 Criminal Law Mag. 796.

belief that if he pleaded not guilty, and was tried by a jury, the jury would find him guilty, and affix the death penalty; whereas if he pleaded guilty, they believed the court might, in the exercise of its judgment, fix the punishment at imprisonment for life. We see no error. * * * Not until the court had performed its duty of fixing the punishment did the defendant express any desire to reconsider his plea of guilty."²²

May Introduce Evidence on Motion.—In *Conover v. State*,²³ the lower court heard evidence on the part of the State, contradicting the facts set forth in defendant's affidavit, and the court say in substance, that the lower court committed no error in permitting the State to introduce evidence on any of the matters presented by the motion.

Statutes.—Some statutes provide for the withdrawal of pleas of guilty, and permitting other pleas to be substituted therefor, but generally providing that such motions must be entered before judgment.²⁴ Some cases have been cited to the effect that after judgment, in no event, can the plea of guilty be withdrawn and the plea of not guilty substituted; but most of those cases are decided under statutes, which limit the time of withdrawing such pleas, and therefore can have no application to the general principle.²⁵

We would conclude from an examination of all the cases upon the subject, that where there is an inducement of any kind held out to the prisoner, by reason of which he enters the plea of guilty, that it will, at all events, better comport with a sound judicial discretion, to allow the plea withdrawn, and the plea of not guilty entered, and especially so, when counsel and friends represent to the accused that it has been the custom and common practice of the court to assess a punishment less than the maximum upon such a plea; but of course we would admit as a re-

striction to this statement, the reasonable argument of the Mississippi court; for not to do so, would be to place a premium upon crime, confessed. M. W. HOPKINS,

Danville, Ind.

CARRIAGE OF FREIGHT.

The functions of railroad companies in the transportation of merchandise are of such great legal as well as commercial interest, that a survey of the decisions upon the subject can hardly fail to be of benefit to the practitioner. The questions arising in this department of the law are of too great scope, however, to be discussed within the compass of an article like the present, while it is more useful as well as convenient to state the results of decisions whose basis and grounds will be sought in any event, by actual reference to the opinion. The succinct summary here given is therefore merely designed to guide the busy member of the profession to the sources of information and to suggest the *data* for investigation, though it is hoped it may be found productive of more practical advantage than more extended commentary always yields.

Safe Transportation and Delivery.—Railway Companies are insurers of the safe transportation and delivery of the property intrusted to them for carriage,¹ except as against loss or injury caused by the immediate act of God,² or of a public enemy.³ But after a safe delivery of the goods in the proper warehouse of the company, and the consignee has had a reasonable time for tak-

¹ *Fitchburg etc. N. M. Co. v. Hanna*, 6 Grey, 539; *Kiff v. Old Colony, etc. Ry. Co.* 117, Mass. 591; s. c. 19 Am. Rep. 429; *Read v. St. Louis etc. R. R. Co.*, 60 Mo. 199; *Pruitt v. Hannibal etc. R. R. Co.*, 62 Id. 527; *Chicago etc. R. R. Co. v. Ames*, 40 Ill. 249; *Illinois Cent. R. R. Co. v. Cobb*, 64 Id. 128.

² *Sweetland v. Boston etc. R. R. Co.*, 102 Mass. 276; *Michalls v. N. Y. etc. R. R. Co.*, 30 N. Y. 564; *Condict v. Grand Trunk Ry. Co.*, 54 Id. 600; *Chicago etc. Ry. Co. v. Sawyer*, 69 Ill. 285; s. c. 18 Am. Rep. 613; *Railroad Co. v. Reeves*, 10 Wall. 176.

³ *Thomas v. Boston etc. R. R. Co.*, 10 Met. 472; *Phila. etc. R. R. Co. v. Harper*, 29 Md. 330; *Patterson v. North Car. R. R. Co.*, 64 No. Car. 147; *Nashville etc. R. R. Co. v. Estis*, 7 Heisk. Tenn. 622; *Jackson v. Sacramento etc. R. R. Co.*, 23 Cal. 238; Compare *Porchle v. North Eastern R. R. Co.*, 14 Rich. (So. Car.) 181; *Ill. etc. R. R. Co. v. Mc. Clellen*, 54 Ill. 58; *Ill. etc. R. R. Co. v. Homberger*, 77 Id. 457.

²² The burden of this case seems to be that after sentence is once passed, it is too late to withdraw the plea of guilty.

²³ 86 Ind. 99; s. c. 5 Criminal Law Mag. 140.

²⁴ "At any time before judgment, the court may permit the plea of guilty to be withdrawn, and other plea or pleas substituted." Sec. 4362. *McClain's Annotated Statutes*, 1880. (Iowa).

²⁵ *State v. Oehlslager*, 38 Iowa 297; *State v. Buck*, 56 Iowa 382; s. c. 13 N. W. Rep. 342; 5 Criminal Law Mag. 460.

ing them away, the liability of the company as carrier ceases,⁴ and it will hold the goods as a warehouseman only;⁵ in which case the company is bound to no more than ordinary care,⁶ or such as a man of ordinary prudence would use in respect to his own property placed in like circumstances.⁷

Continuance of Liability.—The liability of a common carrier continues until the goods are unloaded;⁸ and if they are destroyed by fire while yet in the car in the freight depot, the company is liable.⁹ But in a recent case it has been held that a company is not liable for loss of goods accidentally destroyed by fire, without its fault or negligence, after they had been unloaded and placed in the company's warehouse, and notice given of their arrival.¹⁰ A railroad company is under no obligation, as a common carrier, to deliver goods at a point beyond or off its own line of road,¹¹ but such a duty can be created by contract¹² or by a course of business warranting the presumption that the goods will be so delivered.¹³

⁴ See authorities cited in next note.

⁵ *New Jersey R. R. Co. v. Penn. R. R. Co.*, 27 N. J. L. 100; *Culbreth v. Phil. etc. R. R. Co.*, 38 *Houst. (Del.)* 392; *Mobile etc. R. R. Co. v. Prewitt*, 46 *Ala.* 63; *Mich. etc. R. R. Co. v. Shuntz*, 7 *Mich.* 511; *Derosia v. Winona etc., R. R. Co.*, 18 *Minn.* 133; *Whitney v. Chicago etc. R. R. Co.*, 27 *Wis.* 327; *Francis v. Dubuque etc. R. R. Co.*, 25 *Iowa* 60; *Mohr v. Chicago etc. R. R. Co.*, 40 *Id.* 579; *Compare Hedges v. Hudson River R. R. Co.*, 6 *Robt.* 119; *Southwestern R. R. Co. v. Felder*, 46 *Ga.* 433; *Railroad Co. v. Maine*, 16 *Kan.* 333;

⁶ *Pike v. Chicago etc. R. R. Co.*, 40 *Wis.* 533.

⁷ *Pike v. Chicago etc. R. R. Co.*, 40 *Wis.* 533; *Compare Brown v. Grand Trunk Ry.*, 54 *N. H.* 535.

⁸ *Chicago etc. R. R. Co. v. Bensley*, 69 *Ill.* 630.

⁹ *Chicago etc. R. R. Co. v. Bensley*, 69 *Ill.* 630; and see *Winalow v. Vt. etc. R. R. Co.*, 42 *Vt.* 700; *Rice v. Hart*, 118 *Mass.* 201; *Central R. R. Co. v. Smith*, 54 *Ga.* 499.

¹⁰ *Hirschfield v. Cent. Pac. R. R. Co.*, 56 *Cal.* 484; Upon the strength of a statutory provision (*Cal. Civ. Code* § 2120) changing the liability of the company in such cases from that of a common carrier to that of a warehouseman; *Ibid.* And in another late case, where the goods were placed, on arrival upon the depot platform, and notice given to the consignee, who delayed removal, from difficulty in getting a drayman, until the goods were destroyed by fire on the second day, it was held that the company was not liable, even though the fire originated in a building erected by its permission on its premises; *Chalk v. Charlotte R. R.*, 85 *N. C.* 423.

¹¹ *Norway Plains Co. v. Boston etc. R. R.*, 1 *Gray* 263; *People v. Chicago etc. R. R. Co.*, 55 *Ill.* 95; *Cobb v. Railroad Co.*, 38 *Iowa* 601; and *Compare Pinney v. Charlotte etc. R. R. Co.*, 66 *No. Car.* 34; *Leavenworth etc. R. R. Co. v. Maris*, 16 *Kan.* 333.

¹² *Southern Express Co. v. McVeigh*, 20 *Gratt.* 264; *Cobb v. Railroad Co.*, 38 *Iowa* 601.

¹³ *Cobb v. Railroad Co.*, 38 *Iowa* 601; and see *Balti-*

Providing Adequate Cars.—It is the duty of the company to provide cars of sufficient strength;¹⁴ another fact that the shipper knowingly permits his goods to be packed in an insufficient car does not exempt the company from liability,¹⁵ unless he agrees to assume that risk.¹⁶ But if the shipper personally superintends the loading of the car, the company will not be liable for a loss resulting from its being unskillfully or negligently done.¹⁷

Carriage of Live-Stock.—The rule requiring the company to provide cars of sufficient strength,¹⁸ applies in respect of cars for the carriage of live stock,¹⁹ as well as to those for the carriage of merchandise.²⁰ But in the carriage of live stock, in the absence of negligence the company is not liable for such injuries as occur in consequence of the vitality of the freight.²¹ So that if one horse inflicts an injury upon another during transportation, the company is not liable, if the injury was caused by the peculiar propensities of the horse to fright or bad temper, or by the fault of their owner in attaching their halters, or not removing their shoes.²²

more etc. *R. R. Co. v. Green*, 25 *Md.* 72; *Pittsburg etc. Ry. Co. v. Nash*, 43 *Ind.* 423; *Cuhn v. Mich. etc. R. R. Co.*, 71 *Ill.* 96.

¹⁴ *St. Louis etc. Ry. Co. v. Dorman*, 72 *Ill.* 504; *Sloan v. St. Louis etc. R. R. Co.*, 58 *Mo.* 220.

¹⁵ *Pratt v. Ogdensburg etc. R. R. Co.*, 102 *Mass.* 557.

¹⁶ *Pratt v. Ogdensburg etc. R. R. Co.*, 102 *Mass.* 557; *Compare Lee v. Raleigh etc. R. R. Co.*, 72 *No. Car.* 236; *Illinois Cent. R. R. Co. v. Hall*, 58 *Ill.* 409.

¹⁷ *Ross v. Troy etc. R. R. Co.*, 49 *Vt.* 364; *East Tenn. etc. R. R. Co. v. Whittle*, 27 *Ga.* 535; *Chicago etc. R. R. Co. v. Shea*, 68 *Ill.* 471; *Clauber v. Ames. Express Co.*, 21 *Wis.* 21.

¹⁸ See preceding subdivision of this article.

¹⁹ See authorities cited in the note.

²⁰ *Indianapolis etc. R. R. Co. v. Allen*, 31 *Ind.* 394; *Indianapolis etc. Ry. Co. v. Strain*, 81 *Ill.* 504. Duty of railway companies to care for animals in course of transportation; see *U. S. Rev. Stats.* §§ 4386-4390.

²¹ *Penn. v. Buffalo etc. R. R. Co.*, 49 *N. Y.* 204; *s. c.* 10 *Am. Rep.* 355; *Cragin v. N. Y. etc. R. R. Co.* 51 *N. Y.* 61; *Mich. Southern etc. R. R. Co. v. McDonough*, 21 *Mich.* 165; *s. c.* 4 *Am. Rep.* 466; *Blower v. Great Western Ry. Co.*, *Law R.* 7 *Com. P.* 655; *Kendall v. London etc. Ry. Co.*, *Law R.* 7 *Ex.* 378.

²² *Evans v. Fitchburg R. R. Co.*, 111 *Mass.* 142; 15 *Am. Rep.* 19. For basis of foregoing paragraphs, and preceding subdivisions, see *Boone Corp.* § 258. In carrying of cattle at "owner's risk rates" limitation against liability held to apply only to carriage and not to refusal to deliver. *Gordon v. Great W. R. Co.*, 45 *L. T. N. S.* 509; 25 *Alb. L. J.* 218. Liability of company for injury to sheep carried, caused by burning of material used by them, despite release in contract, where caused by negligence in not furnishing appliances against fire; *Holsapple v. Rome etc. R. R.*, 86

Limiting Liability.—While a common carrier cannot exonerate himself from liability for his negligence or misfeasance, yet he may, by special agreement, fairly made, limit his common law liability, provided such limitation is reasonable and just, and does not contravene any laws or a sound public policy.²³ And in a recent case where in an agreement between a railway company and a shipper for the transportation of horses over the railway, there was a stipulation which provided that, as a condition precedent to his right to recover damages for any loss or injury to the horses while in transit, the shipper would give notice in writing of his claim therefor to some officer of the said railway company or its nearest station agent, before the horses were removed from the place of destination, or from the place of delivery to the shipper, and before such horses were mingled with other stock, it was held that the agreement is reasonable, and when fairly made, is binding upon the parties thereto.²⁴ So in another late case where a railroad company received merchandise to be transported to a point beyond its own law of railroad, over its own and other lines of road connecting with it, and gave to the shipper its receipt, stating that the merchandise was shipped "at owner's risk," it was held that this receipt is a special contract limiting the liability of the carrier;²⁵ and that such connecting lines of railroad are entitled to the benefits of the exemptions from liability contained in it.²⁶

San Francisco, Cal., A. J. DONNER.

N. Y. 275. Compare succeeding subdivision on Limiting Liability.

²³ *Sprague v. Missouri Pac. Ry. Co.*, (Kan.) 8 Pac. Rep. 465, and note, 469.

²⁴ *Sprague v. Missouri Pac. Ry. Co.*, 8 Pac. Ry. Co., 465. Following *Gaggin v. Kansas Pac. Ry. Co.*, 12 Kan. 416; See also *Rice v. Kansas Pac. Ry. Co.*, 68 Mo. 314; *Oxley v. St. Louis etc. Ry.* 65 Id. 629; *Dawson v. St. Louis etc. Ry. Co.*, 76 Id. 514; *Express Co. v. Caldwell*, 21 Wall. 264; *Texas Cent. Ry. v. Morris*, 16 Am. and Eng. R. R. Cas. 259, and cases there cited.

²⁵ *Kiff v. Atchiston etc. R. R. Co.*, (Kan.) 4 Pac. Rep. 401.

²⁶ *Kiff v. Atchiston etc. R. R. Co.*, 4 Pac. Rep. 401. And that neither of the companies running such connecting lines is liable for damages to the merchandise transported, unless it is shown that such damages arise from the negligence of the company sought to be charged; *ibid.* See also *Steamboat Emily v. Carney*, 5 Kan. 645; *Mo. Pac. Ry. Co. v. Haley*, 25 Id. 36; *K. C. etc. R. Co. v. Simpson*, 30 Id. 645; *Whitworth v. Erie Ry. Co.*, 87 N. Y. 413; *Shear. & Redf. Negl.* § 12.

CONSTITUTIONAL LAW—CORPORATION — REPEAL OF CHARTER — INJUNCTION— PUBLIC SERVICES.

LOUISVILLE GAS COMPANY v. CITIZENS GAS- LIGHT COMPANY.

Supreme Court of the United States, Dec. 1885.

1. *Gas-Light Companies—Louisville Gas Company—Public Services.*—The grant by the legislature of Kentucky, in 1869, to the Louisville Gas Company, for the term of twenty years, of "the exclusive privilege of erecting and establishing gas-works in the city of Louisville, and of vending coal gas-lights, and supplying the city and citizens with gas by means of public works," that is, by means of pipes laid in the streets and public ways of that city, constituted a contract, within the meaning of the national constitution, and was not forbidden by that clause in the bill of rights of Kentucky which declares that "all freemen, when they form a social compact, are equal, and that no man or set of men are entitled to exclusive, separate public emoluments or privileges from the community, but in consideration of public services." Within the meaning of that clause the services which the company undertook to perform were public services, affecting the interests and rights of the public generally.

2. *Right to Repeal or Amend Charter.*—By a general statute of Kentucky, passed in 1856, it was declared that "all charters and grants of or to corporations, or amendments thereof, shall be subject to amendment or repeal at the will of the legislature, unless a contrary intent be expressed; provided, that while privileges and franchises so granted may be changed or repealed, no amendment or repeal shall impair other rights previously vested;" also that the provisions of that statute shall only apply to charters and acts of incorporation to be granted hereafter." By an act passed in 1869, amendatory of the charter of the Louisville Gas Company of 1867, and granting the exclusive privileges before mentioned, it was provided that "no alteration or amendment to the charter of the gas company shall be made without the concurrence of the city council and the directors of the gas company." *Held*, that the last act "plainly expressed" an intent that the charter of the company should not be subject to amendment or repeal at the mere will of the legislature, but only with the concurrence of the city council and the company's directors.

3. *Injunction.*—According to the principles announced in *New Orleans Gas-Light Co. v. Louisiana Light, etc., Co.*, the Citizens' Gas-Light Company, incorporated in 1872, and endowed with the privilege of manufacturing and distributing gas in the city of Louisville, by means of pipes and mains laid in its streets and public ways, is not entitled to an injunction restraining the Louisville Gas Company from claiming and exercising the exclusive privileges granted by its charter.

In Error to the Court of Appeals of the State of Kentucky.

This is a writ of error to the highest court of Kentucky. The general question to be determined is, whether certain legislation of that commonwealth is in conflict with the clause of the National Constitution, which forbids a State to pass

any law impairing the obligation of contracts. The appellant, the Louisville Gas Company, contends that its charter, granting certain exclusive rights and privileges, constituted, within the meaning of that Constitution, a contract, the obligation of which has been impaired by the charter subsequently granted to the appellee, the Citizens' Gaslight Company. The Court of Appeals of Kentucky sustained as constitutional the legislation under the authority of which the latter company is exercising the rights, privileges, and franchises conferred by its charter.

By an Act of the General Assembly of Kentucky, approved February 15, 1838 (Sess. Acts 1837-38, p. 206), the Louisville Gas & Water Company was created a corporation, to continue for the term of thirty years from January 1, 1839. It was made its duty, within three years after its organization, to establish in Louisville a gas manufactory of sufficient extent and capacity to supply that city and its people with such public and private lights as might from time to time be required, and within five years after the establishment of its gas-works, to erect and establish water-works sufficient to supply the city with water for the extinguishment of fires, for the cleansing and sprinkling of streets and alleys, and for all manufacturing and domestic purposes; to which end it might lay down and extend pipes through any of the streets and alleys of the city, the company being responsible to the city for any damages resulting therefrom. The act imposed a limit upon the price to be charged for gaslights used by the city, and gave the latter the right to subscribe for 4,000 shares in the company, payment for one-half of which could be made in city coupon bonds for \$200,000, redeemable at any time within three years after the expiration of the company's charter. It was made a fundamental condition that, upon the termination of the company's charter, the city at its election could take the gas and water works at a fair estimate of what they would cost and be worth at that time, to be ascertained by the judgment of competent engineers, selected by the parties, or, in case they disagreed, by the Louisville Chancery Court. Under this charter the company proceeded at once to erect gas-works, including suitable buildings and machinery. It supplied itself with all necessary apparatus, laid down mains and pipes, and erected lamp-posts, for the purpose of lighting the streets. It supplied gas for the public buildings and for street lights, as well as for domestic purposes. And it continued to do so during the term of its original charter.

By an act passed in 1842, the authority to erect water-works was withdrawn by the legislature. By an act entitled "An act to extend the charter of the Louisville Gas Company," approved January 1, 1867, and to continue in force for twenty years from that date, unless the city of Louisville should exercise its privilege of purchasing the works established under the authority of the orig-

inal charter. That act created a corporation by the name of the "Louisville Gas Company," with a capital stock of \$1,500,000. It provided, among other things, that such stock should consist, "First, of the stock of the present Louisville Gas Company, on the thirty-first of December, 1868, at par value; secondly, of the contingent fund and undivided profits that the company may own at the expiration of the present charter, said fund to be capitalized *pro rata* for the benefit of the present stockholders, except fractional shares, which shall be paid in cash; and, thirdly, new stock may be issued and sold by the new company, when required, to the extent of the capital stock, the sales to be made at public auction, after ten days' notice in the city papers; should said stock be sold above its par value, such excess shall not be capitalized or divided among the stockholders, but be employed in the first extensions made by the company after the sale of said stock;" that the business of the company should be to make and furnish gas to the city of Louisville and its residents; within two years after its charter took effect, should extend the gas distribution to Portland, and lay down mains, and erect street lights in certain named streets in that part of the city; should extend mains wherever the private and public lights would pay eight per cent. on the cost of extension, until its entire capital was absorbed in the gas-works and extensions—continuing the use of the pipes and conductors already laid down, and, with the consent of the city council, extending the pipes and conductors through other streets and alleys of the city. It was also provided that the company should put up gas-lamps at certain distances apart on the streets where there were mains, supply the same with gas, and light and extinguish the same, and charge the city only the actual cost thereof,—such charges not to exceed the average charges for similar work or service in the cities of Philadelphia, Baltimore, Cincinnati, Chicago, and St. Louis, and the charges against other consumers not to be greater than the average price in said cities; that the stockholders, exclusive of the city of Louisville, should elect five directors, while the general council of the city should elect four; that the city might, upon the termination of the charter, purchase the gas-works at a fair estimate of what they would be then worth; and that the charter should be valid and in force when accepted by those who held the majority of stock in the old company, all of whose property should belong to the new company.

When the act of 1867 was passed, the city owned 4,985 shares of the stock of the old company. All the gas with which its streets were then lighted, or which was furnished to its people, was supplied by that company.

On the twenty-second of January, 1869, an act was passed amending that of January 30, 1867. Its preamble recites that the city of Louisville and the stockholders of the old company had ac-

cepted the extended charter, and desired that the amendments embodied in that act should become part of that charter. The amended charter repealed so much of the act of 1867 as allows a profit of eight per cent. on the cost of extensions, and, among other things, provides that the company shall extend its main pipes whenever the public and private lights, immediately arising from said extension, will pay seven per cent. profit on the cost thereof; that the company shall put lamp-posts, fixtures, etc., along the street mains, as they are extended, at a distance apart of about two hundred feet; shall keep the lamps in order, furnish gas, and light and extinguish the same. each light to have an illuminating power of about twelve sperm candles; shall furnish public lights to the city at actual cost, which shall in no event exceed annually \$35 per lamp; that the charges to private consumers shall be so graded that the company's profits shall not exceed twelve per cent. per annum on the par value of the stock, ten per cent. of which may be drawn by stockholders in semi-annual dividends, and the remaining two per cent. to be laid out for extensions, not to be capitalized except at the end of five years. The fifth and sixth sections of the last act are as follows: "(5) That said gas company shall have the exclusive privilege of erecting and establishing gas-works in the city of Louisville during the continuation of this charter, and of vending coal gas-lights, and supplying the city and citizens with gas by means of public works: provided, however, this shall not interfere with the right of anyone to erect, or cause to be erected, gas-works on their own premises, for supplying themselves with light. (6) That no alteration or amendment to the charter of the gas company shall be made without the concurrence of the city council and the directors of the gas company."

By an act approved March 21, 1872, the Citizens' Gaslight Company of Louisville was incorporated for the term of fifty years, with authority to make, sell, and distribute gas for the purpose of lighting public and private buildings, streets, lanes, alleys, parks, and other public places in that city and its vicinity. It was authorized, the general council consenting, to use the streets and other public ways of the city for the purpose of laying gas-pipes, subject to such regulations as the city council might make for the protection of the lives, property, and health of citizens. That body did so consent by ordinance passed December 13, 1877.

The Louisville Gas Company having claimed that the foregoing section of the act of January 22, 1869, granting the exclusive privileges therein defined, constituted a contract, the obligation of which was impaired by the charter of the plaintiff, and that the latter's charter was therefore void, the present suit was brought by the Citizens' Gaslight Company in the Louisville Chancery Court for the purpose of obtaining a perpetual injunction against the assertion of any such exclusive privileges, and against any interference with

the plaintiff's rights as defined in its charter. Among the rights asserted by the latter under its charter was "to make, sell, and supply coal gas for lighting the public buildings and other places, public and private," in Louisville and the adjoining localities, by means of pipes laid in the public ways and streets. The court of original jurisdiction dismissed the suit. Upon appeal to the Court of Appeals, the decree was reversed, with directions to issue a perpetual injunction restraining the Louisville Gas Company from claiming and exercising the exclusive right of manufacturing and supplying gas to the city of Louisville and its inhabitants.

Thomas F. Hargie, John K. Goodloe and John G. Carlisle, for plaintiff in error; *John Mason Brown, George M. Davie, and Wm. Lindsay*, for defendant in error.

Mr. Justice HARLAN, after stating the facts of the case in the foregoing language, delivered the opinion of the court:

Two of the judges of the State court held that the clause of the bill of rights of Kentucky, which declares that "all freemen, when they form a social compact, are equal, and that no man or set of men are entitled to exclusive, separate public emoluments or privileges from the community but in consideration of public services" (Const. Ky. 1799, art. 10, § 1; 1850, art. 13, § 1), forbade the general assembly of that commonwealth to grant to a private corporation the exclusive privilege of manufacturing and distributing gas, for public and private use, in the city of Louisville, by means of pipes and mains laid under the streets and other public ways of that municipality. The other judges were of opinion that that clause did not prohibit a grant by the State to a private corporation, whereby certain privileges were conferred upon the latter in consideration of its discharging a public duty, or of rendering a public service; that the municipality of Louisville being a part of the State government, there was a public necessity for gaslights upon its streets and in its public buildings, almost as urgent as the establishment of the streets themselves; that the services thus to be performed by the corporation were, in the judgment of the legislative department, an adequate consideration for the grant to it of exclusive privileges; and, consequently, that the grant was a contract, the rights of the parties under it to be determined by the rules applicable to contracts between individuals.

While the judgment below, in view of the equal division in opinion of the judges of the State court, does not rest upon any final determination of this question by that tribunal, it cannot be ignored by us; for, at the threshold of all cases of this kind, this court must ascertain whether there is any such agreement on the part of the State as constitutes a contract within the meaning of the Constitution of the United States. If the services which the gas company undertook to perform, in consideration of the exclusive privileges granted

to it, were public services, within the meaning of the bill of rights of Kentucky, then the grant of such privileges was not forbidden by the State Constitution. In *New Orleans Gaslight Co. v. Louisiana, etc. Co.*, just decided, it is held that the supplying of gas to a city and its inhabitants by means of pipes and mains laid under its public ways, was a franchise belonging to the State, and that the services performed as the consideration for the grant of such a franchise are of a public nature. Such a business is not like that of an ordinary corporation engaged in the manufacture of articles that may be quite as indispensable to some persons as are gas-lights. The former articles may be supplied by individual effort, and with their supply the government has no such concern that it can grant an exclusive right to engage in their manufacture and sale. But as the distribution of gas in thickly populated districts is, for the reasons stated in the other case, a matter of which the public may assume control, services rendered in supplying it for public and private use constitute, in our opinion, such public services as, under the Constitution of Kentucky, authorized the legislature to grant to the defendant the exclusive privileges in question. This conclusion is justified, we think, by the decisions of the Court of Appeals of that State. In *O'Hara v. Lexington & O. R. Co.*, 1 Dana, 232, the point was made that an inquisition for the assessment of damages for the taking of land by a railroad corporation was void upon certain grounds, one of which was that the company's charter granted exclusive privileges, without any consideration of public services. Chief Justice Robertson, speaking for the court, said that, in the true sense of the Constitution, no exclusive privileges were granted to the corporation; observing that "if the charter be on that ground unconstitutional, it would be difficult to maintain the validity of any statute for incorporating any bridge company or any bank, or even for granting a ferry franchise."

But the principles announced in *Gordon v. Winchester*, 12 Bush, 114, seem more directly applicable to the present case. Judge Cofer, speaking for the whole court, after observing that there were unquestionably cases in which the State may, without violating the Constitution, grant privileges to specified individuals, which from the nature of the case could not be enjoyed by all, and in respect of which the State could designate the grantee, said: "But in all such cases the person, whether natural or artificial, to whom the privilege is granted, is bound, upon accepting it, to render to the public that service the performance of which was the inducement to the grant; and it is because of such obligation to render service to the public that the legislature has power to make the grant." In illustration of this principle, he proceeds to say: "Permission to keep a tavern or a ferry, to erect a toll-bridge over a stream where it is crossed by a public highway, to build a mill-dam across a navigable stream, and the like, are

special privileges, and, being matters in which the public have an interest, may be granted by the legislature to individuals or corporations; but the grantee, upon accepting the grant, at once becomes bound to render that service to secure which the grant was made; and such obligation on the part of the grantee is just as necessary to the validity of a legislative grant of an exclusive privilege as a consideration, either good or valuable, is to the validity of an ordinary contract. Whenever, by accepting such privilege, the grantee becomes bound, by an express or implied undertaking, to render service to the public, such undertaking will uphold the grant, no matter how inadequate it may be; for the legislature being vested with power to make grants of that character when the public convenience demands it, the legislative judgment is conclusive, both as to the necessity for making the grant and the amount of service to be rendered, and the courts have no power to interfere, however inadequate the consideration or unreasonable the grant may appear to them to be. But when they can see that the grantee of an exclusive privilege has come under no obligation whatever to serve the public in any manner, in any way connected with the enjoyment of the grant, it is their duty to pronounce the grant void, as contravening that provision of the bill of rights which prohibits the granting of exclusive privileges, except in consideration of public services." These observations were made in a case in which it was held that a statute giving a building association the right to receive a greater rate of interest than was allowed by the general law was unconstitutional, in that it conferred exclusive privileges not in consideration of any public services to be performed.

In *Com. v. Bacon*, 13 Bush, 212, the question was as to the constitutionality of an act giving a strictly private corporation, which owed no duty to the public, a monopoly of an ordinary business in which every citizen was entitled to engage upon terms of equality. Its validity was attempted to be sustained on the same principle upon which the grant of ferry privileges was upheld. But the act was held to be unconstitutional; the court, among other things, saying: "Ferries are parts of highways, and the government may perform its duty in establishing and maintaining them through the agency of private individuals or corporations, and such agencies are representatives of government, and perform for it a part of its functions. And in consideration of the service thus performed for the public, the government may prohibit altogether persons from keeping ferries and competing with those it has licensed. The establishment of public highways being a function of government, no person has a right to establish such a highway without the consent of the government; and hence, in prohibiting unlicensed persons from keeping a ferry, the government does not invade the right of even those who own the soil on both sides of the stream."

In the later case of *Com. v. Whipps*, 80 Ky. 272, where the validity of a statute of Kentucky authorizing a particular person to dispose of his property by lottery was assailed as a violation of the before-mentioned clause in the bill of rights, Pryor, J. (Chief Justice Lewis concurring), said: "This constitutional inhibition was intended to prevent the exercise of some public function, or an exclusive privilege affecting the interests and rights of the public generally, when not in consideration of public service; and if made to apply to the exercise of mere private rights or special privileges, it nullifies almost innumerable enactments that are to be found in our private statutes, sanctioned in many instances by every department of the State government."

The precise question here presented seems not to have been directly adjudicated by the highest court of the State. But, as the exclusive privileges granted to the Louisville Gas Company affected the rights and interests of the public generally, and related to matters of which the public might assume control, we are not prepared to say that the grant was not in consideration of public services, within the meaning of the Constitution of Kentucky. We perceive nothing in the language of that instrument, or in the decisions of the highest court of that commonwealth, that would justify us in holding that her legislature, in granting the exclusive privileges in question, exceeded its authority.

2. On behalf of the Citizens' Gaslight Company, it is contended that the charter of the Louisville Gas Company, granted January 30, 1867, and amended by the act of January 22, 1869, was at all times subject to alteration or repeal at the pleasure of the legislature. Assuming that the act of 1867 was not a prolongation of the corporate existence of the original Louisville Gas Company, but created a new corporation by the same name, it is clear that such charter was granted subject to the provisions of a general statute of Kentucky enacted on the fourteenth of February, 1856, entitled "An act reserving power to amend or repeal charters and other laws." That statute is as follows: "Section 1. That all charters and grants of or to corporations, or amendments thereof, and all other statutes, shall be subject to amendment or repeal at the will of the legislature, unless a contrary intent be therein plainly expressed: provided, that while privileges and franchises so granted may be changed or repealed, no amendment or repeal shall impair other rights previously vested. Sec. 2. That when any corporation shall expire or be dissolved, or its corporate rights and privileges shall cease, by reason of a repeal of its charter or otherwise, and no different provision is made by law, all its works and property, and all debts payable to it, shall be subject to the payment of debts owing by it, and then to distribution among the members according to their respective interests; and such corporation may sue and be sued as before, for the

purpose of settlement and distribution as aforesaid. Sec. 3. That the provisions of this act shall only apply to charters and acts of incorporation to be granted hereafter; and that this act shall take effect from its passage."

The language of this statute is too plain to need interpretation. It formed a part of the charter of the new Louisville Gas Company when incorporated in 1867, and the right of the legislature, by a subsequent act, passed in 1872, to incorporate another gas company to manufacture and distribute gas in Louisville, by means of pipes laid, at its own cost, in the public ways of that city, so far from impairing the obligation of defendant's contract with the State, was authorized by its reserved power of amendment or repeal, unless it be that the act of January 22, 1869, "plainly expressed" the intent that the charter of the new Louisville Gas Company should not be subject to amendment or repeal at the mere will of the legislature. The judges of the State court all concurred in the opinion that no such intent was plainly expressed. As this question is at the very foundation of the inquiry whether the defendant had a valid contract with the State, the obligation of which has been impaired by subsequent legislation, we cannot avoid its determination. Whether an alleged contract arises from State legislation, or by agreement with the agents of a State by its authority, or by stipulations between individuals exclusively, we are obliged, upon our own judgment, and independently of the adjudication of the State court, to decide whether there exists a contract within the protection of the Constitution of the United States. *Jefferson Branch Bank v. Skelly*, 1 Black, 436; *Wright v. Nagle*, 101 U. S. 794; *Railroad Co. v. Palmes*, 109 U. S. 257; s. c., 3 Sup. Ct. Rep. 193. After carefully considering the grounds upon which the State court rests its conclusion, we have felt constrained to reach a different result. We are of opinion that the act of 1869 plainly expresses the intention that the company should enjoy the rights, privileges and franchises conferred by the act of 1867, as modified and extended by that of 1869, without its charter being subject to amendment or repeal at the will of the legislature. In ascertaining the legislative intent, we attach no consequence to the negotiations between the Louisville Gas Company and the city council of Louisville as to the provisions to be embodied in any amended charter giving the company exclusive privileges from January 1, 1869; for the words of the act of 1869 being, in our opinion, clear and unambiguous, effect must be given to them according to their ordinary signification. The clause in that act declaring that "no alteration or amendment to the charter of the gas company shall be made without the concurrence of the city council and the directors of the gas company," plainly expresses, as we think, the intention that the company's charter should not, as provided in the statute of 1856, be amended or repealed "at the will of the legisla-

ture." When the legislature declared that there shall be no alteration or amendment without the concurrence of the city council and the directors of the company, it must have intended to waive, with respect to that company, its absolute power reserved by the act of 1856, of amending or repealing charters of incorporations thereafter granted. The language used is wholly inconsistent with any other purpose than to withdraw the charter of that particular company from the operation of the act of 1856, so far as to make the right of amendment or repeal subject, not to the mere will of the legislature, but, in the first instance, to the concurrence of the city council and the directors of the gas company. If there can be no amendment or repeal without the concurrence of the city council and the directors of the company, then it cannot be said that such amendment or repeal depends entirely upon the will of the legislature, as declared in the act of 1856. It was as if the legislature had said: "As the municipal government of Louisville and the company are agreed, the latter may enjoy the rights, privileges and franchises granted by its charter for the whole term of twenty years, unless before the expiration of that period the city council and its directors concur in asking alterations or amendments, which will be made if, in the judgment of the general assembly, the public interests will be thereby promoted."

3. But it is argued that, as the defendant's charter of 1867 conferred upon it no exclusive privileges, the granting of such privileges in the act of 1869 was without consideration, and is to be deemed a mere gratuity. To this it is sufficient to answer that, apart from the public services to be performed, the obligations of the company were enlarged by the act of 1869, and its rights under that of 1867 materially lessened and burdened in the following particulars: The amended charter limited the profits of the company to twelve per cent. per annum on the par value of its stock, two per cent. of which were required to be used for extensions, and not to be capitalized except at the end of each five years, while under the original charter the only limitation upon the prices to be charged private consumers was that they should not exceed the average charges in Philadelphia, Baltimore, Cincinnati, Chicago and St. Louis; the amended charter limited the amount to be annually charged the city per lamp to \$35, no matter what its actual cost was, while under the original charter the company was entitled to charge the city for the actual cost of supplying, lighting and extinguishing lamps, not, however, exceeding the average charges in the before-mentioned cities; and by the amended charter the company was required to extend its mains when its income from lights would amount to seven per cent. on such extensions, while under the original charter such extensions were not required unless its income therefrom would pay eight per cent. These concessions upon the part of the

company seem to be of a substantial character, and constituted a sufficient consideration to uphold the grant of exclusive privileges. If the consideration appears now to be inadequate upon a money basis, that was a matter for legislative determination, behind which the courts should not attempt to go.

4. These preliminary matters being disposed of, and without referring to some matters discussed by counsel, but not fairly arising on the pleadings or in any evidence in the cause, it is clear that, upon the main issue, this case is determined by the principles announced in *New Orleans Gaslight Co. v. Louisiana Light, etc., Co.*, just decided. For the reasons there stated, and which need not be repeated here, we are of opinion that the grant to the Louisville Gas Company by the act of January 22, 1869, amendatory of the act of January 30, 1867, of the exclusive privilege of erecting and establishing gas-works in the city of Louisville during the continuance of its charter, and of vending coal gas-lights, and supplying that municipality and its people with gas by means of public works—that is, by means of pipes, mains, and conduits placed in and under its streets and public ways, constituted a contract between the State and that company which was impaired by the charter of the Citizens' Gaslight Company. The charter of the latter company is therefore inoperative, in respect of these matters, until, at least, the exclusive privileges granted the Louisville Gas Company cease, according to the provisions of its charter. As the object of the plaintiff's suit was to obtain a decree enjoining the defendant from claiming and exercising the exclusive privileges so granted to it, the judgment of the Louisville Chancery Court dismissing the bill should have been affirmed by the Court of Appeals. The judgment of the latter court, reversing that of the court of original jurisdiction, is itself reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

NOTE.—While it is settled beyond cavil that a private charter is a contract between the legislature and the corporation, within the meaning of the constitutional prohibition against State legislation impairing the obligation of contracts, it is equally a recognized principle of law that the State may reserve the right to repeal, alter, or amend the charter (in respect to corporations created thereafter), and that when this is done, a subsequent repeal, alteration, or amendment does not fall within the constitutional objection, inasmuch as that provision becomes a condition of the grant and one of the terms of the contract.¹ The importance of this reservation, from the possible results

¹ *Tomlinson v. Jessup*, 15 Wall. 454; *Miller v. State*, 15 Wall. 478; *Holyoke v. Lyman*, 15 Wall. 500; *S. Eiman v. Smith*, 1 Black (U. S.) 587; *Chinleclamouche Lumber Co. v. Comm.*, 100 Pa. St. 438; *State v. Person*, 32 N. J. L. 134; *Perrin v. Oliver*, 1 Minn. 202; *Gardner v. Hope Ins. Co.*, 9 R. I. 194; *Comm. v. Fayette Co. R. R.*, 55 Pa. St. 452; *Miners' Bank v. United States*, 1 Greene (Iowa) 553.

of irresponsible action on the part of great corporations, began to be felt at an early day. In fact (as remarked by Chief Justice Waite, in *Spring Valley Water Works v. Schottler*,² as soon as the decision in the *Dartmouth College* case gave the sanction of the supreme federal tribunal to the inviolability of charters, many of the States began to act on the suggestion of Mr. Justice Story in that case, and to reserve the power to alter and repeal. The right to alter and amend is said to include authority both to withdraw powers granted to the corporation and to confer new powers upon it and require their exercise.³ But on the other hand, "under the pretence of amending its charter, the legislature cannot compel a company to embark upon a new enterprise radically and essentially different from that contemplated in the original grant of corporate franchises."⁴ Where two railroads, each incorporated under a statute containing no reservation of the right to alter or repeal, are consolidated, the new corporation is amenable to the provisions of a law passed in the meantime expressly reserving that power.⁵ The power of revocation may be reserved in the constitution of the State, in force when the corporation is organized, and in that case it need not be repeated in the charter.⁶ And where several charters are contained in one act, it is enough if the power of repeal be reserved in any part of the same act, provided the language of the clause is sufficient to embrace the whole act.⁷ Of course the State is not prohibited from altering a charter, even in its most material features, if the changes are accepted and agreed to by the corporation.⁸ And the assent of a corporation to legislative changes in its charter may be inferred from such circumstances as would raise a similar presumption in the case of a natural person.⁹

And further it must be observed that this constitutional immunity from legislative interference cannot be carried so far as to relieve the corporation from the proper and reasonable control of the State, in cases where its franchises have been perverted or abused, or the rights of third persons are in danger of being compromised through its actions. "While private charters are thus protected, it is also true that corporations, like natural persons, are subject to those regulations which the State may prescribe for the good government of the community. There is no reason why corporations should not be subject to police regulations as well as natural persons."¹⁰ To the same effect are the remarks of Mr. Justice Harlan in *Chicago Life Ins. Co. v. Needles*.¹¹ "The right of the plaintiff in error to exist as a corporation, and its authority, in that capacity, to conduct the particular business for which it was created, were granted subject to the condition that the privileges and franchises conferred upon it should not be abused, or so employed as to defeat the ends for which it was established, and that, when so abused or misemployed, they might be withdrawn or reclaimed by the State, in such way and by such modes of procedure as were consistent with law. Although no such condition is expressed in the company's charter, it is necessarily implied in every grant of corporate existence. * * * Equally implied in our judgment is

the condition that the corporation should be subject to such reasonable regulations in respect to the general conduct of its affairs as the legislature may, from time to time, prescribe, which do not materially interfere with, or obstruct the substantial enjoyment of the privileges of the State has granted, and serve only to secure the ends for which the corporation was created." And see *Bank of the Republic v. Hamilton*,¹² *Mobile & c. R. v. State*,¹³ *Louisville & c. Co. v. Ballare*.¹⁴ So a law which gives a workman, employed by a sub-contractor on a railroad, the right to recover against the corporation, applies to existing companies and is not unconstitutional.¹⁵

And "there is no implied contract between a State and a corporation that there shall be no change in the laws existing at the time of the incorporation which shall render the use of the franchise more burdensome or less lucrative, any more than there is between the State and an individual that the laws existing at the time of the acquisition of property shall remain perpetually in force." Day, J., in *Rodemacher v. Railroad*.¹⁶ Finally, when the legislature limits its power to impose any further duties, liabilities, or obligations on a corporation, it does not restrict its power to make enactments as to the mode, the time when, and the courts where, such liabilities shall be enforced.¹⁷

H. CAMPBELL BLACK.

¹² 21 Ill. 53.

¹³ 29 Ala. 578.

¹⁴ 2 Met. (Ky.) 165.

¹⁵ *Granahan v. Railroad*, 30 Mo. 546.

¹⁶ 41 Iowa, 301.

¹⁷ *Gowen v. Railroad*, 44 Me. 141.

CRIMINAL LAW—LARCENY.

REGINA v. ASHWELL.

Court for Crown Cases Reserved. Dec. 5, 1885.

The prisoner asked one K. to lend him a shilling, and K. gave him what he supposed to be a shilling, but which was in fact a sovereign. The prisoner changed the sovereign, kept the change, and when told by K. of the mistake, denied receipt of the sovereign, but afterwards admitted that he had the sovereign and had spent half the money. *Held*, larceny.

This case had been twice argued, on the first occasion on the 20th of March, before five judges, who, being divided in opinion, directed it to be re-argued before all the judges, which took place on the 13th of June last, when, being still divided in opinion, they took time to consider their judgment. The case raised a highly technical point in the law of larceny. The point was shortly this, whether, if a man hands another a sovereign for a shilling, and the other seeing it in a short time, though not at the moment, keeps it, he can be convicted of stealing it. The case, which was reserved by Denman J., at the assizes at Leicester in January last, was shortly stated this, that the prisoner asked one Keogh to lend him a shilling, and Keogh put his hand in his pocket and pulled out what he believed to be a shilling, but what was in fact a sovereign, and handed it to the prisoner, who went away, and in an hour afterward

¹ 110 U. S. 352.

² *Worcester v. Norwick* &c. R. R. 100 Mass. 103.

³ *Ames v. Railroad*, 21 Minn. 255.

⁴ *Shields v. Ohio*, 95 U. S. 819.

⁵ *Delaware Railroad v. Tharp*, 5 Herringt. 451.

⁶ *Ferguson v. Bank*, 3 Sneed, 609.

⁷ *Ehrenzeller v. Union Canal Co.*, 1 Rawle, 190.

⁸ *Comm. v. Cullen*, 13 Pa. St. 132.

⁹ *Gorman v. Pacific Railroad*, 20 Mo. 450.

¹⁰ 113 U. S. 580.

changed it and kept the change, and next day when Keogh told him of the mistake, denied the receipt of the sovereign, and gave contradictory accounts as to where he got the sovereign, but afterward admitted that he had the sovereign and had spend half the money. It was objected that there was no larceny, as there was no evidence that the prisoner, when he received the coin, knew it to be a sovereign. The jury found that the prisoner did not know it at the time, but that he discovered it "soon" afterward, and fraudulently appropriated it, knowing that the owner had not intended to part with it.

Several of the judges before whom the case had been argued were not able to be present, and their judgments were read by others. It will be seen that seven judges were for affirming the conviction, and seven were for reversing it; and the rule of this court being that the presumption is to be in favor of the conviction—*presumitur pro negante*—the conviction was affirmed.

SMITH, J., delivered his judgment to the effect that it was not a case of stealing, as stealing must be a taking against the will of the owner, with a felonious intent at the time of the taking. For this he cited authorities. In the present case it seemed to him that there was no taking against the will of the owner, nor with a felonious intent, and the case he thought came within the law as laid down by the judges in *Reg. v. Middleton*, L. R., 2 C. C. R. 45, that the prisoner must have been aware of the mistake at the time of the taking in order to render him guilty of felony. It was not, he thought, a mere case of finding, for Keogh delivered the coin to the prisoner who took it honestly. It was a confusion of terms to suppose the finding out of the mistake some time after the taking made it like a case of finding, knowing the owner or knowing he might be found. He did not think the cases cited for the prosecution, *Cartwright v. Green*, 8 Ves. 405; *Merry v. Green*, 8 M. & W. 623, were in point. In those cases there was no intention to deliver the thing, here there was, and the prisoner was not guilty of larceny at common law. And as to his liability as bailee, it was necessary that the thing should have been delivered as a bailment, whereas here it was not, and there was no condition expressed or implied to return the coin delivered. The real obligation on the prisoner was to return 19s when he found the coin was a sovereign, but he was not bound to return the sovereign. He came, therefore, to the conclusion that the conviction ought to be quashed.

CAVE, J.'s judgment, (which was read by the Lord Chief Justice, he being unable to attend,) was to the contrary effect as to larceny at common law. It was impossible, he thought, that the prisoner, who at the moment of taking the coin was under a mistake as to what it was, could be guilty of taking it feloniously. As there was a mistake as to the coin, no property passed; and the question was as to possession, as to which he

thought the person taking the thing could not acquire possession of it until he found what it was. Here the prisoner, when he took the coin, was not aware what it was, and did not become aware of it until afterward. He was unable to reconcile the cases, and thought the law correctly laid down in *Merry v. Green*, 7 M. & W. 623. In his judgment a man could not be presumed to assent to the possession of a thing until he knew what it was, and here the prisoner did not assent to the possession of the coin until he knew it was a sovereign. He had consented to the responsibility of the possession only of a shilling. In this case the prisoner did not at the time of taking, render himself responsible for the possession of a sovereign, and therefore could not set up a lawful possession of it, for at the moment he knew what it was he elected fraudulently to keep it, and therefore was guilty of larceny at common law.

MATHEW, J., declared that he was of the same opinion as Smith, J., that is, that the prisoner was not guilty of larceny. There was no dishonest act in the taking, and it would not do, he thought, by a sort of fiction to refer the taking to the time of changing the sovereign. And certainly, even if that was a taking, it was not a felonious taking, for he might honestly have changed the coin, and it would only be dishonest if he meant to keep the whole. In his view there was no evidence of a felonious taking at any time; and if this conviction could be supported, then any one guilty of any dishonesty could be convicted of larceny. That was a change in the law which could only be effected by statute. He thought, therefore, that the conviction should be quashed.

STEPHEN, J., read a lengthy and elaborate judgment, in which he said, Day and Wills, JJ., concurred, to the same effect. From the earliest time, in the history of our law, larceny had been defined to be a felonious taking against the will of the owner and with the *animus furandi*—that is the intention to steal—at the time. For this he cited Glanville, Bracton, and the Year-books, from Edward III. to Edward IV. He especially cited Bracton defining larceny as *contractatio rei alieni fraudulenter, cum animo furandi*, and he dwelt upon the case in the 13 Edw. 4, the case of the carrier, in which all the judges held that a carrier was not liable for taking the whole bulk of a package, though he would be if he "broke bulk," as it was called, that is, opened the package and took out something. So that if he took a pint of wine out of a cask he was guilty, but not if he took the whole pipe. The rule of law he had stated was established, he said, by all the authorities, and he cited 3 Coke Inst., 1 Hale's Pleas of the Crown, Hawkins' Pleas of the Crown, and Foster's Crown law. That being the rule of law, he said, here the prisoner took the coin innocently, and though he dealt with it dishonestly an hour afterward, that did not make him guilty of larceny at common law. In cases of finding, it had been laid down that there was no larceny,

though in modern cases it was held that there was, if the finder knew the owner. *Re Thorburn*, 1 Den. Crown Cas. 387. The cases under this head, however, established the doctrine that a person, to be guilty of larceny, must have intended stealing at the time he took the thing; and if the present conviction was upheld, it would be quite inconsistent with those cases and cause a curious anomaly in the law. It could not, he thought, be held that a mere alteration of intention after the taking made the original taking felonious. The case showed that the first taking—the actual physical taking—must have been felonious in order to make it a case of stealing. In the case of *Reg. v. Glyde*, L. R. 1 C. C. 139, in 1868, the prisoner had picked up a sovereign and intended to keep it, but did not know the owner, and was held not guilty of larceny. In the cases of finding, the guilty knowledge—the knowledge of the owner—was required to have been at the time of finding and taking up. But in this case Ashwell received the coin honestly, not knowing it was a sovereign. He was, therefore, not guilty of larceny at common law. As to the point as to bailment, he agreed with Smith, J. •

HAWKINS, J., said he concurred in the judgment of his brother Cave.

MANISTY, J., agreed with his brother Stephen, after whose able and elaborate judgment he said, he need not add anything. He thought that the prisoner could not properly be convicted of larceny, either at common law or upon bailment, because at the time of the delivery of the coin neither party knew it to be a sovereign, so that there was neither a felonious taking nor a "bailment," i. e., an intentional delivery of a sovereign. In his view, the law was well settled on the subject in the case of *Reg. v. Middleton* (the case of a man taking up money at a post-office put before him by mistake), and he thought it would be most mischievous if it were now unsettled. That case, in his opinion, covered this case completely, as the prisoner was held guilty, because at the moment he took it up, he took it dishonestly; so that the judges put that as the decisive time—the time of the actual taking—not of a subsequent alteration of intention. The real remedy of the prosecutor was to sue the prisoner for nineteen shillings as money lent. That might be called "technical," but he was prepared to hold that that was the proper course, as the prisoner might honestly have changed the sovereign and was only liable to return the nineteen shillings. Here the taking was lawful, and so the prisoner was not guilty of larceny at common law, neither could he be convicted as a bailee, as there was no bailment of the sovereign.

FIELD, J., also concurred in the opinion that the prisoner was not guilty of larceny and could not be convicted of any crime by our law. He had had the advantage of reading the judgments of his brethren who had held the same view, and they had so abundantly and ably supported it, that

he did not think it necessary to add anything in support of it.

DENMAN, J., however, who had tried and reserved the case, said he had come to the same conclusion as his brother Cave and the Lord Chief Justice, whose judgment he had read. If he had thought the case covered by *Reg. v. Middleton* he should not of course have reserved it, but the opinion of some of the judges referred to by his brother Manisty as conclusive was only a dictum, and a dictum in which he himself had concurred, but did not consider it decisive of this case. The case was stated carefully and designedly in a neutral way; not therefore of course stating a felonious intention at the time of taking, and the very question reserved was whether the jury could rightly find that he was guilty of stealing the coin. On the whole, he thought, there was evidence on which the jury might find the prisoner guilty. There was no doubt as to the definition of larceny, that is fraudulently taking anything with felonious intention; and the question was whether there was a felonious taking. His brother Stephen put it as a case of fraudulent retention after an honest taking, but he denied that such was the case, for it could not be said that the prisoner believed he was taking a sovereign at the time of taking of the coin. There was some ambiguity in the use of the word "taking," and there was no real "taking" of the sovereign by the prisoner until he knew it was a sovereign, and so the case fell within the cases as to finding, in which it was held that if a man found something, and afterward found out the owner and then resolved not to return it, he was then, and not before guilty of larceny; so that the question was not whether he stole it at the time he first took it. He came to the conclusion, therefore, that the conviction ought to be upheld.

LORD COLERIDGE, C. J., then delivered his judgment to the same effect as Cave, J., that the prisoner was guilty of larceny at common law. He doubted whether it could be said that there was a "bailment" in the present case, as bailment meant a "contract," and here there was no contract as to the sovereign. As to the question of larceny at common law, he assumed that there must be a felonious taking, but delivery and taking must be acts into which intention entered. There must be an intentional intelligent taking, knowing what the thing was, and a man could not be said to take a thing when he did not know what it was. It could not be truly said that a man took what he did not know of, and he did not think that it was law. In this case, therefore, he thought that there was no delivery of the sovereign and no taking by the prisoner until he knew what it was, so that here at the time of taking the sovereign as such he intended to steal it, and so took it feloniously, that is the sovereign was taken and stolen at the same moment. The conviction could not be disturbed without overruling the decisions of Lord Eldon in *Cartwright v. Green*, and of

Parke, B., in *Merry v. Green*, and the decision of the judges in *Reg. v. Middleton*. The view he thus took was also in accordance with a case not cited in the argument, *Reg. v. Riley* (Dearsley's Crown Cases Reserved, 149), which was a distinct authority for upholding the present conviction. In this judgment his lordship said his brothers Grove, Pollock, and Huddleston concurred. There were, therefore, seven judges for affirming and seven for reversing the conviction, and as the rule in this court was *presumitur pro negante*, the conviction would be affirmed.

NOTE.—Larceny is "the felonious taking and carrying away of the personal goods of another."¹ Unless the act falls within the above definition, it is not larceny. The cases are very numerous, and the distinctions drawn are very subtle, and the decisions of the courts cannot always be reconciled. We will call attention to various cases which are held to come under the above definition.

Where one takes his own goods from another, who has special property in them, with intent to charge another person with their value, he is guilty of larceny.² The least removal of the thing taken, from where it was before, is sufficient.³ Taking another's property in sport, by mistake, under a fair color of right, or under direction of one, to whom he believes it to belong, is not larceny.⁴

In one case it was held, that the giving away of his employee's goods in charity by a servant was not larceny.⁵ The *animus furandi* must exist at the time of the taking.⁶ If a man rightfully gets hold of property, without at the time any intention of stealing, a subsequent conversion is not larceny.⁷ Whether the taking must be *animo lucri* is a disputed point, but the better opinion seems to be, that, if the property is taken with the intention to deprive the owner permanently of the use of it, with no advantage to the party taking it, it is larceny.⁸

In every larceny there must be a trespass; so, if the original taking was lawful, there can be no larceny.⁹ If the property-owner transfers the property intending to pass title, the receiver cannot be guilty of larceny, though the sale was induced by false representations.¹⁰ A fraudulent taking is necessary; no subse-

quent connection with the property can be larceny, as where one buys the stolen goods from the thief.¹¹ But if one unlawfully obtains possession of another's property and subsequently converts it intended to steal it, this is larceny. The conversion reverts to the original trespass.¹² A distinction is drawn between the transfer of the title to property and a transfer of the possession. Where the owner voluntarily transfers the title, though induced to do so by fraud, the receiver of it cannot be guilty of larceny. But where only the possession, and not the title, is transferred, he may be guilty of larceny.

If one obtains the possession of property from the owner on false pretenses, intending to appropriate it, his taking is felonious and is a trespass, and his conversion thereof is larceny.¹³ If one finds anything, which was lost, and there are no *indicia* about it to disclose the ownership, he is not bound to hunt the owner, and is not guilty of larceny in converting it; but if it has *indicia* of ownership, his taking is felonious and is a trespass, and his conversion thereof is larceny.¹⁴ Where one parts with possession of property, but expects it to be returned to him, or that it shall be disposed of on his account in a designated way, the following cases hold, that the conversion of this property by the receiver is larceny.¹⁵

The following cases hold, that the last proposition is not correct, unless the disposition referred to was to be part and parcel of the delivery, and that such disposition not being made, there was no delivery and no transfer of the possession.¹⁶ Where a man purchased a trunk, in which by mistake some clothes had been left, which, when he subsequently found them, he appropriated, it was held, that his taking did not accrue till he found the goods, when the rule as to finding lost property applied, and that he was guilty of larceny.¹⁷ The same ruling, where a man purchased a bureau, in which he found a purse, which he appropriated.¹⁸

Where a man overpaid another by mistake as to the amount he was giving, the receiver also being mistaken as to the amount, and upon demand to return the excess the receiver refused to do so, it was held that the excess was taken without the owner's consent, and the receiver was guilty of larceny.¹⁹ These last three decisions sustain the case under review, on the theory that there can be no giving and no receiving so as to affect the moral action of men, until it is known what is given and received, until there is an intelligent giving and receiving.

S. S. MERRILL.

¹ 4 Bl. Com. 230.

² *Palmer v. People*, 10 Wend. 165; *Wall v. Adkins*, 59 Mo. 144; *Adams v. State*, 45 N. J. 448.

³ 2 East P. C. 555; *State v. Gazelle*, 30 Mo. 92.

⁴ 2 Bish. on Crim. Law, 840-852; *Witt v. State*, 9 Mo. 671; *State v. Waltz*, 52 Iowa, 227; *State v. Homes*, 17 Mo. 379; *State v. Mathews*, 20 Mo. 55.

⁵ *State v. Fritchler*, 54 Mo. 424.

⁶ *Regina v. Box*, 9 Car. & P. 126; *State v. Wall*, 62 Mo. 597; *Blunt v. Com.*, 4 Leigh. (Va.) 689; *Keely v. State*, 14 Ind. 36; *Kuntson v. State*, 14 Tex. Ap. 870; *Hill v. State*, 57 W. 1. 377.

⁷ *Reg. v. Riley* 14 Eng. L. & E. 544; 2 East P. C. 665; *People v. Wood*, (Cal.) 16 Rep. 648.

⁸ *Dignowitty v. State*, 17 Tex. 521, 530; *Warden v. State*, 60 Miss. 638; *State v. South*, 4 Dutch. (N. J.) 177; *Keely v. State*, 14 Ind. 36; *People v. Juarez*, 28 Cal. 380; *Williams v. State*, 52 Ala. 411; *Rex v. Cabbage*, 1 Russ. & Ry. 292; *Rex v. Morfet*, 1 Russ. & Ry. 307; *State v. Brown*, 3 Strobb. (S. O.) 516; *State v. Slingerland*, (Nev.) not yet reported but found in 6 Crim. L. Mag. 686, where the question is reviewed extensively.

⁹ *Rex v. Hart*, 6 Car. & P. 106; *Cartwright v. Green*, 8 Ves 405; *Beatty v. State*, 61 Miss. 18; *Hall v. Adkins*, 59 Mo. 144.

¹⁰ *Lewen v. Com.*, 15 Serg. & R. 98; 2 East P. C. 816; *State v. Watson*, 41 N. H. 633; *Welch v. People*, 17 Ill. 359; *Murphy v. People*, 104 Ill. 528.

¹¹ *McAfee v. State*, 14 Tex. Ap. 668.

¹² *Beatty v. State*, 61 Miss. 18; *Reg. v. Riley*, 14 Eng. L. & E. 544.

¹³ *Pear's Case*, 2 East P. C. 685; *State v. Williams*, 35 Mo. 229; *Com. v. Barny*, 124 Mass. 325; *Lewen v. Com.*, *supra*; *State v. Watson*, *supra*; *Murphy v. People*, *supra*.

¹⁴ *Regina v. Riley*, *supra*; *Tanner v. Com.*, 14 Gratt. 635; *State v. Dean*, 49 Iowa 73.

¹⁵ *Murphy v. People*, 104 Ill. 528; *State v. Anderson*, 25 Minn. 66; *Farrell v. People*, 16 Ill. 508.

¹⁶ *Rex v. Thomas*, 9 Car. P. 741; *Rex v. Slowter*, 12 Cox C. C. 269; *Rex v. McHale*, 11 Cox C. C. 32; *Hildebrand v. People*, 56 N. Y. 394.

¹⁷ *Robinson v. State*, 11 Tex. Ap. 403.

¹⁸ *Merry v. Green*, 7 M. & W. 623.

¹⁹ *State v. Ducker*, 8 Ore. 394.

WEEKLY DIGEST OF RECENT CASES.

ALABAMA,	2, 9, 10, 23, 25, 26
CALIFORNIA,	15, 17
DISTRICT OF COLUMBIA,	21
FLORIDA,	5, 7, 22
MISSOURI,	1, 4, 20
NEW HAMPSHIRE,	12, 13, 19
NEW YORK,	18, 24
OHIO,	6, 8
OREGON,	11
PENNSYLVANIA,	16, 27
RHODE ISLAND,	14
UNITED STATES,	3

1. ACTION FOR FRAUD AND DECEIT.—*Party must have Relied upon Fraudulent Representations—Fraud upon Corporation does not Give Creditors Thereof a Right of Action.*—To maintain an action at law for fraud and deceit, it must appear that the injured party relied upon the fraudulent representations. *Bigelow on Fraud*, 87; *Dunn v. White*, 63 Mo. 186; 2 *Addison on Torts*, Wood's ed., p. 412. Where it is conceded that incorporators have committed a fraud upon the corporation, still this does not give to a creditor of such corporation a right of action for fraud and deceit, for the wrong is a wrong to the corporation, and not directed to a creditor. *Cooley on Torts*, 518. A wrong to a corporation, which may and does affect the credit of the company and the creditors generally, is not a wrong to them as individuals, and they cannot maintain an action as for a tort. *Angel & Ames Corp.* (11th ed.), § 596-7. *Priest v. White*, S. C. Mo., June 21, 1886.

2. CONTRACTS.—[*Railroads.*].—*When want of Mutuality Cannot be Set Up.*—Where the owner of lands, through or near which it is proposed to run a railroad, binds himself by writing, under seal, to convey to the projectors, their associates or successors, all the coal and iron upon and in certain designated lands, and to secure to them the right of way, in consideration that they would construct the road to a named point within a specified time, and a bill filed to compel the specific performance of the contract, the objection that it is wanting in mutuality, because of a stipulation that the projectors should not be liable for damages if they failed to construct the road, comes too late after the completion of the work. *Wilks v. Ga. Pac. R. Co.*, S. C. Ala., December Term, 1885-86.

3. CORPORATION.—*Municipal Corporation—Duties—Negligence—Drainage—Evidence—Drainage—Defective Plan.*—While the duty of the authorities of a municipality in determining the plan of drainage and location of sewers is quasi judicial, the construction and repair of sewers in accordance with such plan are simply ministerial duties, and for negligence in their performance the municipality is liable to one whose property is injured thereby. In an action against a municipality to recover for injuries done by an overflow from a sewer, evidence tending to show that the plan upon which the sewer has been constructed by the authorities has not been judiciously selected, is incompetent. In such action evidence of what, in case of a freshet or great fall of rain, would be the consequence of the difference in level between the sewer in question and one connecting with it is inadmissible. *Johnston v. District of Columbia*, S. C. U. S., April 19, 1886, *The Reporter*, Vol. 22, 7.

4. CRIMINAL LAW.—*Conviction for Murder—Statement of Instruction as to Official Character of Deceased when Officer of State.*—Where the State relies on the fact that the victim of the homicide was an officer in the discharge of his duty, the existence of such fact must be submitted to the jury by an appropriate instruction, and a failure to so instruct is a reversible error. *State v. Grant*, 76 Mo. 236; *State v. Underwood*, 75 Mo. 230; 15 Mo. 28. *State v. Hays*, S. C. Mo., June 21, 1886.

5. DEED.—*Adverse Possession.*—A deed by one to land which is in the adverse possession of another is void as against such adverse claimant. When by written agreement between opposing counsel, it is admitted that "the defendant was in the actual possession of the land sued for, claiming the same adversely to the plaintiff and all others," this court cannot infer that the defendant was a trespasser. B. makes a deed to land to D., while N. is in adverse possession thereof: *Held*, that the deed is only void as to N., and as against him the title still remains in B., who may sue for and recover the land, that such recovery will inure to the benefit of D., as the deed from B. to D. is valid as between them. *Nelson v. Brush*, S. C. Fla., June 17, 1886.

6. ——. *Contract—Rule of—Construction of.*—In construing a written agreement in which the parties claim that the words and expressions contain their true intent and meaning, and there is no claim of fraud or mistake, there should be given to each word and expression that plain and obvious meaning which the context and the whole instrument require to make each part consistent with the whole, and which will secure and carry into effect the object of the parties. When a written agreement consists of more than one distinct writing or contract, the different provisions of all the parts should be given due weight in ascertaining the intended meaning of any portion of the same; but if the language is clear and distinct, and the plain and obvious meaning of the words is consistent with the whole instrument, such meaning must be taken as the intended meaning of the meaning of the parties, unless other parts of the agreement not only admit of, but require, a different construction. *Cincinnati, etc. R. Co. v. Indiana, etc. R. Co.*, S. C. Ohio, June 1, 1886, 3 West. Rep. 606.

7. EQUITY PRACTICE.—*Injunction—For what that Writ will lie.*—The remedy by injunction is a preventive one only, and when the act which is sought to be prevented is done and accomplished, if a party is aggrieved thereby, he must resort to some other remedy for redress. This court, on appeal from an interlocutory decree of the circuit court, refusing to grant an injunction, the record showing that the act sought to be prevented had been done and accomplished, after the refusal of the injunction and before the appeal, is without power to afford relief to the appellant, and will not inquire whether the court erred in its decree. There is no error in a judge of the circuit court refusing leave to a complainant who had filed an original bill for an injunction which had been denied by the judge, to file a supplemental bill, when the bill showed that the act which the original bill sought to prevent had been done. *Smith v. Davis*, S. C. Fla., June 17, 1886.

8. ESTOPPEL.—*Pleading.*—When a party claims a former adjudication of matter set up in an action to be an estoppel, such judgment should be plead-

ed; and where the same is not pleaded when it can be, it is not evidence conclusive of an estoppel; and testimony may be given to show the truth. *Meiss v. Gull*, S. C. Ohio, May 11, 1886, 8 West. Rep., 624.

9. EVIDENCE.—[Charge to Jury Upon.]—*Credibility of Testimony Submitted to Jury—Exception.*—The credibility of oral testimony is an inquiry of fact, which must be submitted to the jury, except as to those matters of law or fact which are admitted expressly or by implication; hence the rule that in charging juries, it is improper to assume, or state as fact, any material matter which depends on the sufficiency of oral testimony for its establishment. In delivering the opinion of the court upon this point, Stone, C. J., said: "The contestants are usually agreed on many questions, frequently very important questions. These become the incident—an indispensable incident—in the cause; but they are not the real subject in contestation. They are material facts, but they are not disputed facts. If the trial judge, in giving his charge to the jury, were required to state all such non-contested facts in the form of hypothesis, his charges would frequently become cumbersome and confusing, if not misleading. The exception to the rule is, that when the record shows affirmatively that certain facts are clearly shown and not disputed, not made part of the contention, then it is not error if they be assumed in the charge to be facts, and stated as such without hypothesis. *Henderson v. Mabry*, 13 Ala. 713; *Gillespie v. Battle*, 15 Ala. 276; *Kirkland v. Oates*, 25 Ala. 465; *S. & N. Ala. R. R. Co. v. McLendon*, 65 Ala. 266." *Carter v. Chambers*, S. C. Ala., Dec. Term, 1885-86.

10. FRAUD.—*Misrepresentation—Warranty—Patent defects.*—On a sale of chattels, a misrepresentation of a material fact by the vendor, on which the purchaser has a right to rely, and on which he does in fact rely, as an inducement to the contract, is a fraud, and furnishes a defense to an action for the purchase-money, or a separate cause of action in favor of the purchaser. A representation which is in the nature of an expressed opinion does not constitute a fraud, unless it was knowingly false, made with intent to deceive, and accepted and relied on as true; and when made under these circumstances, it may often constitute a warranty. Whether the representation is intended as a statement of a fact, or as the mere expression of an opinion, when it does not involve the construction of a written instrument, is a question for the determination of the jury. Although representations and warranties do not cover patent defects, such as are external and obvious on casual inspection; yet the purchaser may rely upon the warranty except as to such defects, and is not found to make any examination. In the absence of fraud or a warranty, the purchaser must offer to restore the goods, before he can defeat an action for the price; but, in an action for the purchase-money, he may set up the defense of fraud, or want of consideration, without offering to restore the goods, or to rescind the contract. *Brown v. Freeman*, S. C. Ala. May 18, 1886.

11. INNKEEPER.—*Lien for Board—Property of Third Person Received as Property of Guest.*—An innkeeper who receives a piano in his character as innkeeper, and as the property of his guest, is entitled to his lien against the piano for board and lodging furnished his guest, although the piano is

in fact the property of a third person. *Cook v. Prentice*, S. C. Oreg. June 1, 1886. 11 Pac. Rep. 226.

12. INSURANCE.—*Life Insurance—Mutual Relief Association—Beneficiary's Name Inserted after Assured's Death—Omission.*—The name of a proposed beneficiary may be inserted in a certificate of membership in a mutual relief association after the assured's death, when it is shown that both he and the officers of the association understood, when he made his application, that the proposed name should be entered on the record without further direction. *Scott v. Provident etc. Ass'n.*, S. C. N. H. March 12, 1886. 4 Atl. Rep. 792.

13. JOINT TENANTS AND TENANTS IN COMMON.—*Tax Title Acquired by Co-Tenants—Statute of Limitations—Rents Received by Co-Tenants—Evidence—Taxation—Tax Deed—Presumption of Validity—Description in Deed—Sufficiency of.*—The purchase of land sold for taxes by a tenant in common, who is in possession, and receiving the rents and profits, vests no title to the land in such purchaser, against his co-tenants, nor entitles him to invoke the statute of limitations in aid of his claim of title. Evidence of the amount of rents received by a co-tenant in possession is admissible, in a suit wherein such co-tenant claims title through a tax sale. Section 90, c. 57, Misc. Laws, making a tax deed good in certain cases, does not extend to a case where the party taking the deed had no right to take it. Premises described in sheriff's deed as "Minter's donation, T. I. S. R., 2 west, 320 acres," held sufficient, where there is a parcel of land in said township answering to the description, and no similar piece of land in the township. *Minter v. Durham*, S. C., Oreg. June 1, 1886. Pac. Rep. Vol. 11, 23.

14. ————*Account—Evidence—Res Adjudicata—Evidence—Parol Evidence—Deed—Ambiguity.*—The parties are tenants in common of the strip of land in question; plaintiff owning seven twenty-sevenths and defendant twenty twenty-sevenths. The defendant has absolutely excluded the plaintiff and his testator, against their objection, from all use and benefit of one-half part thereof since 1875, and the remainder has been and is occupied by both parties as tenants in common. Held, that under Pub. St. R. I. c. 236, the plaintiff is entitled to an account. He had an undoubted right to the use of the entire strip in common with the defendant, and the latter could not assume the right, because of his larger ownership therein, to make partition thereof, and thereby exclude his co-tenant from any particular part. Held, further, therefore, that evidence to show the plaintiff had the use and benefit of fully seven twenty-sevenths is inadmissible. In a previous suit between the same parties, the title to the same strip of land was passed upon by the court. Held, that, although it was not strictly necessary for the court to have passed upon the question, it was now *res adjudicata*; the point having been distinctly raised by the pleadings, fully argued by counsel, and deliberately passed upon by the court. The usual rule applied, that parol evidence is admissible to explain an ambiguous deed, or repugnant clauses therein. *Almy v. Daniels*, 11 R. I. 250, and *Waterman v. Andrews*, 14 R. I. 589, affirmed. *Almy v. Daniels*, S. C. Rh. I. May 13, 1886, 4 Atl. Rep. 753.

15. JURY.—*Grand Jury—Contempt by Witness—Appeal—Criminal Law—Indictment by Grand Ju-*

ry de Facto—Validity—De Facto Jury—Contempt of.—A grand jury is a part of the court by which it is convened, and is under its control, and witnesses who appear before it are subject to the lawful authority and control of the court in the same manner as are witnesses before a trial jury. The court has, therefore, jurisdiction to deal with a witness who defies the authority of the grand jury, and to adjudge him guilty of contempt of court for such conduct, and punish him therefor, and if no excess of jurisdiction appears in the proceedings which resulted in the conviction and punishment, the judgment rendered is final and conclusive, and not the subject of review. An indictment found by a *de facto* grand jury is regular as one found by a *de jure* grand jury. The tide of one is not collaterally assailable any more than that of the other. The validity of the *de facto* grand jury cannot be called into question in a collateral proceeding to punish a party as a contumacious witness for defying its authority. *In re Gannon*, S. C. Cal. May 22, 1886. Pac. Rep. Vol. 11, 240.

16. **LANDLORD AND TENANT—Lease—Execution by Agent—Tenant at Will—Use and Occupation—Evidence—Covenant—Dependent Covenants.**—Where an agent, without authority from his principal, executes a lease in his own name an "agent," and the lessee executes it, no term vests in him, and his covenants cannot be enforced against him. If, in such a case, the lessee enters, he is a tenant at will, liable to the lessor for use and occupation, and the lease is admissible in evidence on the question of value. In many cases when a deed contains covenants on both sides, the covenants being in consideration of each other, the one executing the deed may be bound, although the other has not executed it; but, when the covenants are dependent, the one executing the deed is not bound until performance by the other party. *Jennings v. McComb*, S. C. Penn. May 10, 1886, 4 Atl. Rep. 812.

17. **LIBEL AND SLANDER.—Publication in Judicial Proceeding Privileged.**—The publication in an insolvency proceeding by an attorney, in the course of his employment as such, of facts of which he was informed by his client, to the effect that the insolvent, while acting in a fiduciary capacity, committed acts of fraud in contracting debts for which he became insolvent, it being his duty, in resisting for his client as an opposing creditor the application of the debtor, to publish the facts, constitutes an absolutely privileged publication, of which malice cannot be predicated, no one being permitted to allege that what was rightly done in a judicial proceeding was done with malice. *Hal- lis v. Mauz*, S. C. Cal. May 26 1886, Pac. Rep. Vol. 11, 248.

18. **LIMITATIONS.—Statute of Limitations—Disability** Where defendant, a resident of Austria, there accepted a bill and soon after absconded from there and came to this State and hid himself here, under an assumed name, for more than six years, he can not be said to have been during that time "without the State," within the meaning of the Statute of Limitations. Although the statute is resorted to defeat a just claim, it must have its operation. Its plain language cannot be perverted, to remedy the hardship of any particular case. Where the debtor was continuously within the State for more than six years after the cause of action accrued, he cannot be deemed to have been

without the State, and thus the running of the statute defeated, because he concealed his abode, and thereby his creditor was unable to discover him and serve him with process. *Engel v. Fischer*, N. Y. Ct. App., June 1, 1886, 3 Cent. Rep. 303.

19. **MASTER AND SERVANT—Servant's Negligence—Combined Negligence of Servant and Defendant.**—By intrusting his team to a servant, in the prosecution of his business, the plaintiff assumes the risk of the servant's negligence in protecting it against the negligence of third parties; and if the servant negligently leaves the team unattended, to engage in a personal combat with the defendant, and the horses, frightened by the noise, run away, and damage the carriage, the defendant is not liable therefor, though his conduct contributed to it. *Page v. Hodge*, S. C. N. H., March 12, 1886. 4 Atl. Rep. 805.

20. **NEGLIGENCE—Evidence—Physician and Patient, Privileged Communication, Waiver of—Injury to Wife, Husband may Sue Alone and Recover damages for Loss of Services, His Own Time and Society of his Wife.**—It is competent for a patient to waive the protection of § 4017 R. S. 1879, of Mo. and allow an attending physician to testify as to statements made to such physician, in reference to sickness or injuries of such patient. And even though the patient be dead, it has been held, that those who represent him after his death may do the like, for the protection of the interest they claim under him. 42 Mich. 206. And the right of waiving the privilege is as broad as the privilege itself. A husband may sue alone for injuries to his wife and recover for loss of services, although the contract to carry the wife safely was made with her alone, and the failure to do so resulted in the tort growing out of the breach of contract. 2 Rorer on R. R. 1093, 1094, 1095; 21 Com. 557; 4 Iowa, 420; 75 N. Y. 192; 26 Iowa, 124; 36 N. H. 9; 2 Thomp. Neg. 1240 § 15; 49 N. Y. 47; Cooley on Torts, 226, 227 and cases cited. The gravamen of such an action of the husband being a breach of duty by the common carrier, privity of contract is not essential. "Anyone sustaining damages by reason of such breach of duty, may maintain his action therefor. In such case the tort does not spring from, nor arise out of a breach of contract, but the action lies against the carrier on the custom of the realm." 7 Eng. L. & Eq. 519; 12 East 89; 18 Eng. Com. L. Rep. 227; Bliss on Code, Pl. § 14; 117 Mass. 541; 78 Mo. 245. And cases like this, where the husband is compelled to attend his wife, he may recover damages for the loss of his time while so attending, (*Smith v. City*, 55 Mo. 456.) as well as for the loss of his wife's society. 2 Rorer on R. R. 1094-1095; 4 Iowa, 420; 21 Com. 557; Cooley on Torts, 226. *Blair v. Chicago & Alton R. R. Co.*, S. C. Mo., June 21, 1886.

21. —. **Instruction—Erroneous—To Seem to authorize Jury to Establish their own Standard of Care.**—In an action against a railroad company for injuries received by being run over by one of its trains, a new trial will be granted when the charge of the court tends to create in the minds of the jury the impression that they may go beyond the general inquiry as to reasonable care and diligence and establish some particular standard of their own. *Springman v. Baltimore etc. Co.*, S. C. Dist. Columbia, April 19, 1886. 3 Cent. Rep. 281.

22. **PRACTICE—Pleading.**—The transcript of the proceedings should show affirmatively the making of

an intermediate order which it is sought to have received on appeal. Where one of the errors assigned is the making of an order striking out a plea, and a statement of the making of such order in and as one of the grounds of a motion for a new trial is the only showing in the record that such an order has been made, and it appears that such motion has been denied by the circuit court, the fact that such an order has been made by the circuit court will not be assumed, nor can a review of the alleged order be based on the mere statement in the motion. Where the only plea or where all the pleas to the declaration are of new matter and there is no replication and consequently no issue of fact, it is error to submit the case to a jury for trial; and such error may be taken advantage of primarily on appeal. *Livingston v. L'Engle*, S. C. Fla., June 17, 1886.

23. RAILWAY COMPANY—[Charter] *Abuse of Corporate Franchise—Objection made in Name of State.*—The objection that a railroad corporation is not authorized by its charter to acquire any easement or interest in lands not necessary for the operation of its road, can only be raised by the State in a proceeding for the abuse of corporate franchise, and is not available in defense of a suit for the specific performance of a contract. "The weight of modern authority is that such objection can not be raised collaterally, but can only be made at the instance of the State, for the abuse of corporate franchise. *Waterman on Spec. Per.* § 226; *Kansas City Horse R. R. Co. v. Horel*, 79 Mo. 632; S. C. 20 Am. & Eng. R. R. Cas. 17, and note; *Parish v. Wheeler*, 22 N. Y. 494; *Thompson v. Lambert*, 44 Iowa, 239; *Wilcox v. Toledo etc. R. R. Co.* 43 Mich. 534; *Wilks v. Ga. Pacific Ry. Co.*, S. C. Ala. Dec. Term, 1885-86.

24. REPLEVIN—*Bond—Undertaking—Construction of.*—The condition of an undertaking executed by a defendant in action for the recovery of chattels, for the purpose of reclaiming them, does not become fixed and determined until the final determination of the action, and if there be an appeal, not until the appeal has been disposed of. Such undertaking may be allowed to be amended in furtherance of justice. Objections to the form of the undertaking properly arise upon the application for its allowance, and amendments thereto may then be allowed. *Corn Exchange Bank v. Blye*, N. Y. Ct. App. April 27, 1886. 3 Cent. Rep. 301.

25. TAXATION. — *Jurisdiction—Tax Sale.*—Under the act approved February 12, 1879, providing for the sale of lands for delinquent taxes, the powers conferred on a probate court are special and limited; and to sustain a decree of sale, the record must affirmatively show jurisdiction both of the subject-matter and of the person. The statute requires that notice, the form of which is prescribed, must be served upon the owner, his agent or representative, or left at his residence; or, if the owner is unknown, or is a non-resident, must be given by publication; and such notice is preliminary and essential to jurisdiction of the person. The lands being assessed to "Est. Robert Carlisle, reputed owner," the notice directed in the same way, and returned executed by leaving a copy, "at residence of Robert Carlisle;" the court has no jurisdiction to order the sale, when it is shown that Robert Carlisle died many years before, that his estate had been finally settled and distributed, and that the lands were, at the time of

the assessment, in the possession of purchasers from his heirs. *Carlisle v. Watts*, S. C. Ala., May 18, 1886.

26. TRUST.—*Equity—Will—Pleading.*—Where property is bequeathed to a trustee, to be taken care of, and the profits and interest to be paid annually to the testator's married daughter, "for the use and support of herself and her children during her natural life, and at her death the whole of said property to go and become the absolute property of her lawful heirs;" the daughter and her children may join a bill for an account and settlement of the trust, the removal of the trustee, and the appointment of another in his stead. When a trustee is appointed by the register in chancery, gives bond, and enters on the discharge of the duties of the trust, and a bill in equity is afterwards filed by the beneficiaries, charging waste and loss of the trust funds, asking an account and settlement, the removal of the trustee, and the appointment of another; he and his sureties are estopped from denying his liability to account, on account of any informality in his appointment. The defense of the statute of non-claim may be taken by demurrer, when the bill seeks to enforce a demand which is *prima facie* within the statute, and does not aver presentation, nor state facts which avoid the bar. Under a bond executed by a trustee appointed by the register in chancery, conditioned for the faithful performance of his duties, a liability does not accrue to the beneficiaries against the sureties until there has been a default by their principal, and the statute of non-claim (Code, § 2597) does not begin to run until such default. *McDowell v. Brantley*, S. C. Ala., July 2, 1886.

27. WILL.—*"Male Issue," Interpretation—Ejectment.*—A testator devised land to his daughters for life, and, at the death of the survivor of them, "to the male issue then living of my said son, Richard, their or his heirs and assigns, in fee; but, if no such issue shall then be living, in such case I give the same unto all the children of my said daughters, Catherine and Sarah, and my said son, Richard, their heirs and assigns, in equal parts, according to the number of them." Testator's son, Richard, was not married at the time of testator's death, and the daughters died unmarried and without issue. An action of ejectment having been brought by one of Richard's daughters, as heirs to her son, against her two brothers, held, that the words "male issue" in the will denoting the whole class of male descendants, whether descended through males or females, and the plaintiff's son coming within that class, she was therefore entitled to recover his share. *Wistar v. Scott*, 105 Pa. St. 200, followed. *Wistar v. Gillilan*, S. C. Penn., Feb. 8, 1886, 4 Atl. Rep. 815.

QUERIES AND ANSWERS.*

[Correspondents are requested to draw up their answers in the form in which we print them, and not in the form of letters to the editor. They are also admonished to make their answers as brief as may be.—Ed.]

QUERIES.

11. A. B. & C. sign a petition for dramshop license; § 4 of Dramshops, session Acts, 1888, of Mo. C. after-

wards reconsiders his action and in writing, petitions the county court to cause his name to be erased from or held for naught on dramshop petition. His plea being filed before the 4th day of July, and before action had on dramshop petition, should the court grant his prayer? J.

12. A lease for a store-room made for one year, contains the following covenant: "And that the party of the second part shall have the privilege of leasing the above described premises for two more years, after the expiration of this lease, at the same rate per annum." After the year for which the lease was made, the lessee keeps the premises for ten months, pays the same rent per month, and in manner as described in said written lease. The tenant now leaves the premises; can the landlord hold him for the two years' rent? Is not the keeping of the premises for ten months and paying in accordance with the terms of the lease, a ratification on the tenants' part and a contract for two years' more leasing? Or does the case come within the statute of frauds? Cite authorities. G. & F.

QUERIES ANSWERED.

Query 36. [22 Cent. L. J. 310.] A corporation organizes with a capital stock of \$50,000, \$45,000 is paid in cash, and after the concern has been running some time, the appraisal of the real estate is increased \$5,000, and stock to that amount issued to the stockholders in proportion to the amounts then held by them, no money being paid for said increase. Afterwards the concern promulgates a statement showing a surplus of \$15,000. Shortly after making this statement the capital stock is increased, and the new stock is sold, the statement of the affairs of the concern being used to induce persons to purchase the stock. Two years later the concern becomes insolvent. Are the original stockholders liable to purchasers of the new stock, who had no notice that the \$5,000 represented "water" nor that the surplus consisted of worthless paper, and if so, what would be the measure of damages?

Answer. If the value of the property of a corporation has increased, the corporation can issue *pro rata* to its stockholders new paid up stock to that amount, or can apply it in the same manner as a payment on stock not fully paid up. *Howell v. Chicago & N. W. R. R.* 51 Barb. 378; *Morawitz on Corp.* § 349; *Kenton F. R. & M. Co. v. McAlpin*, 5 Fed. Rep. 737. Since it is not stated, that the real estate had not increased \$5,000 in value, nor that the corporation did not have a surplus of \$15,000, we cannot see that any wrong has been done, or that any one is liable. If, however, both these representations were fraudulent, an action for deceit may be maintained, but it must be shown, that the person charged made the representations, that they were false to his knowledge, and that these representations were relied on and were the inducing cause for parting with the property. *Arthur v. Griswold*, 55 N. Y. 400; *Wakeman v. Dalley*, 51 N. Y. 27. It would be difficult to hold any stockholder to any liability for deceit relative to a third party for the reports made to the corporation or for its proceedings, all of which concern and are intended for the corporation alone. To hold a party for deceit he must have been guilty of it personally, or must have authorized the use of his name for that purpose. S. S. M.

Query 13. An attorney in California collects money from an estate there, for the widow who resides here. She died and the attorney refuses to pay over to her

administrator. How can the money be collected, and what steps should the administrator take to enforce the collection? SUBSCRIBER.

Shelbyville, Ill.

Answer. An attorney in California is not obliged to account or pay money to the administrator of his client, appointed in Illinois. The following extract from the California Code of Civil Procedure, § 1913 is conclusive on this point.

"The authority of a guardian or committee, or an executor or administrator does not extend beyond the jurisdiction of the government under which he was invested with his authority."

The attorney is only responsible to an administrator of his client appointed in California, and therefore the proper way to get the money out of his hands, is to have an administrator appointed in California, who can collect the money and pay it over to the person who can show to the satisfaction of the proper California court that he is entitled to it.

Under the law of California, an absentee who is entitled to receive property or money from an administrator, may appoint an agent to receive it. Or if he does not, the court will appoint an agent to take possession for the absentee, the agent in such case must give bond and is entitled to compensation. Cal. Code Civ. Proc., §§ 1691, 1692.

RECENT PUBLICATIONS.

ELEMENTS OF RIGHT, AND OF THE LAW.—To which is added an historical and critical essay upon the several theories of jurisprudence. By George H. Smith. *Ante omnia videndum est quid sit justitia, quid jus, quid jurisprudentia.* PANDECTS. San Francisco: A. L. Bancroft & Co., Law Publishers, Booksellers and Stationers. 1886.

This is not a law book in the sense in which we usually employ that term, nor, indeed, in any other sense. It is properly a philosophical treatise upon those fundamental principles of right which underlie all positive human law, those principles which all law-givers of all nations, and of all ages, have recognized as the *substratum* upon which they must needs erect their systems of polity. This *substratum* is justice, taken in both senses, the general sense in which it is, according to Aristotle, synonymous with virtue, and includes everything meritorious in human action: and the particular, which is merely a limitation of the operation of this broad principle to limited and special circumstances, things and persons. Right in its broadest sense is the correlative of justice, what the latter must accord may be demanded in the name and by virtue of the former. Upon these correlated principles is founded all human government, and from them are derived all the multitudinous details of the administration of law, in all its various forms.

Upon these general principles are founded the theories of the author on the functions of government in the administration of justice, the enforcement of rights and the redress of wrongs.

It would be inappropriate, in a cursory notice like this, to attempt anything like a thorough analysis of the views on these abstract subjects which the author has evolved with so much labor and thought. It must suffice to indicate the general course of the treatment of the subject which he has adopted. In his first Book he proposes to treat of the "Elements of Right," of the

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CURRENT EVENTS.

CITIES AND TOWNS.—Under this title, Judge M. P. Deady, of the U. S. District Court of Oregon, delivered an address to the University of Oregon, upon its Commencement day, 1886. The subject was, of course, Municipal Corporations, and although the treatment of the subject was characterized by the author's well-known learning and ability, and presents very startling facts and figures, we think he has failed to propose a practical remedy for the evils which he has so clearly depicted.

How important the subject is, and how large a proportion of the people of the United States are interested in it, is evident from the fact that nearly one-fourth (22.5 per cent., according to the census of 1880) of the people of the United States live in towns and cities, and their persons and property are subject to municipal, as well as State and National legislation. And that proportion steadily increases, the rich seek the cities because of their comforts, luxuries, and pecuniary advantages and conveniences; the enterprising because of the facilities and opportunities for money making, which, in so many different forms, they present; the criminal and depraved, for the sake of the plunder which they hope to acquire. In the aggregate, as Judge Deady shows, the urban population of the United States increased, between 1870 and 1880, forty-three per cent., a much larger proportional increase than that of the whole country, but during the same period the debts of the cities and towns were doubled, the municipal taxes were increased in proportion, and in 1880 exceeded, by one-fourth, the aggregate of State and county taxes. From this, Judge Deady concludes:

"At this rate the people of the towns are consuming their capital or anticipating the future, and must in time become bankrupt. It matters little how well the National and State Governments are conducted; if this growing canker continues it will eventually corrode and destroy them both."

Besides this ruin thus approaching with mathematically accelerating strides, Judge Deady recognizes the further evils of the purchased voters, the venal aldermen, and other *indicia* of corruption, at once the cause and consequence of the bankruptcy which he deprecates, and for all this he sees no remedy more practicable than a restriction of the right of suffrage, not a property qualification exactly, but a limitation of the right to vote, to men who own property and pay taxes upon it, or are householders and pay rent.

If this is the only remedy that can be devised for the deep-seated and wide-spread corruption that exists among the managing politicians of so many towns and cities, the case is indeed hopeless, for if there is one political dogma, which, more than any other, has attained the dignity of *res judicata*, it is the proposition that every man over twenty-one years of age has a right to vote in the ward, town, county, or State of his domicile. Women may be allowed to vote hereafter, or they may not. However that may be, men of mature age *must* have the right to vote in all elections, National, State, county or municipal. There may be a few localities, old-fashioned boroughs, that have not, as yet, reached this stage of progressive Democracy, they are exceptions and prove the rule, and the rule, of manhood suffrage, is as immutable as the laws of the Medes and Persians. Once conferred, suffrage cannot be taken away, and any reliance upon such a possibility is futile and unwise.

That most of the maladministration of municipal affairs results from the neglect of the "solid men" of the community, is conceded, and as these men can control the affairs of the corporations, if they will, and suffer more than any others from their failure to do so, it would seem to be only a question of time as to when they would be sufficiently quickened, by self-interest, to take the necessary steps to place suitable men at the head of municipal affairs. If they will not help themselves, nobody can help them, legislative interference, repeals or modifications of charters are of little avail. If those, whose interest it is that corporate matters shall be well managed, will take no part in municipal government, it must needs fall into the hands of those whose interest it is that they should be ill-managed, and there can be no doubt of their activity.

RELATIONS OF THE STATE TO MUNICIPAL CORPORATIONS.—Speaking of municipal corporations, a very able address on the above subject was recently delivered before the Tennessee Bar Association, by Hon. H. M. Wiltse, of Chattanooga. The subject is one that deserves very careful consideration by lawyers as well as legislators. A very large proportion of the losses, inconvenience, and misgovernment of our urban population can be directly traced to the faults of the legislatures, by which they are chartered. These are faults of omission, commission, and sometimes of corruption. The organic laws of municipal corporations, their charters, are not contracts, but can be changed or abrogated at the pleasure of the legislature, and consequently there is no right or interest especially dependent upon municipal law, which is not liable to be very seriously affected by the machinations of the lobbyist. As already intimated, the legislative fault is three-fold: doing too little, doing too much, and acting corruptly. Like all other private legislation, that connected with municipal corporations is chiefly promoted by outsiders, and, as we have elsewhere stated, men most active in municipal affairs do not usually represent the real interests of the community, and hence, when powers are conferred at the instance of such persons (probably to be exercised by them), no adequate safeguards are provided against the abuse of such powers. This is a fruitful source of the jobs, corruption and consequent loss which are so rife in our larger cities. It is the consequence either of culpable negligence or downright corruption on the part of legislators, generally of the corruption of the few, and the complaisance and negligence of the many. Less considerable places sometimes suffer from the omission of needed legislation, this, however, is neither very frequent nor very serious in its results. The chief evil which in this connection afflicts the people of so many of our towns and cities, is, that the legislation which affects them is procured for personal advantages by non-representative men, and conceded by legislatures from inertia, complaisance, or worse motives.

This is more properly a legislative than a legal subject, but as so many of the profession are either legislators themselves, or directly or

indirectly engaged in the preparation of legislative measures connected with municipal affairs, our suggestions are not altogether inappropriate. If legislators should more diligently investigate the projects submitted to them by persons interested in municipal affairs, a partial remedy for municipal misgovernment, and its consequent scandals and losses, would be found; but the radical cure will only be applied when the solid men, financially and personally, for we do not mean rich men only, shall give to the affairs of the city or town attention of the same kind and, approximatively, to the same extent, which they bestow upon their own personal estates and pursuits.

DIVORCE LAW AGAIN.—Our article, in the third number of this volume, on "Divorce Law," has elicited a letter from a gentleman of New Orleans, commenting upon our suggestion in the last paragraph of our article, "that the six months post-divorce period of probation might well be borrowed from our English friends." He says;

"Why borrow from England, or any other foreign country, when you have the law ready made at home. In Louisiana absolute divorce can be obtained, before the courts, only in cases of adultery, or where the spouse has been convicted of infamous crime. In all other cases a separation from bed and board (*a mensa et thoro*) must be first pronounced, and after the expiration of one year from the rendition of such judgment, then, on proof that no reconciliation has taken place, final decree of divorce is rendered.

In many instances the reconciliation does take place, and happy re-unions are the result.

The theory of our law is precisely that suggested by the article, that divorce is, at best, a sad necessity, and every opportunity should be afforded to prevent the separation, which should take place, in its nature, only at the death of one of the contracting parties.

G. A. B.

The Louisiana law of divorce is in the highest degree commendable, and in the other States the practice on that subject is, relatively unobjectionable. Nevertheless we reiterate our remark, that, "under the practice of

most of our States, the proceedings in divorce cases are unduly summary." That in those States there should be a reform, is abundantly manifest, and it is comparatively immaterial whether the example to be followed is foreign or domestic. In matters of reform we may well take lessons even from the ends of the earth, or isles of the sea. The Louisiana law is more stringent than the English, perhaps for that reason it is less likely to be accepted as a model.

We suggested the adoption of the English law on the subject, because we then had that law under consideration, in connection with the most resounding social scandal of this generation.

NOTES OF RECENT DECISIONS.

CONTRACT—WHEN DIVISIBLE—WHEN NOT DIVISIBLE.—The New York Court of Appeals has recently decided a very interesting case on the law of contracts.¹ The terms of the contract appear only in the broker's memorandum which is in the following words: "Sold to the following named parties, Scotch pig-iron, to arrive as specified below: * * * 500 tons of Coltness pig-iron, at thirty-six per ton, for shipment, to be due here in April next; 500 tons of Caulder pig-iron, at thirty-four per ton, for shipment, to be due here in March next, payable, on arrival here, by four months note, indorsed by the above-named parties, with interest added at six per cent."

It appears that the seller made default in point of time in delivering the Caulder iron, and under the stipulations of the parties the question presented for decision was whether the right of withdrawal from the contract consequent upon the default, extended to all the iron, or only to the Caulder iron. The court held that the contract was not divisible, that the seller was bound to deliver in accordance with its terms; that although there were stipulations for two separate and distinct deliveries, that fact did not render the contract divisible, nor remove the ambiguity in the written agreement as to whether there were to be two notes given, one for each shipment

upon delivery, or only one when the last shipment had been made and accepted, the iron delivered, and the complete contract fulfilled. The court says: "If the construction of payment due upon each arrival be correct, the contract was 'divisible' in the sense in which that word is applied to cases of a particular character, and depending upon peculiar circumstances. If the plaintiffs had shipped the 500 tons of Caulder iron for arrival in March, and it had been delivered to the defendants, who had accepted it, they would have been bound to pay for that iron, irrespective of a possible or actual default thereafter as to the Coltness iron. But this is because of a part delivery on one side, and a part acceptance on the other, which is in accordance with the contract, and permitted by its terms. That doctrine, however, does not at all reach or cover a case like the one before us.

"Here there is a breach of the contract at the beginning—a failure to perform at the outset—and that breach justifies a rescission by the vendee. But a rescission of what? Obviously of the entire contract. It must be that or nothing, since there are not two independent and separate contracts, one of which may be broken without peril to the other; but there is a single contract, which may be broken without peril to the other; but there is a single contract, which may be rescinded at the moment of a breach, so far as it remains wholly unperformed on both sides."

In a similar case the Supreme Court of the United States says:² "In the contracts of merchants, time is of the essence. The time of shipment is the usual and convenient mode of fixing the probable time of arrival, with the view of providing funds to pay for the goods, or of fulfilling contracts with third persons. A statement descriptive of the subject-matter or of some material incident, such as the time or place of shipment, is ordinarily to be regarded as a warranty, in the sense in which that term is used in insurance and maritime law, that is to say, a condition precedent, upon the failure or non-performance of which, the party aggrieved may repudiate the whole contract." A statement in a contract may be a representation only, or a warranty or condition. If the former, and

¹ Pope v. Porter, N. Y. Ct. of App., June 1, 1886, 7 N. East. Rep. 304.

² Norrington v. Wright, 115 U. S., 188, 203.

only a matter of description or inducement, it will not usually authorize a rescission of the contract if it should prove to be untrue; but if the statement is a warranty or condition, its failure will justify an abandonment of the contract by the party aggrieved. Whether a statement in a contract is a representation or a condition is a question for the court upon consideration of the whole instrument, and by no means a question for a jury.³ That a vessel should sail from one port to another, named in the charter-party, "with all possible despatch," was held to be a warranty that she would so proceed, and a condition precedent to a recovery on the charter-party.⁴

The more modern English cases are in full accord with the rulings in the case under consideration, and those of *Norrington v. Wright*,⁵ which it follows. In a leading case,⁶ the action was brought on a contract of sale of 667 tons of bar iron to be shipped in June, July, August and September, in about equal portions each month. The seller sent only twenty tons within the first month, which the buyer refused to accept on the ground that such a tender was a breach, not a part performance of the contract; and this view was sustained by the court. Other English cases support this doctrine, particularly *Bowes v. Shand*,⁷ which, after contradictory decisions in the lower courts, was finally decided by the House of Lords. The contract was for a quantity of rice to be shipped at Madras "during the months of March and (or) April." A large quantity of the rice was shipped in February, very little in March, and none in April. The buyer refused to accept the rice, and the House of Lords sustained his refusal. Lord Chancellor Cairns struck the key-note of the whole question when he said: "The plaintiff who sues upon that contract has not launched his case until he has shown that he has tendered that thing which has been contracted for, and if he is unable to show that, he cannot claim any damages for the non-fulfillment of the contract."

Contracts that are divisible, or distributive,

are thus described by the court in the case under consideration. "The cases which seem to have misled the court below are founded upon peculiar equities growing out of the form of contract. They contemplate and require a performance in separable parts or divisions; and where the vendor delivers an agreed proportion, which the vendee accepts, and payment therefor becomes immediately due, the right to recover is at once complete, and is not forfeited by a later default. The contract in such case is called divisible or distributive, and the language is not objectionable if correctly understood and applied. The right of rescission or of abandonment, where such a contract has been wholly performed on one side as to one of its separable parts, and that performance accepted on the other, is lost, and cannot be regained, for the right to the payment reserved has fully accrued, and does not depend upon further conditions."

LEX LOCI CONTRACTUS—LAX LOCI SOLUTIONIS—ELECTION OF PARTIES—EXPRESS RESERVATION OF INTEREST—USURY.—In a recent case in North Carolina,⁸ the question was presented, whether parties in one State, making in that State a note under seal payable to a resident of another State, dated in the former State, could legally bind themselves in that instrument for a rate of interest, usurious by the laws of the State in which the payee resided. The note was dated at Gaston, N. C., expressly reserved eight per cent. interest, legal in North Carolina, but usurious in Virginia, was payable to a Norfolk merchant, and was delivered to him in Norfolk. The defence was that because of such delivery it was a Virginia contract, and that the interest expressed in the face of the note was therefore usurious. The court held, upon the authority of Lord Brougham,⁹ that "a contract, payable generally, naming no place of payment, is to be taken as payable at the place of contracting the debt, as if

³ *Behn v. Burness*, 3 Best & S., 751.

⁴ *Lowber v. Banks*, 2 Wall. (69 U. S.), 728; *Davison v. Van Lingen*, 113 U. S. 40.

⁵ *Supra*.

⁶ *Hoare v. Rennie*, 5 Hurl. & N. 19.

⁷ 1 Q. B. D. 470; 2 Q. B. D. 112; 2 App. Cas. 455.

⁸ *Morris v. Hockaday*, S. C. N. C., The Reporter, Vol. 22, 55.

⁹ *Dow v. Lipman*, 5 Clark & Fin., 1; See also 1 Daniel on Negotiable Instruments, § 881; 2 Parsons on Contracts, 588, 589; 2 Kent's Com. 457; Story's Conflict of Laws, § 272.

it was expressed to be there payable. Being payable everywhere, the rule of interest must be determined by the law of the origin, since there is nothing else to give a rule."

The North Carolina court adds, however:

"But the defendants insist that their note was under seal, and the contract was not consummated until a delivery, and it is alleged, and admitted by the demurrer, that the note was delivered to the plaintiffs in Norfolk, Virginia. But we think that is altogether immaterial. If the defendant had stated in his answer, that the note was given to secure the payment of goods purchased by the defendants from the plaintiffs, who were merchants of the city of Norfolk, there would have been some force in the contention,—for it is laid down in 2 Parsons on Contracts, 586: 'If a merchant of New York comes to Boston to buy goods, and then returns there and gives his note for them, which specifies either Boston, or no place, for payment, it is a Boston transaction.'"

As, however, the defendants, either from inability to make the necessary proof, or by their neglect, by suitable answer to bring before the court the facts that the plaintiffs were residents of Virginia, that the contract was made in that State, and that the note was given for goods there purchased, they were manifestly in no condition to avail themselves of the principle which the court adopts from "Parsons on Contracts". All these things it was necessary for them to aver in their answer, and sustain by sufficient evidence. For want of such averments, and such evidence, the case manifestly falls within the rule laid down by Lord Brougham.

STATE REGULATION OF RAILWAY CORPORATIONS AS TO RATES.

Within the last three-quarters of a century the subject of legislative control or regulation of railway corporations has occupied a large share of attention from both legislative and judicial departments of government. During that period the spirit of enterprise and development has brought into being a class of artificial persons whose power and influence have extended to every department of industry. Corporations have been created,

whose power, in a short time, rivaled those of the State which gave them being. The people in their laudable desire to secure railway facilities, by improvident legislation, and their failure to erect the necessary safeguards have, in many instances, placed themselves in positions beyond the power of relief from courts, or even constitutional conventions. Corporations, on the other hand, in their greed for power and wealth have taken advantage of the popular frenzy, and in many instances have secured grants of franchise, which, if construed as claimed, would have placed them absolutely beyond and independent of legislative regulation.

This question is one peculiar to this country and our institutions of government. In England it is competent for parliament to make a law binding upon corporations, however much it may increase their burdens, restrain their powers, whether general or organic, even to the extent of repealing their charters, no matter how valuable their franchises may be.¹

In this country the limitation upon State legislation, which has for its purpose the regulation or control of private corporations, originates in that clause of the constitution of the United States, which prohibits States from passing any law impairing the obligation of a contract,² and the additional fact that charters of private corporations have been judicially declared to be contracts between the State and the corporation, and therefore subject to the constitutional restriction.³ Whether such charters, in a strict legal sense, are contracts, and whether that clause of the constitution was ever designed to include such a class of so-called contracts, it is now too late to question.

Where a legislature has brought into being an artificial person, and endowed it with life, perpetuity and powers, granted to it valuable franchises, and those franchises are accepted and acted upon, the legislature cannot afterwards take from such corporation, or materially impair its valuable franchises without its consent,⁴ unless the right so to do is re-

¹ Ch. J. Redfield in *Thorp v. R. R. Co.*, 27 Vt. 140.

² § 10, Art. 1.

³ *Dartmouth College v. Woodward*, 4 Wheat., 518.

⁴ *Dartmouth College v. Woodward*, 4 Wheat., 518; *Bank v. Sharp*, 6 How. 801; *University v. Indiana*, 14 How. 268; *Bank v. Knoop*, 16 How. 369; *Bingham-*

served in the charter or some general law,⁵ and even then the power is limited. The charter is a contract within the purview of the constitution as construed by the courts of last resort, and, therefore, cannot be violated or impaired by one party thereto without the consent of the other party.⁶ This may now be said to be the settled law of this country, though it has met with serious opposition on the part of many courts and eminent jurists of high standing.⁷ But whether such charters are strictly and in a legal sense contracts, or not, they are a species of grant from the State to the corporation, to support which a consideration is unnecessary, and the right of the corporation to the thing granted, when accepted by it, cannot be contested by the State or reasserted successfully.⁸ This,

however, is not true if the thing granted is a mere privilege and does not rise to the dignity of a franchise, exclusive right or an element having the attributes of property.⁹

When the right to alter or amend is reserved in the charter, or in some general law, or in the constitution, the legislature, in such case, may make any reasonable amendment, or impose upon the corporation additional burdens, duties or liabilities if the effect thereof is not to take away from the company any of its substantial property or property rights.¹⁰ But for the constitutional prohibition it has been contended that in the modification, amendment or even repeal of corporate charters, there would be no restraint upon the legislative will. Under a constitutional form of government, however, it is insisted that property rights, or property of any kind, ought not to be taken from individuals or corporations by arbitrary power.¹¹ If property be lawfully acquired it is immaterial whether it be by purchase, labor, descent or by "making profitable use of a franchise granted by the State;" in either case the right thereto ought to be sacred and inviolable.¹²

While all charter rights should be secure, and charter contracts enforced, and the parties thereto held to the terms thereof, yet, such contracts and the franchises secured thereby are as sacred, but not more so than those of natural persons under similar circumstances and should be governed by the same rules of construction.

It is, therefore, a well-established principle applied to this class of charter contracts, or grants, that, as against the public, only those rights, franchises and privileges which are clearly conferred pass to the corporation. Being in derogation of the public rights the grants are strictly construed and no rights, powers or privileges pass by implication. All

ton Bridge case, 3 Wall. 51; *Brown v. Hummel*, 6 Penn. St. 86; *State v. Hayward*, 3 Rich. 389; *Norris v. Academy*, 7 G. & J. 7; *Grammar School v. Burt*, 11 Vt. 632; *People v. Manhattan Co.* 9 Wend. 351; *Commonwealth v. Cullen*, 13 Pa.St. 113; *Bank v. State*, 14 S.& R. 599; *Backus v. Lebanon*, 11 N. H. 19; *Bridge Co. v. Hoboken Co.* 2 Beas. 81; *Bank v. United States*, 1 Greene, (Iowa), 553; *Bank v. Hastings*, 1 Doug. 225; *Edwards v. Jagers*, 19 Ind. 407; *Bruffet v. R. R. Co.* 25 Ill. 353; *State v. Noyes*, 47 Me. 189; *People v. Plankroad Co.* 9 Mich. 285; *Mills v. Williams*, 11 Ired. 558; *Bank v. Bank*, 13 Ired. 75; *Wales v. Stetson*, 2 Mass. 143; *King v. Bank*, 15 Mass. 447; *Nichols v. Bertram*, 3 Pick. 342; *Bridge v. Lowell*, 15 Gray, 106; *State v. Bank*, 2 Stew. 30; *Com. v. R. R. Co.* 103 Mass. 254; *Delaware Tax Cases*, 18 Wall. 206; *Bridge Co. v. State*, 18 Conn. 53; *R. R. Co. v. Bowers*, 4 Hous. 506; *R. R. Co. v. Casey*, 26 Pa. St. 287; *Lake View v. Rose Hill Cemetery Co.* 70 Ill. 191; *St. Louis v. Bank*, 49 Mo. 574; *Hamilton v. Keith*, 5 Bush, 458; *Smead v. R. R. Co.* 11 Ind. 104; *R. R. Co. v. Burkett*, 46 Ala. 569; *R. R. Co. v. Harris*, 27 Miss. 517; *Allen v. McKeen*, 1 Sumn. 276; *Louisville v. University* 15 B. Mon. 642; *R. R. Co. v. Mosely*, 52 Miss. 127; *Sloane v. R. R. Co.* 61 Mo. 24; *State v. R. R. Co.* 73 N. C. 527; *Detroit v. Plank Road Co.* 43 Mich. 140; *Atty. Gen. v. R. R.* 35 Wis. 425; *R. R. Co. v. Maine*, 96 U. S. 499; *Sinking Fund*, cases 99 U. S. 700; *University v. People*, 99 U. S. 309; *Stone v. Miss.* 101 U. S. 814; *Farrington v. Tenn.* 95 U. S. 679.

⁵ See authorities in note 4.

⁶ *Waterworks Co. v. Waterworks Co.*, 14 Fed. Rep. 194; *R. R. Co. v. R. R. Co.*, 2 Gray 1, and cases cited in note 4.

⁷ *Bridge Co. v. Bridge Co.*, 7 N. H. 35; *Brewster v. Hough*, 10 N. H. 143; *Backus v. Lebanon*, 11 N. H. 19; *Thorpe v. R. R. Co.*, 27 Vt. 140; *Brainard v. Colchester*, 31 Conn. 417; *Mott v. R. R. Co.*, 30 Penn. St. 9; *Bank v. Debolt*, 1 Ohio (N. S.) 591; *Bank v. Bond*, *Ibid* 622; *Knoup v. Bank*, *Ibid* 603; *Manufacturing Co. v. Saginaw*, 19 Mich. 259; *R. R. Co. v. Reid*, 64 N. C. 155; *R. R. Co. v. Transportation Co.* 25 W. Va. 324; *R. R. Co. v. Supervisors*, 35 Wis. 257; see also dissenting opinion of Justice Miller, (in which Ch. J. Chase and Justice Field concurred,) in *University v. Rouse*, 8 Wall. 441.

⁸ *Bank v. Skelley*, 1 Black, 436; *Bank v. Ohio*, 1 *Ibid*

474; *Charles River Bridge v. Warren Bridge*, 7 Pick. 344; *R. R. Co. v. R. R. Co.*, 2 Gray, 1; *Toll Bridge Co. v. Conn. River Co.*, 7 Conn. 28.

⁹ *Church v. Philada.*, 24 How. 300; *Brainard v. Colchester*, 31 Conn. 407; see also *Commonwealth v. Bird*, 12 Mass. 443; *Dale v. Governor*, 3 Stew. 387.

¹⁰ *Detroit v. Plank Road Co.*, 43 Mich. 146; *R. R. Co. v. Brownell*, 24 N. Y. 345; *Com. v. Essex Co.*, 13 Gray, 239; *R. R. Co. v. Maine*, 96 U. S. 499; *Sinking Fund Cases*, 99 U. S. 700.

¹¹ C. J. Cooley, in *Detroit v. Plank Road Co.*, *supra*.

¹² *Wood's Railway Law*, Vol. 3, p. 1697, quoting from the case last cited.

doubts, uncertainties and ambiguities are resolved against the corporation.¹³

But even if the grant is exclusive in its terms it cannot be given the effect to abridge the police powers of the State.¹⁴ The exercise of the police power does not depend upon the reservation of the right to alter or amend in the charter, general law or constitution. Its exercise is an inalienable attribute of sovereignty applicable to all corporations and persons alike, and which no State, through its legislature, can divest itself. "It would seem to be the prevailing opinion, and one based on sound reason, that the State could not barter away, or in any manner, abridge, or weaken, any of the essential powers, which are inherent in all governments, and the existence of which, in full vigor, is important to the well being of organized society."¹⁵ By this power "persons and property are subjected to all kinds of restraints and burdens * * * and it is certainly calculated to excite surprise and alarm that the right to do the same in regard to railways should be made a serious question."¹⁶ The tendency of courts is towards a liberal exercise of the police power of the State over corporations in all matters where it might be exercised over natural persons.¹⁷ It is called "the power to govern men and things" inherent in every sovereignty.¹⁸ That State legislation having for its purpose the regulation of charges by railroads for the

transportation of persons and property is a legitimate exercise of the police power has been held by many courts of last resort.¹⁹

But the constitutionality of this class of legislation has been sustained upon other grounds than the police power. In England from time immemorial, and in this country from its earliest colonization, it has been customary to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, inn-keepers, etc., and in doing so to fix a maximum charge to be made for services rendered.²⁰ Railroads are common carriers for hire, and in the transaction of their business have the same rights and are subject to the same control as private individuals under the same circumstances.²¹ When a corporation accepts a charter authorizing it to do business as a common carrier it would seem that, unless expressly exempted therefrom, the acceptance was with reference to the existing law universally prevailing applicable to carriers.

Again, the constitutionality of this class of legislation has been upheld by a series of cases in the United States Supreme Court upon the ground that railroad corporations are engaged in an employment which is *quasi* public in its nature, the business being "affected with a public interest," and, therefore, subject to the general control which the State exercises over other public employment.²²

The foregoing are some of the general principles underlying this question and are settled by a long line of decisions. There are many exceptions, limitations and restrictions, however, which are noticed in their

¹³ *Charles River Bridge v. Warren Bridge*, 11 Pet. 420; *R. R. Co. v. R. R. Co.*, 18 How. 71; *Rice v. R. R. Co.*, 1 Black, 358; *Bank v. Skelley*, *Ibid* 436; *R. R. Co. v. R. R. Co.*, 3 Ind. 464; *Collins v. Sherman*, 31 Miss. 679; *Shorter v. Smith*, 9 Ga. 517; *R. R. Co. v. Davis*, 13 Ga. 68; *Stone v. R. R. Co.*, 62 Miss. 607; *Road Co. v. Robinson*, 13 Cal. 519; *Bartram v. Cent. T. Co.*, 25 Cal. 283; *Fall v. Sutter Co.*, 21 Cal. 237; *R. R. Co. v. State*, 45 Md. 586; *Fitch v. R. R. Co.*, 30 Conn. 38; *Bridge Co. v. Ferry Co.*, 29 Conn. 210; *White River T. Co. v. R. R. Co.*, 21 Vt. 590; *Thorpe v. R. R. Co.*, 27 Vt. 140; *Bridge Co. v. Fish*, 1 Barb. Ch. 547; *Thompson v. R. R. Co.*, 3 Sandf. Ch. 625; *Hamilton Ave.*, 14 Barb. 405; *Wales v. Stetson*, 2 Mass. 142; *Cambias v. R. R. Co.*, 4 Brewst. 568; *Com. v. R. R. Co.*, 52 Penn. St. 506; *Scales v. Pickering*, 4 Bing. 448; *Canal Co. v. R. R. Co.*, 14 N. J. Eq. 321; 16 *Ibid* 546; *State v. Chase*, 5 Ohio St. 528; *State v. Noyes*, 47 Me. 189; *R. R. Co. v. Navigation Co.*, 15 La. Ann. 404.

¹⁴ *Thorpe v. R. R. Co.*, 27 Vt. 140.

¹⁵ *Cooley's Const. Lim.* p. *283.

¹⁶ *Ch. J. Redfield*, in *Thorpe v. R. R. Co.*, *supra*.

¹⁷ *Wood on Railway Law*, Vol. 3, p. 1707, referring to *Munn v. Illinois*, 94 U. S. 113; see also *Com. v. Intoxicating Liquors*, 115 Mass. 153; *Stone v. Miss.* 101 U. S. 814.

¹⁸ *Ch. J. Taney*, in *License Cases*, 5 How. 563.

¹⁹ *Ruggles v. The People*, 91 Ill. 256; *R. R. Co. v. People*, 95 Ill. 313; *Stone v. Wisconsin*, 94 U. S. 181; *Tilley v. R. R. Co.*, 5 Fed. Rep. 641; *Hinckley v. R. R. Co.*, 38 Wis. 194; *State v. R. R. Co.*, 19 Minn. 434; *R. R. Co. v. Cole*, 29 Ohio St. 126; *R. R. Co. v. Furnace Co.*, *Ibid* 208; *State v. Columbus Co.*, 34 Ohio St. 572; *R. R. Co. v. Steiner*, 61 Ala. 559.

²⁰ *Ch. J. Waite*, in *Munn v. Illinois*, 94 U. S. 113; see also *R. R. Co. v. Iowa*, *Ibid* 155. As early as 3 W. & M. Ch. 12, § 24, a statute was enacted in England, the preamble of which was as follows: "And whereas divers wagoners and other carriers by combination amongst themselves have raised the prices of carriage of goods in many places, to excessive rates to the great injury of the trade; Be it therefore enacted," &c.

²¹ *Munn v. People*, 69 Ill. 80; s. c., 94 U. S. 113.

²² *R. R. Co. v. Iowa*, 94 U. S. 181; *Peik v. R. R. Co.*, 94 U. S. 164; *R. R. Co. v. Ackley*, 94 U. S. 179; *R. R. Co. v. Blake*, 94 U. S. 180; *Stone v. Wisconsin*, 94 U. S. 181.

order, that have become a part of the law of the land and are as firmly established as the original principles themselves. The case of *Dartmouth College v. Woodward*, though it has been attacked from almost every conceivable standpoint, is the foundation of the law in this country on the subject of State interference with charter contracts. It still stands as firmly imbedded in the laws and institutions of the country as the constitution itself.²⁵ Yet it has been limited and modified and explained away to such an extent as to leave but a mere shadow of its original proportions.

1. By its own language it was limited as "not being in restraint of the States in the regulation of their civil institutions, adopted for internal government," and was not to embrace "other contracts than those which respect property of some object of value."

2. This property test was afterwards abandoned by the same court and the rule placed on the distinction between public and private corporations.²⁶

3. It has been held not to apply to that class of powers which belongs to the State as defined in the license cases.²⁷

4. In another class of cases it has been held not to apply, because it would obrogate the police power of the State, which is absolutely inalienable.²⁸

5. The application of the rule was again limited in the *Munn* case and held not to apply to that class of corporations where the use of whose property was "affected with a public interest," which interest must be controlled by the public for the public good.

6. The effect of the principles therein enunciated have been defeated by inserting in the charters or organic laws the reserved right to alter, amend or repeal.²⁹

Applying the above limitations and restrictions of the *Dartmouth College* case to the question under consideration and we find the legislature may pass laws regulating the charges upon railroads within its jurisdiction:

First. If the power to alter or amend be reserved in the charter, or in some general law existing at the time of granting the charter, or in the constitution.

Second. And whether this power be reserved or not the legislature may regulate charges of railroad corporations, because of the public nature of the business in which they are engaged.

Third. And in many of the States upon the ground that it is a legitimate exercise of the police power, which cannot be surrendered.

However, if the charter by its terms vests in the corporation the exclusive right to fix its rates for carriage then in such case the legislature is powerless to act. But there must be a deliberate purpose of the legislature to abandon the right expressed in the charter. It must be a positive grant or something which in law is equivalent.³⁰ Its abandonment ought not to be presumed in a case in which the deliberate purpose of the State to abandon it does not appear.³¹

A reference to the language of some of the charters, wherein it has been held that the legislature has not divested itself of the right to regulate and control private corporations, may not be without interest in this connection.

1. Where a charter provided: "It shall be lawful for the company hereby incorporated from time to time to fix, regulate and receive the toll and charges by them to be received for the transportation of persons and property," it was held not to give the corporation exclusive control of charges.³²

2. A charter provided that a railroad company "should pay annually into the treasury of the State a tax of one-quarter of one per cent. on its capital stock," without words indicating the intent of the legislature that no further or different tax should be subsequently levied, it was held not to be a contract.³³

by Justice Story, in his opinion in that case, as a probable result of the decision.

²⁵ *Stone v. Farmers Loan and Trust Co.*, Sup. Court Rep. Vol. VI. p. 384, 116 U. S., 307; *R. R. Co. v. Maryland*, 21 Wall. 456; *R. R. Co. v. Iowa*, 94 U. S. 155; *Peik v. R. R. Co.*, *Ibid.*, 164; *R. R. Co. v. Blake*, *Ibid.*, 180; *Ruggles v. Illinois*, 108 U. S. 526.

²⁶ *Ch. J. Marshall in Bank v. Billings*, 4 Pet. 560.

²⁷ *Stone v. F. L. & T. Co.*, *supra*.

²⁸ *Minot v. R. R. Co.*, 18 Wall. 206.

²⁵ *Ch. J. Waite, in Munn v. Illinois, supra.*

²⁶ *East Hartford v. Hartford Bridge Co.*, 10 How. 511; *Charles River Bridge v. Warren Bridge*, 11 Peters 420.

²⁷ 5 How. 563.

²⁸ *Stone v. Mississippi*, 101 U. S. 814.

²⁹ This practice, now almost universal, was suggested

3. So, where a charter subjected a corporation "to taxation at the rate assessed by the State on other real and personal property of like value" it was held to be no waiver of taxation for other than State purposes.

4. Where a statute provided that a county seat should "be considered as permanently established at Canfield" if the citizens should make a certain donation, which was done, and the county seat "permanently established," and afterwards by another law the county seat was changed to another locality it was claimed that the last act was in violation of an executed contract, but it was held not to be.³²

5. A charter exempted the company from taxation, and from the operation of the statute providing for alteration, amendment and repeal, but it was held not to be a contract.³³

6. A corporation formed under a general law expended a large amount of money in the erection of water-works, under a statute which provided for a commission, whose duty it should be to fix water rates. A constitution subsequently adopted provided that such rates should be fixed by a different board, selected without the co-operation of the company, held not to be a contract, and the mode of fixing rates could be changed.³⁴

7. A charter provided that the company "should, from time to time, fix, regulate and receive tolls and charges * * * for the transportation of persons and property," held that the legislature retained the power to fix reasonable rates, through a commission.³⁵

8. A charter authorized a company "to demand and receive such sum or sums of money for the transportation of persons and property * * as it shall deem reasonable," held not to be a contract.³⁶

9. A company was authorized "to charge for the transportation of persons and produce such charges or rates as it may deem just, provided the charge for transporting oil shall in no case exceed 75 cents per barrel," held not to prohibit the legislature from pass-

ing a law providing for reasonable maximum rates.³⁷

10. Where a charter provided, "that said company is hereby authorized and empowered to transport, carry and convey persons and property on said railway * * * and receive for such transportation, carrying and conveying such tolls and charges as shall be, from time to time, established, fixed and regulated by the directors of said railway company," held not to be a contract.³⁸

On the contrary, in the following instances the words of the charter were held to be contracts not subject to future modification or change by the legislature.

1. Where a statute provided, "that upon any of the banks of this State complying with the conditions of this act the faith of the State is hereby pledged not to impose any future tax or bonus," held to be a contract of exemption.³⁹

2. Where a corporation was authorized to set off to the State six per cent. of its profits, in lieu of all taxes, it was held by a divided court to be an exemption.⁴⁰

3. In a charter of a bridge company it was provided: "It shall not be lawful for any person or persons, whomsoever, to erect any other bridge or bridges over or across said river," held to be a contract.⁴¹

At common law, independent of the statute, a common carrier can charge only reasonable rates for his services. Where a charter authorizes a corporation "to fix reasonable rates" it is for the court to say whether the rates are reasonable or not,⁴² and in such case the legislature may fix a maximum charge.⁴³ If the power is to "fix, regulate and receive the toll and charges," there is no additional right given above what the company had at common law, which requires all rates to be reasonable, and in such case the legislature has a right to fix a reasonable maximum rate, beyond which all charges will be unreasonable.⁴⁴ If the charter does not fix the rates,

³² R. R. Co. v. Transportation Co., 25 W. Va. 324.

³³ Stone v. F. L. & T. Co., Vol. VI. Sup. Court Rep. p. 334.

³⁴ Gordon v. Appeal Fox Court 3 How. 183.

³⁵ Bank v. Knoop, 16 How. 369.

³⁶ Bridge Proprietors v. Hoboken, 1 Wall. 116.

³⁷ Campbell v. Marietta R. R. Co., 23 Ohio, 168; Smith v. Pittsburg R. R. Co., 23 *Ibid.*, 10.

³⁸ Peik v. R. R. Co., 24 U. S. 164.

³⁹ Stone v. F. L. & T. Co., *supra*, citing Munn v. Illinois, and R. R. Co. v. Iowa, *supra*.

³² Newton v. Comm., 100 U. S. 548.

³³ Home of Friendless v. Rouse, 8 Wall. 430.

³⁴ Spring Valley Water Works v. Schottler, 110 U. S. 248.

³⁵ Stone v. Natchez R. R. Co., 62 Miss. 646.

³⁶ Peik v. R. R. Co., 24 U. S. 164.

or specify the limits, the common law doctrine of reasonable rates is implied, and "the power to charge being coupled with the condition that the charge shall be reasonable, the State is left free to act on the subject of reasonableness within the limits of its general authority as circumstances may require. * * The power of declaring what shall be deemed reasonable has not been surrendered." ⁴⁵ It is only where there is an unmistakable manifestation of a purpose to place the unrestricted right in the corporation to determine rates of compensation that the power of the legislature afterwards to interfere can be denied. ⁴⁶

The rate legislation of the States has also been attacked of late upon the ground that it is an interference with inter-state commerce, and, therefore, invading the domain of Congressional action. But to make such legislation objectionable upon this ground it must necessarily amount to, or operate as, a regulation of business without the State as well as within. ⁴⁷ Even if State legislation, to some extent, encroaches upon the sphere of Congressional action, yet, until such time as Congress shall pass a general law regulating inter-state commerce, the State laws will be enforced as tending to promote general welfare. ⁴⁸ State legislation must not be carried to such extent as to impose a direct burden upon inter-state commerce, or interfere directly with its freedom and thus encroach upon the exclusive power of Congress. ⁴⁹ Such laws are none the less objectionable to the commerce clause of the constitution, though by their terms they purport to relate only to, and are intended to affect only, domestic affairs, for in their results they may reach beyond the local business of the State and seriously affect inter-state commerce, which would render them unconstitutional. ⁵⁰ Especially will this be true when Congress shall have taken action on the subject, ⁵¹ which will probably be in the near future. ⁵² The guarded

expressions of the Supreme Court when the commerce clause of the constitution has been under consideration in connection with railway legislation, *i. e.* "in the absence of Congressional action," "until Congress shall have passed a uniform law upon the subject," etc., leaves the constitutionality of many of the rate laws in some doubt, until the question shall have been finally passed upon. ⁵³

This class of legislation has also been attacked as being in contravention of the Fourteenth Amendment to the constitution, and, therefore, depriving corporations of their property without due process of law. This position, however, has been determined to be untenable. ⁵⁴

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much toward adjusting and harmonizing the relations between the public and railway companies, so that each may work in harmony in its appropriate sphere. If on the contrary, owing to the magnitude and diversity of the interests at stake, and the great variety of State laws in existence upon the subject, congressional action shall not be marked by wisdom and foresight, it is greatly to be feared that railroad litigation is but in its infancy.

⁵³ As tending to throw light upon this subject. See *R. R. Co. v. Husen*, 95 U. S. 486; *Chy Lung v. Freeman*, 92 U. S. 275; *Henderson v. Mayor*, 92 U. S. 259.

⁵⁴ *Munn v. Illinois*, *supra*; *R. R. Co. v. Richmond*, 96 U. S. 529; See also the same effect; *Spring Valley Water Works Co. v. Schottler*, 110 U. S. 354.

MUNICIPAL CORPORATION—HIGHWAYS—STREETS—LIABILITY OF CORPORATION FOR INJURIES CAUSED BY NEGLIGENCE OF ABUTTING PROPRIETORS.

LANGAN v. CITY OF ATCHISON.

Supreme Court of Kansas, May 7, 1886.

Where a person, passing along the sidewalk of a much traveled street, in a city of the first class, is injured by the falling of a bill or show board, blown down by a strong wind, which bill or show board was negligently and imperfectly constructed on private property, but was partly supported by studding or uprights nailed to the sidewalk, and was so near to and adjoining the sidewalk as to be dangerously contiguous thereto, and the officers of the city knew, before the falling of the bill or show board, that it was not put up in a safe and proper manner, and that it was so insecure as to endanger persons passing on the street. *Held*, The city will be liable in damages therefor, if the person so injured used ordinary care and prudence to avoid the danger.

Messrs. Jackson & Royse, attorneys for plaintiff in error; *John C. Tomlinson, Esq.*, and *W. R. Smith, Esq.*, attorneys for defendant in error.

⁴⁵ Note 44.

⁴⁶ *Comrs. v. Yazoo R. R. Co.*, 62 Miss. 607; *Comrs. v. Natchez R. R. Co.*, *Ibid.*, 646.

⁴⁷ *Stone v. F. L. & T. Co.*, *supra*.

⁴⁸ *R. R. Co. v. Iowa*, 94 U. S. 155; *Peik v. R. R. Co.*, *Ibid.*, 164.

⁴⁹ *Hull v. DeCuir*, 95 U. S. 485.

⁵⁰ *Chy Lung v. Freeman*, 92 U. S. 275.

⁵¹ *Henderson v. Mayor*, 92 U. S. 259.

⁵² Congress by wise and judicious legislation may do

HORTON, C. J., delivered the opinion of the court:

The plaintiff, passing along the south side of Commercial street, near Sixth street, in Atchison, was injured by a bill or show board which, having been placed on a lot adjoining the south side of the sidewalk, had been blown down by a strong wind and fell upon him. Upon the trial, a demurrer to plaintiff's evidence was sustained, the jury discharged, and judgment rendered for the defendant. A motion for a new trial was made by the plaintiff and overruled.

The record is before us for review, and the question presented is as to the liability of the city of Atchison to the plaintiff, if he was without fault, for the injuries inflicted upon him, as disclosed in the evidence. The show or bill board, extending east and west upon Commercial street thirty-six feet, and twelve feet high, stood upon an old foundation from which a building had been burned, and was built on private property close to and adjoining the south side of the sidewalk of the street. At the back of the structure were braces, and these were nailed to stakes driven into the ground, covered with bricks and ashes where the building had been burned. The braces were nailed against the stakes, and the stakes were three or four feet lower than the bottom of the bill board. To further support the structure, there were several places or notches cut in the sidewalk about three inches in size, and studding slipped in and nailed. Some of the witnesses testified that uprights assisted to support the structure and were spiked into the stringers of the sidewalk; and others, that parts of the structure were actually upon the south edge of the sidewalk. There was evidence introduced tending to show that the structure was negligently and imperfectly constructed, and that before, and at the time of its fall, it was in such a weak and insecure condition as to be unsafe for persons passing in front upon the sidewalk. There was also evidence tending to show that the officers of the city knew the structure was not put up in a safe and proper manner, and that before its fall it was in a condition to endanger persons passing on the sidewalk.

The contention on the part of counsel for the city is that the bill board was private property, on private property, and used for private purposes only; and that if it were in close proximity to, or even upon the edge of the sidewalk, the city would not be liable for injuries resulting from its negligent construction or its unsafe condition at the time of its fall.

We do not concur with this view. The decisions in this State are numerous, that cities having the powers ordinarily conferred upon them respecting streets and sidewalks within their limits, owe to the public the duty of keeping them in a safe condition for use in the usual mode by travelers, and are liable in a civil action for injuries resulting from the neglect to perform this duty. *Jansen v. City of Atchison*, 16 Kas. 358, and cases there cited; *City of Salina v. Trosper*, 27 Kas. 544.

The injury occurred to plaintiff in September, 1881; at the time Atchison was, as now, a city of the first class. Under chap. 37, Session Laws of 1881, entitled "An act to incorporate and regulate cities of the first class, etc.," among other things, the following duties and powers of the mayor and council of such cities are stated:

"To adopt all such measures as they may deem necessary for the protection of strangers and the traveling public, in person or property." Art. 3, sec. 11, sub-div. 7.

"To make regulations * * * to prevent and remove nuisances." Art. 3, sec. 11, sub-div. 11.

"To compel owners of property adjacent to walks and ways, where dangerous, to erect and maintain railings, safe guards and barriers along the same." Art. 3, sec. 11, sub-div. 15.

"To enter into and examine all dwelling-houses, lots, yards, enclosures and buildings of every description and other places, in order to ascertain whether any of them are in a dangerous state, and to take down or remove buildings, walls and superstructures that may become insecure or dangerous, and to require the owner of insecure and dangerous buildings, walls, and other erections to remove or render the same secure and safe, at the cost of the owner or owners of such property." Art. 3, sec. 11, sub-div. 18.

"To require and regulate the planting and protection of shade trees in the streets and on public grounds of the city; the building of bulk-heads, cellar and basement-ways, stair-ways, railings, window and door-ways, awnings, hitching-posts and rails, lamp-posts, awning posts, and all other structures projecting upon or over or adjoining the street or sidewalk, and all excavations through and under the sidewalks of the city." Art. 3, sec. 11, sub-div. 27.

"To cause to be constructed all sidewalks, determine the material, plans and specifications of the same, and to levy and collect special taxes for the payment thereof." Art. 3, sec. 11, sub-div. 43.

"To compel owners or occupants of real property to keep in good order and proper place any of the improvements of any sidewalks, gutters, and also to clean and remove from sidewalks and gutters ice, snow, or other substances." Art. 3, sec. 26.

Under the powers conferred upon the corporate authorities of citizens of the first class by the provisions quoted, and other provisions of the statute, it is their duty to keep the streets and sidewalks in such a condition that persons passing over or along them may do so with safety and convenience. It is also the duty of the mayor as the executive officer of the city, to see that all laws and ordinances are enforced, and that all subordinate officers perform their duties. That the streets and sidewalks may be in a reasonably safe condition, it is the duty of the corporate authorities to remove or abate any nuisance from the streets or sidewalks. We think, in this case, that the city,

especially under its power to prevent and remove nuisances and to regulate all structures projecting upon or over, or adjoining the street or sidewalk, was bound to remove or protect the sidewalk from the imperfectly constructed and insecure bill board standing so near the sidewalk as to fall upon it. It was so close to or upon the edge of the sidewalk that it could not fall in that direction without falling upon it. Having failed to take the necessary steps to remove the bill board, or to protect the sidewalk therefrom, the city is liable for the damages caused by the falling of the board upon any person passing in front thereof along the sidewalk, if such person was injured without fault on his part. We do not think it is very material whether the bill board was so close to and adjoining the sidewalk as to be dangerously contiguous thereto, or was actually supported by braces or uprights resting upon the south edge of the walk. The liability of the city would be the same in either case. *Grove v. City of Ft. Wayne*, 45 Ind. 429; *Parker v. Mayor, etc. of Macon*, 39 Ga. 725; *Duffy v. City of Dubuque*, 18 N. W. Rep. 900; 2 *Dillon on Municipal Corporations*, secs. 789, 794, 795; *Jones v. New Haven*, 34 Conn. 1; *Kiley v. City of Kansas*, 69 Mo. 102; *Wood on Nuisances*, sec. 744; *Bassett v. City of St. Joseph*, 53 Mo. 290. As announcing a contrary doctrine, we are referred by counsel of the city of Atchison, with apparently great confidence, to the cases of *Taylor v. Peckham*, 8 R. I. 349; *Hickson v. Lowell*, 79 Mass. 59; *Jones v. Boston*, 104 Mass. 75.

In *Taylor v. Peckham*, the town officials had not the same authority to enter upon or control the uses of property adjoining the street or highway as have the officials of cities of the first class in this State, and in that case the alleged liability was one created by statute alone; and it was decided that the courts could not enlarge the liability beyond the scope and intention of the statute.

In *Hickson v. Lowell*, the statute relating to the liability of towns was construed, and it was held that a town has discharged its duty under the statute, when it has made the surface of the ground over which the traveler passes sufficiently smooth, level and guarded by railings to enable him to travel with safety and convenience, by the exercise of ordinary care on his part; and, therefore, that an injury resulting to a person on a sidewalk, by the falling of an overhanging mass of snow and ice from the roof of a building now owned by the city, did not constitute a defect or want of repair in the way or street for which the town would be responsible.

The decision in *Jones v. Boston* followed *Hickson v. Lowell*, and the court there held that an insecure sign suspended over the sidewalk on an iron rod fastened to a building was of the same character as overhanging ice. These, and other like decisions, cannot be held as controlling under the statutes of our State, and the general principles of law which have already been announced by this court as to the liability of cities concern-

ing streets and sidewalks. However, in *Drake v. Lowell*, 13 Metcalf, 292, and *Day v. Milford*, 5 Allen, 98, the city of Lowell in the one case, and the town of Milford in the other, were held liable for the injuries received by reason of defective awnings projecting over and across sidewalks, and the decisions do not appear to have been made upon the ground that the awnings, or posts upon which they were supported, were of themselves obstructions in the street; but those decisions are put exclusively on the ground of the insufficient strength or defective condition of the awnings, whereby persons passing upon the sidewalks were exposed to danger.

The judgment of the district court will be reversed, and the cause remanded for a new trial in accordance with the views herein expressed.

NOTE—By the common law of England the charge of repairing highways lay upon the inhabitants of the parish of common right, and could rest upon other corporations of individuals only by tenure or prescription.¹ *Gray, C. J., in Hill v. Boston*, 122 Mass., p. 346, cites from *Brooke's Abridg.*: "Common highway is out of repair, so that I mire my horse, and shall be reformed by presentment."² And the case might at first sight be supposed to be but a statement of the general rule, that a public nuisance can be prosecuted by an indictment only, and not by private action, and it was so treated in some of the year books. "But it has been uniformly understood in modern times as showing that it was because the highway ought to be repaired by the public, that the common law did not make an injury, arising from neglect to repair, a subject of private action but only of indictment by the government."³ No action lies at common law against a town for damages sustained through the defect of a highway in such town, unless given by the statute.⁴ The reason assigned in some of the cases is that there are no funds. But this does not hold good as to regular corporations.⁵ And it makes no difference with the above rule that the town is quasi-corporate and has a fund, and they are obliged to repair.⁶ Nor is a city liable except by statute.⁷ The

¹ *Austin's Case*, 1 Ventr. 138 189; *Com. Dig. Chimin, A 4*; *Bac. Abridg. Highways, E*; 13 Rep. [ed. 1826] 33, note B.

² *Quod. note per Heidon*, 5 E. IV. 8; *Bro. Ab. Accion sur le Case*, Pl. 93; See 5 E. IV 2 pl. 24.

³ *Russell v. Men of Devon*, 2 T. R., 667; *McKinnon v. Parson*, 8 Exch. 319, 321; *Gibson v. Mayor*, T. R. 5 Q. B. 218 222; *Bartlett v. Croner*, 17 Johns. 439 454; *Freehold ers v. Strader*, 3 Harrison, 108 121; *Weet v. Brockport*, 16 N. Y. 161; See *Thomas v. Sorrell*, Vaugh. 330 340; See also *Bro. Ab. Nuisance*, pl. 29; *William's Case*, 5 Rep. 72 b. 739; *Moore*, 180 pl. 331.

⁴ *Mower v. Leicester*, 9 Mass. 247; *White v. Phillipston*, 10 Met. 108 110; *Sawyer v. Northfield*, 8 Cush. 490 494; *Bigelow v. Randolph*, 14 Gray 541 543; *Adams v. Westcasset Bank*, 1 Greenl. 361 364; *Reed v. Belfast*, 20 Me. 246 248; *Farnum v. Concord*, 2 N. H. 392; *Hyde v. Jamaica*, 27 Vt. 443 457; *Young v. Yarmouth*, 9 Cush. 396; *State v. Burlington*, 36 Vt. 521 524; *Childsey v. Canton*, 17 Conn. 475 478; *Taylor v. Peckham*, 8 R. I. 349; *Ekenberry v. Baazaar*, 22 Kan. 556; *Frazer v. Lewiston*, 76 Me. 531.

⁵ *Riddle v. Prop. &c. Merrimac River*, 7 Mass. 187.

⁶ *Mower v. Leicester*, *Supra*. See *Com. v. Martin*, 4 Mich. 557; *Cooley v. Freeholders*, *Dutcher* 415; *Hedges v. Madison*, 1 Gilman 567; *White v. Bond*, 58 Ill. 297; *Walsham v. Kemper*, 55 Ill. 346; *Bushnell v. Stenton*, 27 Ill. 35.

⁷ *Hill v. Boston*, *supra*; *Brady v. Lowell*, 3 Cush. 121; *Harwood v. Lowell*, 4 Cush. 310; *Hixon v. Lowell*, 15

distinction is well established, however, between the responsibility of towns and cities for acts done in their public capacity, in the discharge of duties imposed by the legislature for the public benefit, and for the management of their private property.⁸ It is elsewhere stated that a distinction is to be noted between the liability of a municipal corporation, made such by the acceptance of a village or city charter, and the involuntary quasi-corporations known as counties, towns, school districts, and especially the townships of New England.⁹ The liability of the former is greater than that of the latter, even when invested with corporate capacity, and the power of taxation.¹⁰ So a village was held to be liable for the negligence of its trustees,¹¹ when a town was held not liable for the same acts by its commissioners of highways.¹²

On the other hand there is a large class of authorities which hold that the control of streets and highways is itself a sufficient basis for liability for injuries arising from defects thereof. "The surrender by the government to the municipality of a portion of its sovereign power if accepted by the latter, may with propriety be considered as affording ample consideration for an implied undertaking the part of the corporation to perform with fidelity the duties which the charter imposes."¹³ The ground of the liability, say other courts, is that the franchise and privileges involved in incorporation are equivalents for the burdens and duties imposed.¹⁴ "Where a public body is clothed by statute with power to do an act which concerns the public interests, the execution of the power may be insisted on as a duty, though the statute conferring it be only permissive in terms.¹⁵ The authorities state that the care and superintendence of streets alleys and highways, the regulation of grades, and the opening of new and closing of old streets, are peculiarly municipal duties. No other power can so wisely and judiciously control this subject as the authority of the immediate locality where the work is to be done.¹⁶ I collect below a list of authorities which base this general liability on control of streets, sidewalks, etc.¹⁷

The question whether or not a municipality has assumed control of a locality where an injury occurs is of

a determining character.¹⁸ A city is not liable by permitting the use of a sidewalk not on a city highway.¹⁹ Title acquired by user is as much a foundation for the duty of keeping a street or highway in repair as grant or condemnation.²⁰ During a change from a town to a village organization, a corporation is not relieved from its duty as to streets.²¹ A city is liable for an injury caused by breaking through the cover of a well, placed there by the authorities.²² Where a city authorizes the opening of a ditch across a street, it is responsible negligence in the work causing injury to passers by.²³ An injury caused by a defective awning over a sidewalk is actionable, because it is an essential part of the street.²⁴ If one public way open into another, it is the duty of the city or town to keep the entrance in repair, because the entrances are a portion of the public way used by travellers.²⁵ If work is done under supervision of city commissioners, the city is liable for negligence in the work.²⁶ But this general duty extends no further than to keep streets and highways reasonably safe; municipalities are not insurers.²⁷ The legislature has no power to exempt a particular municipality from liability for defective condition of streets.²⁸ A municipal by-law or ordinance must not be inconsistent with or repugnant to the constitution and laws of the United States or the State; It must be reasonable and in harmony with the principles of the common law.²⁹ Where a wall left standing after a fire, and not parallel with the street, fell upon an adjoining building, and killed a person therein, the city was held not liable.³⁰ Although the owner of a cow paid a municipal tax on her, a city was held not liable for injuries by goring in the street, where the ordinance against cattle running at large had been suspended.³¹

But a city will not be liable for defects in its streets unless it had notice of the defects, or unless the defect had existed for such a length of time as to lead to the presumption that the city authorities knew of it or with reasonable care and diligence might have known of it.³² Unless a reasonable time has elapsed

Gray 59 64; *Oliver v. Worcester*, 102 Mass. 489; *Jones v. New Haven*, 31 Conn. 1 18; *Morgan v. Hallowell*, 57 Me. 375; *Hewison v. New Haven*, 37 Conn. 475; *Pray v. Jersey City*, 3 Vroom 394; *Detroit v. Blackley*, 21 Mich. 84; *Windigler v. Los Angeles*, 45 Cal. 36.

⁸ *Oliver v. Worcester*, *Supra*. *Western Saving etc. v. Phila.* 31 Pa. St., 185 189; *Bailey v. Mayor*, 3 Hill 531 539; *Scott v. Mayor*, 2 H. & N. 294 210; *Henley v. Lyme*, 5 Bing. 81; s. c. 3 B. & Ad. 77; 1 *Scott*, 29 1 Bing. N. C. 222; *Ot. & Fris.* 331; 3 *Belger*, (N. S.) 690; *Weigalman v. Washington*, 1 Black 39; *Nebraska City v. Campbell*, 2 Black 590; *Child v. Boston*, 4 Allen 41 51; *Thayer v. Boston*, 19 Pick. 511; *Pittsburgh v. Grier*, 23 Pa. St. 54; *Mersey Docks Trustees v. Gibbs*, 11 H. L. Cas. 697; *Hill v. Boston*, *Supra*.

⁹ *Barnes v. Dist. Col.*, 91 U. S. p. 552.

¹⁰ *Dillon*, 10 11 13 2nd. Ed. 761.

¹¹ *Conrad v. Ithaca*, 16 N. Y. 158.

¹² *Weet v. Brockport*, *Supra*; *Brook's Ab. "Ac. on Case"*; *Russell v. Men of Devon*, *Supra*.

¹³ *Weet v. Brockport*, *supra*; See *Hickok v. Trustees*, 15 Barb. 437; *Conrad v. Ithaca*, *supra*; *Starrs v. Utica*, 17 N. Y. 104.

¹⁴ *Omaha v. Olmstead*, 5 Neb. 446.

¹⁵ *Mayor New York v. Furz*, 3 Hill 612.

¹⁶ *Barnes v. Dist. Col.* *supra*.

¹⁷ *Chicago v. Robbins*, 2 Black 418; *Nebraska City v. Campbell*, 2 Black 519; *Erie City v. Schwring*, 22 Pa. St. 384; *Meares v. Wellington*, 9 Ired. 573; *Lacour v. Mayor*, 3 Duer 406; *Wendell v. Troy*, 39 Barb. 329; *Clark v. Lockport*, 49 Barb. 580; *Browning v. Springfield*, 17 Ill. 143; *Savannah v. Cullens*, 28 Ga. 334; *Manchester v. Hartford*, 30 Conn. 118; *Schomer v. Rochester*, 15 Abb.

N. Cas. 57; *Sterling v. Thomas*, 60 Ill. 264; *Denver v. Dunsmore*, 7 Col. 328; *Bequa v. Rochester*, 45 N. Y. 129; See *Hutson v. Mayor*, 5 Seld. 463; *State v. Crompton*, 2 N. H. 513; *Angell on Highways*, Par. 257, 267; *Heacock v. Sherman*, 14 Wend. 58; *Dybert v. Schenck*, 23 Wend. 446; *Batty v. Duxbury*, 24 Vt. 155; *Griffin v. Williamston*, 6 W. Va. 312; *Hines v. Lockport*, 50 N. Y. 236.

¹⁸ *Manchester v. Ericsson*, 105 U. S. 548.

¹⁹ *Bishop v. Centralia*, 49 Wis. 669.

²⁰ *Beaudeau v. Cape Girardeau*, 71 Mo. 392.

²¹ *Evanston v. Gunn*, 99 U. S. 660.

²² *Sherwood v. Dist. Col.*, 3 Mackay 276.

²³ *Savannah v. Donnelly*, 71 Ga. 258.

²⁴ *Bohen v. Waseca*, 33 Minn. 176.

²⁵ *Paine v. Brockton*, 138 Mass. p. 568.

²⁶ *Wendell v. Mayor*, 4 Keyes 261.

²⁷ *Rockford v. Hilderbrand*, 61 Ill. 155.

²⁸ *Durkee v. Janesville*, 28 Wis. 464; *State v. Barlett*, 35 Id. 287; *Rooney v. Supervisors*, 40 Id. 23; *Kimball v. Rosendale*, 43 Id. 407.

²⁹ *Barling v. West*, 29 Wis. p. 315; *Hayes v. Appleton*, 24 Id. 542; *Dunham v. Trustees of Rochester*, 5 Cow. 463; *Austin v. Murray*, 16 Pick. 121; *Mayor of Mobile v. Yulie*, 3 Al. 137.

³⁰ *Cain v. Syracuse*, 95 N. Y. 83; *Parker v. Mayor etc* 39 Ga. 725; case of a wall standing on the edge of a street. *People v. Albany*, 11 Wend. 539, case of foul basin endangering health. *Jones v. New Haven*, 34 Conn. 1, case of trees pruned in the street. *Norrisstown v. Mayor*, 67 Pa. St. 356, case of rotten liberty pole in street, all liable

³¹ *Rivers v. Augusta*, 65 Ga. 376.

³² *Cuthbert v. Appleton*, 22 Wis. 642; *Goodnough v. Oshkosh*, 24 Id. 549; *Ward v. Jefferson*, Id. 342; *Mayor v. Sheffield*, 4 Wall, 189; See *Regua v. Rochester*, *supra*. *Reed v. Northfield*, 13 Pick. 945 96.

since the injury to have raised this presumption there can be no liability.³³ But after a street has been out of repair, and a defect has become notorious, and the city has had full opportunity to learn the fact, a city will be liable.³⁴ A city will be liable for damage caused by an open ditch along a defective sidewalk allowed to remain for a long time without protection.³⁵ Where an injury was caused by an icy sidewalk which had been so three days, a city was held not liable.³⁶ A city is not held liable for the acts of its citizens in obstructing its streets, when notice thereof has not been shown to have been received by its officers.³⁷ Where a city's officers knew a walk to be in such a condition from mere decay that an accident was liable to happen upon it at any moment, it is chargeable with negligence without bringing home to the authorities actual knowledge of the particular defect causing the injury in suit.³⁸ Where injury is caused by a latent defect, of which the municipality was ignorant without negligence, it is not liable.³⁹ Where ice or snow is suffered to remain upon a sidewalk in such an uneven and rounded form that a person cannot walk over it, using due care, without danger of falling down, that, it seems, constitutes a defect for which a city or town will be liable.⁴⁰ A city will be liable for icy state of walk, although the walk is not defective and all walks are similarly dangerous.⁴¹ Where an injury was caused by dirt thrown up from an improvement in a street in an icy condition, the city was held liable.⁴² A slippery sidewalk caused by constant wear and paint, is defective.⁴³ But the ice must be uneven,⁴⁴ or in ridges.⁴⁵ But an injury caused by falling snow and ice from an overhanging building is not actionable.⁴⁶ Mere slipperiness of a walk caused by snow and ice which have accumulated on it, is not an insufficiency or want of repair under some statutes.⁴⁷ Ice formed on sidewalk by reason of water pumped by a city fire engine the engine not being used for an unlawful purpose, will not lay foundation for an action.⁴⁸

A city is not liable for injuries caused by boys coasting in streets, the suppression thereof may be a police duty, but it is not a duty in which the corporation has a particular interest, or from which it de-

rives any special benefit in its corporate capacity.⁴⁹ In such a case there is no liability, even if the city has designated the place.⁵⁰

The exhibition of animals permitted by a city, will not lay a foundation for an action for an injury caused thereby.⁵¹

A city will be held liable for an injury caused by an excavation in its streets made by a gas company if it has control of the work by its charter.⁵² Where there is a dangerous place some distance from the travelled highway which one may reach by straying, a town is not liable nor bound to erect barriers to prevent it. A city is not liable for injuries caused by excavations outside of the street.⁵³ Nor for an excavation in a sidewalk made by the owner of an adjoining lot and left open without barriers, the circumstances not warranting the inference of notice.⁵⁴ Nor for a coal hole left open for a short time.⁵⁵ Stairways on the street side of buildings leading downwards to basements or upwards to the front entrance of such buildings must be guarded by proper safeguards.⁵⁶ But where a descending stairway is parallel to the sidewalk and properly protected on the side, a city is not bound to cause a gate to be maintained at the entrance.⁵⁷ A city is liable for cellar doors opening out on to the sidewalk and constantly left open.⁵⁸ Where a stone was left by the side of the walk while the street was being repaired, and a horse took fright at it, the city was held not liable.⁵⁹

Municipal corporations are only liable when the defects or obstructions are the result of their acts, or of some negligence or omission of duty by them or their servants or agents. And where an injury was sustained by reason of a stick of timber concealed by snow, and it did not appear who placed it there, or that the authorities had notice or that there were circumstances implying notice, the city was held not liable.⁶⁰ Where an obstruction is caused by the act of a third person, and there is no notice, there is no liability.⁶¹ Where an injury is caused by the unsafe condition of a highway and the unlawful or careless act of a third person, a city is not liable.⁶² A city is not liable for injury caused by a trench in one of its streets, constructed to connect with the main water pipe by a private per-

³³ *State v. Freyburg*, 3 Shipley 406; See *People v. H. & C. T. R. Co.*, 23 Wend. 254.

³⁴ *Todd v. Troy*, 61 N. Y. 506; *Hart v. Brooklyn*, 36 Barb. 226; *Clark v. Lookport*, 49 Barb. 580; *Oonrad v. Ithaca*, 16 N. Y. 158; *Requa v. Rochester*, *supra*; *Hyatt v. Rondont*, 44 Barb. 385.

³⁵ *Galveston v. Pasnainsky*, 62 Tex. 118; *Galveston v. Barbour*, Id. 172.

³⁶ *Smith v. Brooklyn*, 36 Hun. 224.

³⁷ *Griffin v. Mayor*, 9 N. Y. 456.

³⁸ *Weisenberg v. Appleton*, 26 Wis. 56; *Ripon v. Bittel*, 30 Wis. 614; See *Aurora v. Hillman*, 90 Ill. 61.

³⁹ *Ward v. Jefferson*, 24 Wis. 342.

⁴⁰ *Luter v. Worcester*, 97 Mass. 268; *Hutchins v. Boston*, Id. 273; See *Hull v. Lowell*, 10 Oush. 280; *Shea v. Lowell*, 8 Allen 136; *Payne v. Lowell*, 10 Id. 147; *Providence v. Clapp*, 17 How. 164.

⁴¹ *Cloughessy v. Waterbury*, 51 Conn. 405.

⁴² *Stafford v. Oskaloosa*, 64 Ia. 251.

⁴³ *Martin v. Smith*, 48 Wis. 265.

⁴⁴ *Broburg v. Des Moines*, 63 Ia. 526.

⁴⁵ *McAuley v. Boston*, 113 Mass. 503; See *McLaughlin v. Carry*, 77 Pa. St. 109; See also *Luther v. Worcester*, *supra*; *Battersby v. N. Y.*, A Daly, 16; *Morse v. Boston*, 109 Mass. 446; *Crocker v. Springfield*, 110 Mass. 135; But see *Mason v. Boston*, 14 Allen 508.

⁴⁶ *Hixon v. Lowell*, 13 Gray 59.

⁴⁷ *Cook v. Milwaukee*, 24 Wis. 280; *Stanton v. Springfield*, 13 Allen 566; *Johnson v. Lowell*, Id. 572; See *Kirby v. Boylston Mark. Assa.*, 14 Gray 249.

⁴⁸ *Cook v. Milwaukee*, 27 Wis. 191.

⁴⁹ *Schultz v. Milwaukee*, 49 Wis. 254; *Ray v. Manchester*, 46 N. H. 452.

⁵⁰ *Burford v. Grand Rapids*, 52 Mich. 96; See *Steels v. City of Boston*, 123 Mass. 583;

⁵¹ *Little v. Madison*, 42 Wis. 642; *Oole v. Newburyport*, 129 Mass. 594.

⁵² *McDermott v. Kingston*, 6 Abb. N. Cas. 246; 57 How. N. Y. Pr., 196.

⁵³ *Barnes v. Chicopee*, 138 Mass. 67; See *Sparhawk v. Salem*, 1 Allen 80; *Alger v. Lowell*, 3 Allen 402; *Adams v. Natick*, 13 Allen, 429; *Puffer v. Orange*, 122 Mass. 389; *Warner v. Holyoke*, 112 Mass. 362; *Murphy v. Gloucester*, 105 Mass. 470; *Dally v. Worcester*, 131 Mass. 453; See *Hubbell v. Yonkers*, 35 Hun. 349.

⁵⁴ *Kelly v. Columbus*, 41 Oh. St. 263; *Monmouth v. Sullivan*, 8 Ill. App. 50; *Young v. Dist. Co. 1*, 3 MacArthur 137.

⁵⁵ *Fort Wayne v. DeWitt*, 47 Ind. 391.

⁵⁶ *Lafayette v. Blood*, 40 Ind. 63.

⁵⁷ *Fitzgerald v. Berlin*, 51 Wis. 81.

⁵⁸ *Fitzgerald v. Berlin*, *supra*.

⁵⁹ *Chapman v. Mayor Macon*, 55 Ga. 566; *Smith v. Leavenworth*, 15 Kan. 81.

⁶⁰ *Farrell v. Oldtown*, 69 Me. 72.

⁶¹ *Gorham v. Cooperstown*, 59 N. Y. 660.

⁶² *Dorion v. Brooklyn*, 46 Barb. 604; *Griffin v. Mayor*, 9 N. Y. 456.

son,⁶³ or for a defective covering on an opening in a sidewalk made by the owner of an adjoining lot.⁶⁴ An iron grating protecting a passage way into a basement of a building adjoining a sidewalk, was left open by a stranger, but never known to have been disturbed before, the city was held not liable for an injury to a passer by.⁶⁵ For injuries resulting from the plan or construction of a walk, done under legal obligation by the owner of adjoining premises, and not by the city, the latter is not liable.⁶⁶ Where an ordinary sign fell from its support and injured a person under it, the city was held not liable, for the reason that the sign was a mere incident of the street.⁶⁷ And the same ruling was made, and the same reason given where the injury was caused by the weight attached to a flag.⁶⁸ Where the street had been dedicated to the public for forty years, but for ten years it had been but little used, and a sidewalk had been built by a citizen for his own convenience, the city was held not liable for an injury thereon.⁶⁹ A municipality is not liable for damages caused by an insufficiency, unless the place where the injury was received and the insufficiency exists, was a lawful public highway which it is the duty of the municipality to keep in a state of reasonable safety and repair.⁷⁰ The use, for a series of years by people traveling on foot along a public highway, of a part thereof as a foot path, on both sides of the carriage way constitutes such path a portion of the "travelled way."⁷¹ A city was held not liable for an injury caused by stones placed at a muddy crossing, used by one familiar with them, and there being nothing dangerous in their appearance.⁷² Nor is a city liable for an injury caused by swine running at large in one of its streets,⁷³ although the city has an ordinance against it. Where a child pulled over upon itself a heavy counter left by a third person against a fence on the street, the city was held not liable.⁷⁴ But a city is primarily liable for a defect in a street, as for instance a stringer and rail of a street railway, although a third party may be liable over for a tort.⁷⁵

Where a city permits a lot owner to connect his premises with a sewer in the street, the city is responsible for reasonable care to prevent injury, but it is not responsible for the negligence of the servants of the lot owner in the performance of the work.⁷⁶ A city is bound to see that dangerous places, made so by building materials placed on the street by an adjoining proprietor, are properly guarded.⁷⁷ Where a private person had placed a bridge over the gutter on his side of the street, opposite his place of business, for the purpose of attracting persons crossing the street to his place, and, such bridge being out of repair, the plaintiff fell on the same and was injured, the city was held liable.⁷⁸ Although the expense of repairing defects is imposed upon lot owners, a city is not exonerated from the duty towards the public to keep its streets and walks in good condition.⁷⁹

A banner permitted to be hung across a street and frightening a horse has been held a cause of action.⁸⁰ Where a city negligently suffered some roofing to stand upon the sidewalk, it was held liable for an injury caused by its falling upon a passer by.⁸¹ A permanent wooden awning, or roofing, covering the sidewalk, so insecurely supported as to be dangerous, is a defect.⁸² The fact that the proprietorship of a street is in a private corporation will not relieve a city from liability.⁸³ The fact that an injury was caused by an excavation in a sidewalk, made by a third person, is no defense.⁸⁴ Nor that a sidewalk was constructed by a private person without orders.⁸⁵ Nor that an excavation was made by a company engaged in putting in water works.⁸⁶ Nor that an obstruction was caused by a company engaged in laying a railway track in the street.⁸⁷ The liability of a city or town, for an injury or defect in a street or way, is not varied or discharged if the defect is occasioned by the exercise of the right of an adjoining owner of land to use the street or way for some private purpose, not inconsistent with the right of the public.⁸⁸ A city is liable for an injury caused by a defect in a sidewalk being built by a proprietor of the adjoining premises under orders from the authorities.⁸⁹ A city is primarily liable for excavations or obstructions in sidewalks made by a citizen.⁹⁰ But not independently of the rule as to notice.⁹¹

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⁷⁹ Johnson v. Milwaukee, 46 Wis. 568; See also Green v. Bridge Creek, 38 Wis. 449; Matthews v. Baraboo, 39 Wis. 674, 677.

⁸⁰ Cuthbert v. Appleton, 22 Wis. 642; Manchester v. Hartford, 30 Conn. 118; Hutson v. Mayor, *supra*; Veazie v. Penob. R. R. Co., 49 Me. 119; 2 Hilliard on Torts, 501 502; Wallace v. Mayor, 2 Hilton 440.

⁸¹ Champlin v. Penn Yan, 34 Hun. 33.

⁸² Duffy v. Dubuque, 63 Ia. 171.

⁸³ Hume v. Mayor, 74 N. Y. 384 9 Hun. 674; See 47 N. Y. 685; See Day v. Milford, 5 Allen 88.

⁸⁴ Ericsson v. Manchester, 3 Hughes C. Ct. 191.

⁸⁵ Elkhart v. Ritter, 66 Ind. 136; See Centerville v. Woods, 57 Ind. 192.

⁸⁶ Barnes v. Newton, 46 Ia. 567.

⁸⁷ Butler v. Bangor, 67 Me. 385.

⁸⁸ Wilson v. Watertown, 5 Thomp. & C. N. Y. 579; 3 Hun, 508;

⁸⁹ Bacon v. Boston, 3 Cush. 174.

⁹⁰ Cusick v. Norwich, 40 Conn. 375.

⁹¹ Aurora v. Bitner, 100 Ind. 386; Urquhart v. Ogdensburg, 97 N. Y. 238; Washburn v. Mount Kisco, 35 Hun, 329.

⁶³ Shepherd v. Chelsea, 4 Allen 113; See Rowell v. Lowell, 7 Gray 100.

⁶⁴ West Chester v. Apple, 35 Pa. St. 284.

⁶⁵ Hart v. Brooklyn, 36 Barb. 226.

⁶⁶ Littlefield v. Norwich, 40 Conn. 406.

⁶⁷ Marquette v. Cleary, 37 Mich. 296; See Sweet v. Gloversville, 19 N. Y. Sup. Ct. 302.

⁶⁸ Jones v. Boston, 104 Mass. 75.

⁶⁹ Hewison v. New Haven, 34 Conn. 136.

⁷⁰ Saulsbury v. Ithaca, 24 Hun. 12.

⁷¹ Houle v. Town of Fulton, 34 Wis. 608 617.

⁷² James v. Portage, 48 Wis. 647.

⁷³ Bullock v. N. Y., 51 N. Y. Super. Ct. 36.

⁷⁴ Levy v. Mayor, 1 Sandf. S. C. k. 465.

⁷⁵ Chicago v. Starr, 42 Ill. 89.

⁷⁶ Kittredge v. Milwaukee, 26 Wis. 46; See 2 Hilliards on Tort, 403; Phillips v. Veazie, 40 Me. 96; Elliot v. Concord, 7 Foster 208; Batty v. Duxbury, 24 Vt. 158.

⁷⁷ Masterton v. Mount Vernon, 58 N. Y. 391.

⁷⁸ Seneca Falls v. Zalinski, 15 N. Y. Sup. Ct. 571.

EQUITY JURISDICTION—RULE OF INFRA DIGNITATEM—DE MINIMIS.

ALLEN v. DEMAREST.*

Chancery Court of New Jersey.

1. Lord Bacon's ordinance, declaring that all suits under the value of £10 shall be dismissed, is in force in this State.

2. In order to justify a dismissal on the ground that the matter in dispute is beneath the jurisdiction of the court, the matter in dispute must be less than \$50.

3. A defendant may avail himself of the objection that the matter in dispute is too trivial to justify the

*From advance sheets New Jersey Equity Reports.

court in entertaining the suit, either by demurrer or by motion on notice.

On motion to dismiss, heard on bill and notice.

Mr. Charles H. Voorhis, for motion; *Mr. Charles L. Corbin*, *contra*.

VAN FLEET, V. C., delivered the opinion of the court.

This is a motion to dismiss the complainant's bill on the ground that the matter in dispute is beneath the jurisdiction of the court. The bill is filed to enforce a right to an equitable set-off. The complainant, in January, 1882, demised certain lands to the defendant, by lease under seal. The complainant neglected to perform one of the covenants of his lease requiring him to make certain repairs. The defendant brought suit against him for such default, and in September, 1884, recovered a judgment in the circuit court of Bergen county for \$70. The defendant at the time he recovered his judgment, was in arrear with his rent over \$175, and is still, and the object of the complainant's bill is to procure a decree satisfying the judgment, by setting off so much of the rent due from the defendant as will be sufficient for that purpose.

The claims, it will be observed, had a common origin. They both grew out of the lease, and there would, therefore, seem to be a strong natural equity that the larger should pay the lesser. It would be contrary to the lowest notions of justice to permit the defendant, to whom there is but \$70 due, to enforce the payment of that sum by legal process against a person who is his creditor for more than twice that sum, and whose debt arose out of the same transaction as that from which the debt of the defendant sprang. However, that is aside from the question now before the court. The question the court is called upon to decide on this motion is whether the subject matter of the suit is too trivial to justify the court in taking jurisdiction of it.

The rule is perfectly well settled that a suit in equity involving a pecuniary value of less than \$50, and not founded on fraud, or brought to establish a right of a permanent nature, must be dismissed. The rule is founded in reason and policy. It was designed to prevent expensive and mischievous litigation about trifling matters, which, in consequence of the insignificance of the amount involved, would do the parties themselves more harm than good, and might occasion injurious delay to other suitors. An attempt to redress by a suit in equity a wrong which has resulted in a loss of less than \$50, will, as a general rule, result in an aggravation of the wrong rather than in remedying it. Courts of equity sit to administer justice in matters of substantial interest, not to gratify the passions of the litigants, nor to foster a spirit of vexatious litigation. *Swedesborough Church v. Shivers*, 1 C. E. Gr. 453; *Moore v. Lyttle*, 4 Johns. Ch. 183; *Story's Eq. Pl.* § 500.

By the last clause of the fifteenth paragraph of Lord Bacon's ordinances, it is declared that all

suits under the value of £10 are regularly to be dismissed. Beame's Orders in Chan. 10. Chancellor Kent and Chancellor Green both say that this rule has the imposing character of an original constitutional ordinance. *Moore v. Lyttle* and *Swedesborough Church v. Shivers*, *supra*. It constitutes part of the law marking and defining the boundaries of the jurisdiction of the court, and as such, must be obeyed.

It is undoubtedly true that the purchasing power of \$50 is much less now than it was at the time of the adoption of this ordinance, or even thirty years ago, and it may also be true, that to allow a suit in equity to be maintained now, where the pecuniary value of the matter in dispute is less than \$100, will let in all the mischiefs which the ordinance was originally designed to prevent. But the courts are not charged with the duty of making laws. It is their duty to administer and enforce them, not to ordain and establish them. And even in cases where they have power, by rule or ordinance, to regulate and control the course of practice before them, they should not exercise such power, in my judgment, so as to give their action a retrospective effect. A suitor who has, by the rules of court, a right of suit when he commences his action, should not be deprived of such right by a rule or law made subsequent to the institution of his suit. Retrospective laws which destroy private rights are always unjust.

This rule has been rigidly adhered to: where the amount in dispute was under \$50, the suit has been dismissed regardless of its merits. *Fullerton v. Jackson*, 5 Johns. Ch. 276; *Mitchell v. Tyghe*, Hopk. 119; *Douw v. Thelden*, 2 Paige 323. and where it was just \$50, the bill has been retained. In *Vredenberg v. Johnson*, Hopk. 112, a bill was filed to restrain the enforcement of a judgment for \$50, recovered before a justice of the peace. It was alleged that it had been obtained by fraud. The amount, it will be observed was just sufficient, according to the rule, to entitle the complainant to have bill held. Chancellor Sandford, in denying a motion to dismiss, said that he felt sensibly the weight of the argument, that if such small suits were entertained the injured party, in seeking a remedy for his wrong, would lose more than if he allowed his wrong to go unredressed, but as the rule of the English court of chancery constituted part of the law of his court, and had never been changed by legislation or otherwise, he thought he was obliged to respect and enforce it. It is quite evident that the chancellor retained the bill in that case, not because he thought it best to do so, but because the law made it his duty to do so. A change was subsequently made in the rule in New York by legislation. A statute was passed, directing the dismissal of all suits in equity where the matter in dispute, exclusive of costs, did not exceed the value of \$100. *Smets v. Williams*, 4 Paige 364.

The rule in this State has never been changed by legislation or otherwise. The eighty-eighth

section of the chancery act (Rev. p. 120,) which authorizes a judgment creditor having a judgment on which there remains due a sum exceeding \$100, exclusive of costs, and who has exhausted the means which the law furnishes to compel the payment of his judgment, to file a bill in chancery to compel his debtor to make discovery of his property and things in action, was not intended to prescribe a new rule on this subject. The design of the statute, of which this section is a part, was to increase the efficacy of the creditor's remedy in equity. Prior to the enactment of this statute a judgment creditor could not seize the choses in action of his debtor nor acquire a lien thereon. This statute was passed to enable him to reach and seize that species of property. *Whitney v. Robbins*, 2 C. E. Gr. 360; *Green v. Tatum*, 4 C. E. Gr. 105. This statute does not attempt to change or define the general jurisdiction of the court; that is left unaltered and in its original vigor. All that the statute does is to make an old remedy more efficacious, and declare who shall be entitled to the benefit of it.

The practice pursued in this case is in accordance with precedent. The application is made on notice. A defendant may avail himself of the insignificance of the suit either by demurrer or by motion made on notice, or the court may of its own motion dismiss the bill. *Swedesborough Church v. Shivers*, *supra*.

The defendant's motion must be denied, with costs.

NOTE.—Of the limitation to equity jurisdiction fixed by Lord Bacon's ordinance, Judge Story says, referring to demurrers to the substance of bills: "One of the objections that can be so taken, is, that the value of the subject of the suit is too trivial to justify the court in taking cognizance of it; or as the phrase usually is, that the suit is unworthy of the dignity of the court. The true ground of this objection is, that the entertainment of suits of small value, has a tendency not only to promote expensive and mischievous litigation, but also to consume the time of the court in unimportant and frivolous controversies, to the manifest injury of other suitors, and to the subversion of the public policy of the land." The rule of Lord Bacon has been generally followed in England.¹

Of the exceptions to the rule, Judge Story says, that they "were probably established at a later date, from the manifest propriety of retaining suits in furtherance of rights of a permanent nature, in aid of charities, and in suppression of frauds."² In America the same rule has generally been followed, or statutes limiting the amount enacted.³ In Georgia it has been held

that the rule of *infra dignitatem*, is superseded by the sweeping terms of the judiciary act of that State which confers on the Superior Courts the powers of a court of equity in all cases, where a common law remedy is not adequate.⁴ In Tennessee under a recent statute,⁵ conferring upon chancery courts concurrent jurisdiction, in ejectment, with the circuit courts, it was held that the rule *de minimis* did not apply, although in equity cases under the general law of the State it did.⁷ And in Missouri the court in a case involving an equitable estate in lands, dower, etc., the court says: "Counsel speak of the amount as trifling, etc., and that so small an amount should make no difference with the plaintiff's rights. But the rules which regulate estates are exact, almost mathematical in their character, and if there is anything due and known to be due, the contract certainly is not executed and the trust is not fixed."⁸ In this case it will be observed that the amount, though small, was, in one sense, jurisdictional, and fixed rights and liabilities of greater magnitude.

In cases of fraud, it is well settled, the rule of *infra dignitatem* will not apply. Like sin in religion, fraud in law cannot be so small as to escape retribution.⁹

The amount set forth in the bill governs the question of jurisdiction,¹⁰ and the court may entertain the suit, even when below the amount, if the defendant does not object.¹¹

In *Wells v. Elsam*,¹² it was held that a bill in equity to obtain an off-set of a judgment would not lie unless it showed that the amount involved, after satisfying any proper claim of the attorneys, exceeded \$100—the amount fixed by statute.

In *Putnam v. Bentley*,¹³ a statute of Tennessee restricted the jurisdiction of chancery to suits of \$50 and upwards, and another statute gave to that court exclusive jurisdiction to aid a judgment creditor to subject the property of his debtor, which could not be reached by execution, to the satisfaction of his judgment: *Held*, that chancery would exercise jurisdiction to aid a creditor whose judgment was less than \$50.

Hams, 116 Mass. 510, 512; *Gamber v. Holben*, 5 Mich. 331; *Bay City Bridge Co. v. Van Etten*, 26 Mich. 210; *Dewey v. Dwyer*, 39 Mich. 509; *Marsh v. Benson*, 11 Abb. Fr. 241, and note; *Braman v. Johnson*, 26 How. P. 27; *Mallory v. Norton*, 21 Barb. 424; *Marsh v. Benson*, 34 N. Y. 358; *Ohunn v. McCarron*, 2 Dev. Eq. 73; *Carr v. Iglehart*, 3 Ohio St. 457; *Rentfroe v. Dickinson*, 1 Overt, 198; *McNew v. Toby*, 6 Humph. 27; *Williams v. Wilhite*, 3 Head 344; *Malone v. Dean*, 9 Lea 336.

¹ *Smith v. Ashcroft*, 25 Ga. 132.

² *Sess. Act 1877*, Ch. 97, p. 119.

³ *Frazier v. Browning*, 11 Lea 253; see also *Malone v. Dean*, 9 Lea 336.

⁴ *Worham v. Callicon*, 49 Mo. 206.

⁵ *Hamilton v. Johnson*, Vern. & S. 394; *Barnett v. Woods*, 2 Jones Eq. 198; S. C., 5 Jones Eq. 428; *Yantis v. Burdett*, 3 Mo. 457; see *Vredenberg v. Johnson*, Hopk. 112.

⁶ *Spurlock v. Fulks*, 1 Swan 299; *Birmingham v. Tapscott*, 4 Helsk. 322; *Fink v. Denny*, 75 Va. 663; 1 Dan. Ch. Pr. 328.

⁷ *Beckett v. Billrough*, 8 Hare 188.

⁸ 40 Mich. 218.

⁹ 8 Baxt. 94.

¹ Story Eq. Pl. § 500; see also Cooper's Eq. Pl. 165.

² Chity's Eq. Dig. "Jurisdic. of Chancery," XI. (1st Am. ed.) 1213; 1 Dan. Ch. Pr. (5th ed.) *228; 1 Story's Eq. Pl. § 500; see also Chaine v. Dungannon, 6 Irish Jur. 174; *Westbrooke v. Browett*, 17 Grant's Ch. 339.

³ Story's Eq. Pl. § 501; see also *Cocks v. Foley*, 1 Vern. 359; *Moore v. Lyttle*, 4 Johns. Ch. 183.

⁴ *Williams v. Berry*, 3 Stew. & Port. 284; *Wood v. Wood*, 3 Ala. 756; *Hall v. Canute*, 22 Ala. 650; *Oowan v. Jones*, 27 Ala. 317; *Wheat v. Griffin*, 4 Day 419; *York v. Kile*, 67 Ill. 233; *Reynolds v. Howard*, 3 Md. Ch. 331; *Cummings v. Barrett*, 10 Oush. 185, 190; *Smith v. Wil-*

**BENEVOLENT SOCIETIES—CORPORATIONS
DISCIPLINE OF MEMBERS—DISFRAN-
CHISEMENT OF MEMBERS—LIABILITY
TO THE LAW—REMEDY—BY—LAWS—LI-
BEL.**

ALLNUTT v. HIGH COURT OF FORESTERS.

Supreme Court of Michigan. June 27, 1886.

1. **BENEVOLENT SOCIETIES—Corporate Privileges under Laws of Michigan—How Amenable to Outside Bodies.**—Whatever advantages may exist in affiliation with other associations, the rights of Michigan corporations must be governed by the laws of Michigan, and corporate privileges cannot be destroyed in violation of them.

2. —. **Disfranchisement of Member—Delegation of Power by Society—Limitation.**—No corporation can allow its members to be disfranchised by another body for any cause, or in any manner, which it could not have adopted for itself in the premises.

3. —. **Disfranchised Member—Remedy in Case of Illegal Disfranchisement.**—Where a corporator is deprived of valuable corporate rights in a beneficial society by interference, to which he has not assented, by an outside body, whose powers in the premises are not derived from the incorporation laws of the State, he can call upon his own corporation to do him justice.

4. —. **By-Laws—Must be Reasonable.**—All by-laws must be reasonable, and if not so, are void.

5. —. **Libeling Fellow-Member—In What Case Punishable.**—The discipline to which a member of a beneficial society is liable for the offense of libeling another member is not ever to be exerted upon vague charges of libeling, and only in cases where the libel is without any reasonable cause.

Mandamus.

James H. Pound, for relator. Case & Carpenter and T. C. Prosser, for respondents.

CAMPBELL, C. J. delivered the opinion of the court.

Relator complains that he has been unlawfully suspended from membership in court City of the Straits, which is an incorporated society of the order of Foresters, organized originally under affiliation with the general system of societies of that brotherhood, and obtaining corporate powers under the general statute for benevolent associations. He asks a mandamus to restore him, and the subsidiary high court impleaded as the superior body under whose order the alleged wrong was done. It appears from the showing on both sides that Forest-r Associations, which originated in England several years ago, act together, by means of local lodges, usually called "Courts," all of which are in some measure subordinate to the subsidiary high court, which appears to be a body of delegates which has, among other things, a court of final arbitration to which appeals lie from lower courts.

Allnutt, the relator, who is a member of the City of the Straits Court, was charged, by complaint of another body, (the Peninsular,) with defaming a member of the latter body, whose name is not

given in the complaint. The complaint was entirely general, giving no details whatever of the alleged defamation, and was not made by the party injured, as it should have been. It was, however, tried before the proper body in the corporation to which Allnutt belonged, and he was unanimously acquitted. The person referred to, appears to be one John H. Lays, who occupies a high office in the subsidiary high court, and who turns out to have been charged with dishonesty and immorality. The Peninsular Court, whose right to do so we have not found in the rules, undertook to appeal, making Court City of the Straits respondent in the appeal. The latter appeared before the arbitration board, represented by relator and another person, who, by what was called a "demurrer," but which was in fact what in law would usually be called an "answer," and was entirely appropriate, raised several objections, a part of which went to the competency of the members of the board of arbitration, and were challenges for cause. The board overruled the other objections, and failed to consider the challenges. The appellee refused to appear further, and the board proceeded to dispose of the matter without the production of any of the letters or other articles claimed to be libelous, and without any proof of contents, and undertook to reverse the acquittal and sentenced Allnutt to a fine of \$15, and to two years' suspension. This being communicated to the inferior court, the second respondent here, he was required to desist from any further action as a member, as it is admitted by his local society, which regarded the action of the subsidiary high court as illegal, but it did not feel justified in defying it. We are now asked to reinstate him.

The Detroit society being a corporation under our laws, the rights of its members are entitled, in a proper case, to protection. The question discussed relate to the propriety of our interference in this case.

Under our statutes, the corporation in question has the right and duty of determining the conditions of membership. This it has done by its by-laws, and we find nothing in them which makes such membership subject to the action of any outside body. The subsidiary high court is not an incorporated body, under the laws of this State. One of the objections raised to its action here is that the rules of the order require it to become incorporated. We shall not undertake to discuss that question, but there is evidently much reason for it, as it would be contrary to the general legal rules to allow membership in a corporation to depend on the will or action of an unincorporated outside society. Whatever advantages may exist in affiliation with other associations, the rights of Michigan corporations must be governed by the laws of Michigan, and corporate privileges cannot be destroyed in violation of them. If there are rights independent of those of corporators, they stand on a footing of their own. If members see fit to subject themselves voluntarily to arbitration it would not be desirable for this court to under-

take to review the action of extrajudicial bodies, and intermeddle with their action in the course of delegated power. But where a corporator is deprived of valuable corporate rights by interference to which he has not assented, he can call upon his own corporation to do him justice. In the present case, if relator is shut out from his corporate rights, he loses privileges of considerable pecuniary value: as benefits and support during sickness, and other similar aid. If these were entirely distinct from his social privileges, the latter would probably be left to the social forum. But whether joint or distinct, we can only look at the case as one where the right are of tangible value, and determine them accordingly. We shall not, therefore, discuss the mutual relations of these bodies on any other basis, and we shall consider the action had against Allnutt merely to see whether it is such that, by his tacit recognition of the usages of the order, he can be held bound by the proceedings complained of.

It may be fairly held that no corporation can allow its members to be disfranchised for any cause, or in any manner, which it could not have adopted itself. All by-laws must be reasonable, and if not so, they are void. This order professes to be dependent for its methods and usages on those of an English corporation, which must be supposed subject to this same common law rule of reasonableness. All by-laws and regulations must be construed, therefore, on that principle; and so construed, the proceedings here are very singular.

Assuming that the society to which relator belongs has accepted, as it seems to have done, the rule that a member may be disciplined for libel of another member, yet the English rules expressly, and the American rules by the only implication which is reasonable, restrict the punishment to cases where the libel is without any reasonable cause. It is well-settled common law that the mere fact of defamation of another member is no cause of discipline. Any other doctrine would be monstrous, and it cannot be held that a corporation in this State shall deprive any member of his rights unless he is himself grossly in fault. Neither can any one be called on to meet vague and uncertain charges. The charge here was no charge at all, and the conviction itself does not show who was defamed, or by what means.

Passing by other defects, which are, however, very serious, the rules of the order, assuming them to be valid, limit fines in this class of cases to five dollars. Article 21. The American rules differ in this from the English; but neither code allows more than one form of punishment to be imposed. Article 24. Fine, suspension, or expulsion may be imposed, but there is nothing in any of the rules allowing a double punishment. In the absence of direct provisions to the contrary, it is well settled that power to give an alternative sentence does not authorize a double one, and that any such sentence is void. Giving to the peculiar

affiliation shown here the widest possible effect, and assuming—what all parties have assumed, for the purposes of this proceeding—that the corporation has subjected itself and its members to the complete system of the order, the sentence given is null and void, and the prosecution itself entirely unauthorized. Had the proceedings been properly instituted, and the sentence competent, we should have declined to scrutinize what might be treated as resting on a jurisdiction by consent. But these proceedings disregarded all correct principles, and we think it proper to require relator's restoration, and, for this purpose, the writ must go to the defendant corporation, without costs, as we are satisfied that body has meant no wrong.

So far as the other respondent is concerned, we do not propose to review its action directly, because it is not a body known to the law, and the action is void according to its own code. It is denied, on its own behalf, that this body is a corporation, and, that, being so, the appearance of Mr. Lays amounts to nothing, and the Detroit corporation must be considered the only respondent whom we can recognize as before us. We have looked into the proceedings, because pertinent to the corporate action of the legal respondent, and have considered the arguments so ably presented in behalf of the high court. It is much to be regretted that so much personal bitterness has governed parties who should have been impartial. No association can hold together if its authorities are not disposed to respect the rights of members, fairly and in accordance with impartial justice.

The writ must issue, as above suggested.

SHERWOOD and MORSE, JJ., concurred; CHAMPLIN, J., dissented.

WEEKLY DIGEST OF RECENT CASES.

ALABAMA,	1, 11, 12, 22
CONNECTICUT,	26
ILLINOIS,	6, 22
MARYLAND,	25
MICHIGAN,	4, 10, 18, 19, 23, 24
NEBRASKA,	7
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NEW YORK,	5, 13, 15, 23, 24
OHIO,	3
OREGON,	9
PENNSYLVANIA,	2, 16
VERMONT,	14
UNITED STATES,	17

1. *BAIL—Recognizance—Forfeiture.*—In *scire facias* against bail on a forfeited recognizance, which is a civil proceeding, the issue presented is required to be decided by the court (Code, § 4867-68); and if any issue can arise which would be proper for the determination of a jury, the failure to demand it is a waiver of the right. When the principal defendant is required by the court to enter into a new undertaking of bail, because of the insufficiency of the first, and is ordered into custody for his failure to do so (Code, § 4864), the sureties are

discharged for any future default. When the record does not show the evidence on which the decision of the court was founded, this court will presume that it justified the decision. *State v. Posey*, S. C. Ala.

2. **BANKS—Savings Banks—Assignment for the Benefit of Creditors—Stockholders—Assessments—Notice to Stockholders.**—Where a petition is filed by the assignee of a savings bank for the benefit of creditors, against the stockholders, for unpaid assessments, and the court, in accordance with the petition, orders an assessment, it is error to hold that, when defendants deny liability to pay assessments on other grounds than want of notice, they are not entitled to notice. When, in a petition filed by an assignee of a savings bank against the stockholders for unpaid assessments, the assignee has failed to give the notice specified in the decree, a verdict is properly rendered against the bank. *Franklin Sav. Bank v. Fatzinger*, S. C. Penn., March 8, 1886: 4 Atl. Rep. 912.

3. **CONSTITUTIONAL LAW—Enactment of Laws—Right of Legislators to Seat—Evidence—Collateral Attack—Legislative Power—Act of May 17, 1886, for Government of Cities of First Class.**—Where the journal of each house of the general assembly shows that a law received the concurrence of the number of members required by the constitution for its adoption, and that it was publicly signed in the presence of each house by its presiding officer, as required by § 17, art. 2, of the Constitution, its authenticity cannot be impeached by parol evidence that one or more of the members in either house, recorded as concurring in its adoption, had, prior thereto, been seated, upon the determination of a contested election, by less than a constitutional quorum, although the concurrence of such member or members was necessary to the number of votes required by the Constitution for the passage of the law. The members so seated are, at least, *de facto* members of the house to which they belong, and the validity of the title by which they occupy their seats cannot be inquired into by the courts for the purpose of affecting the validity of laws enacted by the legislature in which they hold seats. The act of the general assembly passed May 17, 1886, entitled "An act to establish an efficient board of public affairs in cities of the first grade of the first-class," (83 Ohio L. 178,) is within the legislative power conferred on the general assembly by § 1, art. 1, and the requirement of § 6, art. 8, of the Constitution; and does not, by its provisions vesting the appointment of the board in the governor of the State, impair any of the undelegated powers which, by § 20, art. 1, are declared to "remain with the people." Whether laws so enacted for the government of cities and villages are wise or unwise is left by the Constitution, to the wisdom of the legislature, and the courts have no power to hold them invalid, although they may differ with the legislature as to the policy of such laws. *State, ex rel. v. Smith*, S. C. Ohio, June 29, 1886: 7 N. East. Rep. 447.

4. **CONTRACT—Settlement—How Regarded by Law—Good Except in case of Fraud—Rescission—Essential Prerequisite—Surrender of Benefits—Receipt Signed on Faith of—Estoppel—Receipt Signed in Ignorance.**—The law favors settlements of disputed matters by the parties without recourse to litigation; and, presuming that in such settlements the parties consulted their own interests, will not interfere except in the case of fraud

or mistake. When one of the parties to a settlement had to adjust matters in dispute between them desirous to rescind such settlement on the ground of fraud, he must, before proceeding thereupon, surrender the benefits received by him under the terms agreed upon; otherwise he recognizes the settlement, and is bound by it. When a receipt has been signed by a party upon the faith of a statement made to him to the effect that certain outstanding matters had been settled, such receipt does not, upon discovery of the fallacy of such statement, estop him to maintain an action in the premises. A receipt signed in ignorance of a failure of the debtor to account for certain moneys concerned, does not prevent the signer from recovering such moneys. *Hart v. Gould*, S. C. Mich., July 1, 1886: 28 N. W. Rep., 831.

5. **CORPORATION—Sinking Fund Contract—Construction of Conflicting Provisions.**—The defendant corporation gave a first mortgage on its property and franchises, in which it was provided that \$12,500 of the surplus of the net earnings, after paying interest on the bonds secured by the mortgage should be paid semi-annually to the mortgage trustees, as a sinking fund for the redemption of the bonds. The moneys in this fund, with the accumulations of interest thereon, were to be invested in the purchase of these bonds, if such purchase could be made at not exceeding ten per cent above par, the bonds so purchased to be indorsed as belonging to the sinking fund, and they were to "remain in force" and the interest thereon was to be continued to be paid as part of the capital of the sinking fund. In case the bonds could not be purchased at ten per cent above par, no further payment was to be made to the sinking fund until the price lowered to that point, when such payment of \$12,500, semi-annually was to be resumed. Purchases of bonds were made until January, 1879, when they advanced in value beyond the limit imposed. But interest on the bonds held for the sinking fund continued to be paid. In this action, by a preferred stockholder of the corporation, to restrain this payment, held, that the interest payments to the sinking fund must continue until the maturity of the mortgage. *Wilde v. St. Louis, etc. Co.*, N. Y. Ct. App., June 1, 1886, 5 East. Rep., 662.

6. **MUNICIPAL CORPORATIONS—Improvements—Special Assessments and Special Taxation—Amount, How Determined—Failure of Ordinance to Determine Amount of Assessment—Description of Improvement in Ordinance.**—Where an improvement by municipal authorities is made by special assessment, the gross amount to be so raised is determined by commissioners appointed for that purpose, and not by ordinance, and is reviewable on appeal. 1 Starr & C. St. c. 24, art. 9, par. 140. But where the cost of a local improvement is to be raised, in whole or in part, by special taxation, the ordinance itself must either state the sum, or give data by which the commissioners can fix the amount; and when this amount is fixed in accordance with the ordinance, it is not reviewable. The failure of an ordinance authorizing a special assessment to determine the gross amount of such assessment is not ground for vacating the assessment; but such omission from an ordinance authorizing a local improvement by special taxation would be fatal. The requirement of the statute that the ordinance authorizing a local improvement shall specify the nature, character, locality and description of such improvement (1 Starr & C. St. c. 24, art. 9, par. 135) is mandatory. An in-

sufficiency of description, such as the court finds to have existed in this case is fatal. *City of Sterling v. Galt*, S. C. Ill., May 15, 1886: 7 N. East. R., 471.

7. **COURTS—County Court—Justice of the Peace—Jurisdiction—Amount.**—Under the provisions of the Constitution, and the statute enacted pursuant thereto, county judges and justices of the peace have jurisdiction of actions, within the stated limits, as to amount for money had and received, brought to recover back a deposit, or money paid upon an agreement for the purchase and sale of land, where the defendant omits or refuses to perform his agreement to convey the same. *Mushrush v. Devereaugh*, S. C. Neb., July 6, 1886, 28 N. W. Rep. 847.

8. **Judges—Disqualification—Effect—New Trial—Gen. St. 2464.** Act of judge, involving the exercise of judicial discretion, in a case where he is disqualified from acting, are not voidable only, but void. A judge who is disqualified from hearing a case, under Gen. St. 2464, cannot extend the time within which to make a motion for a new trial. *Frevert v. Swift*, S. C. Nev. July 8, 1886. 11 Pac. Rep. 273.

9. **CRIMINAL LAW—Complaint—City Ordinance 11 Pac. 29—Bawdy and Disorderly Houses—Municipal Corporations—Jurisdiction of Police Court—Constitutional Law—Trial by Jury—Violation of City Ordinance—Constitution of Oregon.**—In a prosecution for the violation of a city ordinance, where the words of the ordinance fix a penalty for "knowingly" committing the offense in question, and the complaint charged that the defendant "willfully and unlawfully" did the act charged, *held*, that the complaint was sufficient. Where a city, by its charter, has authority to suppress and prohibit bawdy-houses, and a general power to punish for violation of its ordinances, and the State is authorized by its constitution to create such municipal corporation without any limitation of such authority except the city's power of taxation, the police court of the city, has jurisdiction of an action charging a defendant with a violation of its ordinance prohibiting the keeping of bawdy-houses. The enforcement of a penalty for the violation of a city ordinance is not a criminal prosecution, within the meaning of the provision of the constitution on the subject of the right of trial by jury in criminal prosecutions, and it is not error in the police court to refuse a jury trial in such an action. *Wong v. Astoria*, S. C. Oreg., June 24, 1886. 11 Pac. Rep. 295.

10. **DEED—Execution—Delivery—Destruction after Delivery by Grantor's Wife—Informal Conveyance of Real Property—Equitable Title—Statute of Limitations—Adverse Possession—Verbal Sale Followed by Possession.**—A deed executed and delivered, and then intrusted to the grantor to obtain his wife's signature, and by her destroyed, *held*, to pass the title of the grantor. An informal writing, signed by one of the heirs to an estate, certifying that, for a stated valuable consideration, she signs off to another of the heirs of said estate all her interest therein, creates in such other heir an equitable title to her interest in the estate. Proof of a verbal sale of the interest of one of the heirs to an estate to another of the heirs, followed by 20 years' adverse possession in such other heir, *held*, to create a sufficient title in the latter. *Hyne v. Osborne*, S. C. Mich., July 1, 1886. 28 N. W. 821.

11. **EJECTMENT—Adverse Possession—Judgment.**—

In a statutory action in the nature of ejectment, the suggestion of adverse possession and the erection of valuable improvement being found true, and the value of the improvements being assessed, or their excess above the rents, (Code, §§ 2051-54), the verdict should go further, and ascertain the value of the lands without the improvements; and being defective in this particular, the court may, during the term, set it aside, and award a *venue de novo*; or, judgment being rendered on the defective verdict, it would be reversed on appeal. Judgment having been rendered on the defective verdict, and set aside, on motion, at a subsequent term, after which the cause was, for several terms, treated as a cause pending and undecided; the irregularity, if any, in setting it aside, is waived, and the irregular order can not be vacated on motion, as a void judgment or order may be. *Coltart v. Moore*, S. C. Ala.

12. **EVIDENCE.—Written Instrument—Landlord and Tenant.**—

While a written contract can not be contradicted or varied by parol evidence, it is permissible, where the writing does not purport to set out the entire contract, to show by parol other stipulations not inconsistent with those expressed. A tenant having given his note or written obligation for the rent, specifying a certain number of bales of cotton, it is not permissible to show by parol that he also agreed to deliver certain quantities of cotton seed. The landlord suing in case for the conversion of his tenant's crop, whereby his statutory lien was lost, can not be allowed to prove "that it was a rule or custom he had made on his plantation that he should have all the cotton seed raised on the land by his tenants;" because one man can not establish a custom, and because such evidence contradicts the terms of the note for rent, which specifies that a certain number of bales of cotton should be delivered as rent. If the cotton was converted by the wrongful act of the tenant himself, co-operating with the other defendants, who had notice of the landlord's rights, a joint action for the wrongful act may be maintained against all of them; but, if the wrongful act of each were separate and distinct, a joint action can not be maintained against them. While the removal of the tenant's crop from the rented premises, without the consent of the landlord, and without paying the rent, is *prima facie* a wrongful act, tending to the destruction of the landlord's lien; yet it may be justified by proof of legal right or lawful excuse, as by showing that it was replevied by the tenant after attachment levied at the suit of the landlord, and after the expiration of the tenancy and the tenant's removal from the rented premises; but, if such replevy was made, not in good faith for the preservation of the cotton, but with the intention to waste and convert it, and the sureties on the bond had notice of such wrongful intent, they are liable for the conversion jointly with their principal. *Powell v. Thompson*, S. C. Ala.

13. **EXEMPTION—Findings of fact—Equitable Relief**—

It is essential to the support of a judgment that the findings of fact should establish a legal right on the part of the successful party to relief granted, and when they do not, and there is nothing in the evidence to show such right, an exception to the legal conclusion of the court directing judgment raises the question whether upon all of the

facts found the party succeeding is entitled to the judgment directed. In an action brought to establish the title to, and recover the possession of real property, the plaintiff is not entitled to a judgment for equitable relief directing the defendant to deliver up for cancellation the deed under which he claims title, and the cancellation thereof, when it appears from the allegation of the complaint and the findings of fact that the plaintiff had a common remedy at law in an action of ejectment. *Moore v. Townsend*, N. Y. Ct. of App., June 1, 1886.

14. FIRE INSURANCE—Application—Agent—Broker—Proof of Loss—Fraudulent Misrepresentations—Inventory Made by Wife—Where an application for insurance against loss by fire was obtained by one not an agent of the defendant, but a broker doing the business under an arrangement with defendant's only-authorized agent, by whom it was sent to defendant; and the defendant returned it for additional information as to the ownership and occupation of the property to be insured; and the agent gave the application to the broker, with instructions to obtain the answers from the applicant; and the broker took the application away, and returned it with the answers written in his own handwriting, and not in accordance with the facts, although the broker at the time had full information as to the facts: *held*, that the act of the broker, under these circumstances, was the act of the agent, and the knowledge of the broker, no matter when obtained, if before the answers were given, was the knowledge of the defendant, and it was estopped from setting up such false answers in defense. It was the duty of the assured to supply the defendant with an honest inventory of the property damaged, and although he may employ his wife to make the inventory of household goods destroyed, if he makes oath to one thus made by his wife, containing false statements and fraudulent claims, without knowing of its false claim, and without scrutiny, he thereby adopts and makes the fraud his own, and cannot recover. *Mullin v. Vermont etc. Co.*, S. C. Vt., June 26, 1886.
15. FRAUD—Warehouseman—Representing That Building Fire-Proof.—When a warehouseman issues a circular to the public, intended as an advertisement, in which he describes his warehouse as fire-proof on the exterior, and solicits the storage of property upon that ground, knowing at the time that the building is not fire-proof, and the premises and their contents are subsequently destroyed by fire, communicated from without, an action for fraud and deceit will lie against the warehouseman in favor of a party storing goods there, relying upon the description contained in defendant's circular. *Hickey v. Morrell*, N. Y. Ct. App. June 1, 1886, 5 East. Rep. 685.
16. GIFT TO WIFE—Policy of Life Insurance—Deceit—Volunteer.—A., under engagement of marriage with B., took out a policy of life insurance upon his life, payable to his legal representatives. He intended it for B.'s benefit, but it was not made payable to her from feelings of delicacy on her part. After their marriage he often stated his intention to assign the policy to her, and before his death he obtained a form of assignment from the company to so do, but for some reason this was never executed, though after he got it he stated that she was to get the insurance money. The policy was put in a tin box, with other papers of A. and B., and remained in the keeping of B. un-

til after the death of A., who died intestate without issue. At the audit of A.'s estate one-half of the policy was claimed by his father and mother. *Held*, that a valid gift to the wife was made out, as against her husband's parents, who were volunteers. *Appeal of Madetra*, S. C. Penn., Feb. 15, 1886, 4 Atl. Rep. 908.

17. GUARDIAN AND WARD—Sale Under Order of Probate Court—Dispensing With Bond—Constitutional Law—Deprivation of Property.—Where a sale of land by guardian took place under order of probate court, and the proceedings were regular and in proper form, save that the court dispensed with the giving of a bond by the guardian under a certain requirement of the statute, the failure to furnish this bond did not render the sale void. The failure to require the bond being a question of procedure merely, is not a breach of the constitutional provision against deprivation of property, without due process of law. *Arrow-smith v. Harmenting*, S. C. U. S. May 10, 1886: 16 Ohio L. J. 89.
18. HUSBAND AND WIFE—Divorce—Pleading.—Dissolution of marriage will be decreed upon a bill charging extreme cruelty, and also refused to support, where the latter charge is fairly proved, even without any proof of cruelty, and even though the bill is not specific enough to admit any proof of cruelty whatever. A bill in equity seeking divorce on the ground of extreme cruelty, but failing to specify any distinct act of cruelty, is insufficient to warrant the introduction of any proof whatever. *Dashback v. Dashback*, S. C. Mich., July 1, 1886: 28 N. W. Rep. 812.
19. ———— Divorce—Temporary Alimony—Bargaining Away Alimony by Wife—Section 6235, How. St.—Assigning Alimony by Wife Before Decree to Attorney.—An allowance for temporary alimony to enable a wife to carry on a suit for divorce, and to furnish her sustenance during its pendency, under § 6235, How. St., is not assignable, and it is against the policy of the law to permit the wife to bargain it away in advance of receiving it. The power to decree alimony is statutory, and incident to the jurisdiction in suits for divorce, and a contract made between the wife and her solicitor, in advance of a decree for divorce and allowance of alimony, to pay one-half of what she should be awarded to her solicitor is void, as being against public policy. *Jordan v. Westernman*, S. C. Mich., July 1, 1886: 28 N. W. Rep. 826.
20. JUDGMENT—Conclusiveness of—Action on Judgment—Judgment Against Minor—No Guardian ad Litem—Judgment Voidable Only.—Errors in the course of proceedings leading to a judgment when not jurisdictional, cannot be reviewed in an action upon the judgment. The rule is inflexible that a judgment cannot be collaterally assailed for errors not jurisdictional. A judgment rendered against a minor, where no guardian has been appointed, is not void, but only voidable by a direct proceeding. Such omission will not vitiate the judgment on a collateral attack. *Millard v. Marmion*, S. C. Ill. May 14, 1886, 7 N. East. Rep. 463.
21. NEW TRIAL—In Equity—Res Adjudicata—Equity—Diligence.—A bill in equity to obtain a new trial, and for relief against a judgment, will not be entertained after motion for new trial has been submitted to and denied by the court which rendered the judgment, and its denial affirmed by the court of last resort, because the entire controversy must, under such circumstances, be consid-

ered *res adjudicata*. Equity relieves against a common-law judgment only upon clear proof of artifice and deceit by the prevailing party against his adversary, and the injured party must have been diligent in the assertion of his rights. *Gray v. Barton*, S. C. Mich., July 1, 1886: 28 N. W. Rep. 813.

22. REAL ESTATE—Adverse Possession—Destruction of Fence does not Interrupt.—A fence or inclosure is not an essential element of an adverse possession; and permitting a fence to become dilapidated, or even destroyed, during the interval between periods when necessary to protect the crops, does not, of itself, constitute an abandonment, nor interrupt the continuity of the possession. In delivering the opinion of the court, Somerville, J., said: "A fence or inclosure is not an essential element of adverse possession, but is only one of the many acts indicative of possession and claim of ownership. It is often very important, it is true, to mark with precision the limits or boundaries of a possession, especially when the occupant is without color of title, which would answer this purpose. In a section of the country, for example, where fence-laws have been abolished, the absence of an inclosure would weigh but little, where a river constitutes a boundary line. The reason is that it would then be no index of an intention to abandon. It has often been decided in this country that the possession of an occupant may be adverse without either inclosure or improvements. *Bell v. Benson*, 56 Ala. 444; *Ellcott v. Pearl*, 10 Pet. 441; *Leeper v. Baker*, 68 Mo. 400; *Angell on Lim.* § 400; *Real property Trials* (Malone), § 277-278. And color of title is sometimes said to be a substitute for a substantial and permanent fence around the premises claimed. *Trial of Titles to Land* (Sedg. & Walt), § 707; *Watson v. Mancill*, 76 Ala. 600." *Hughes v. Anderson*, S. C. Ala., Dec. Term, 1885-86.

23. PARTNERSHIP—Contract—Letters-Patent.—Plaintiff and defendant were copartners in the brewing business. An inventor by the name of Mixer proposed to the defendant that if he would furnish the means of conducting certain experiments in perfecting a beer refrigerator which he was working upon that he would give the defendant a one-half interest in the results. Defendant consulted with the plaintiff in regard to the matter, and it was finally agreed between them that Mixer should use their brewery in which to construct an experimental refrigerator, and that the firm should bear the expense, and that they should share equally in the one-half interest which Mixer had agreed to give defendant. Mixer accordingly, under this arrangement proceeded with the experiments, and in making them was materially assisted by the defendant personally. They resulted in an invention of great value, and several patents were issued, all of which, however, were taken out either in the name of the defendant alone or in the names of the defendant and Mixer jointly, and the plaintiff was not recognized as having any interest in them. In an action brought by the plaintiff against the defendant to recover of him one-half of his interest in such patents and also of the profits derived therefrom, held, that the plaintiff could recover. *Burr v. De La Vergne*, N. Y. Ct. App. June 1, 1886, 5 East. Rep., 674.

24. — Transactions of Partner Outside of Partnership Business—Evidence—Notice to Third Per-

son—When one partner has a transaction with a third person which is neither apparently nor really within the scope of the partnership business, the partnership is not bound by his declarations make that a partnership transaction which does not appear to be such, and which is apparently and really an individual transaction. In such a case the third person has notice that the transaction is outside of the partnership business, and he cannot rely upon the partnership credit. One member for a partnership has no power to bind his co-partner by giving the firm note for his own individual debt without the knowledge, assent or authority of his partner. *Union Nat. Bank v. Underhill*, N. Y. Ct. of Appeals, June 1, 1886. 5 East. Rep. 678.

25. PROMISSORY NOTES—Liability of Indorser, how Affected by Offer of Indorsee—Upon notice of presentation and dishonor of a promissory note, the liability of the indorser becomes fixed; and if, thereupon, the indorsee makes a proposition of certain acts to be done by such indorser in lieu of immediate payment performance by the indorser strictly, as so proposed, is the only alternative to payment open to him. *Strickland v. Lee*, Court of Appeals, Md. June 22, 1886. 4 Alt. Rep. 384.

26. WILL—"Or" Should Read "And"—A testator by a clause in his will gave certain estate consisting of bank stock, etc., to his son, with a gift over, if he should die during minority or without issue. Held, that the word "or" should read "and," and that the son's estate became indefeasible on his attaining his majority. *Phelps v. Bates*, S. C. Conn. Feb. 5, 1886. 5 East. Rep. 708.

27. WITNESS—Communications to Attorney by Both Parties—Submission to Arbitration—Award—When the parties in disagreement lay the facts in the case before an attorney for his opinion thereon, the question of privileged communication does not arise to exclude his testimony in a subsequent action, since there can be no privilege when both parties hear the communication, and where they are not made by a client confidentially to obtain counsel. When two parties have agreed to submit their differences to an attorney, with the understanding that his opinion is to be binding upon them in settlement, such a case establishes a parol submission to an arbiter, and the testimony of the attorney is admissible to prove the award. *Cady v. Walker*, S. C. Mich., July 1, 1886. N. W. Rep. 805.

QUERIES AND ANSWERS.*

[Correspondents are requested to draw up their answers in the form in which we print them, and not in the form of letters to the editor. They are also admonished to make their answers as brief as may be.—Ed.]

QUERIES.

14. "A, a manufacturer has \$40000 invested in grounds, buildings, machinery, and stock in business. He makes a contract with B. by which he agrees to pay him, \$1000 per year, and "10 per cent. net profits." What are net profits in such case? What are the deductions to get at net profits? S. & M.

QUERIES ANSWERED.

Query No. 3 [23 Cent. L. J. 46,] "Husband and wife living together, wife gives husband money (not for household expense) there being no contract to re-

pay, under laws of Michigan, can wife maintain action against husband as for money had and received?"

"Milwaukee, Wis."

SUBSCRIBER.

Answer. At common law husband and wife were under mutual disabilities in regard to mutual contracts, and neither could enforce a mere personal contract against the other in courts of law, the same rule applies in equity, except in regard to separate estates, and to some extent in these. The constitution of Michigan, *Schedule sec. one*, retains the common law not repugnant to that instrument until the same shall be altered or repealed by the legislature. Therefore if the action can be maintained at all in this State, it must be by virtue of some statute, that constitution was adopted in 1850, in 1855 the Legislature passed what has since been known as the married woman's Act (Howells Statutes, Chap. 239;) still in force, the only statute bearing, on this inquiry, the right of of husband or wife to sue the other at law, first came before our Supreme Court in Oct. 1877, in the case of *Jennie v. Marble*, 37 Mich. 319, it was there held that a husband could not sue his wife at law or equity to enforce a purely executory contract, that the act did not confer that power. The question was again before the court in *Bunt Adm. v. Jonas* 45 Mich. 392, where it was again held that this action between husband and wife would not lie, there are other cases in this State bearing more remotely on the subject in regard to the power of a married woman to make and enforce contracts under the statute. *DeVires v. Conklin*, 22 Mich. followed by many others. It follows from the two cases first above cited, that an express or implied assumpsit, purely, cannot be maintained by husband or wife against the other in Michigan. From the statement of fact in the inquiry, no assumpsit could arise in favor of the wife, the money being paid to the husband without stipulation or agreement, was either a gift, or presumptive payment of a concurrent or antecedent consideration, there was nothing to give rise to an assumpsit. *Bunt Adm. v. Jonas*, *supra*.

Hillsdale, Mich. July 15, 1886.

S.

RECENT PUBLICATIONS.

A Treatise on the Law of Attachment and Garnishment—With an Appendix Containing a Compilation of the Statutes of the different States and Territories now in Force Governing Suits by Attachment. By W. P. Wade, Author of "Law of Notice." In two Volumes. San Francisco, Sumner Whitney & Co., 1886.

This is a very elaborate work upon an intensely practical subject, the remedy by attachment and garnishment. The whole of the first volume is taken up with the subject or attachment, properly so called, about half of the second with that relating to garnishment, the remainder being occupied by a very carefully prepared compilation of all the statutes of the several States and Territories, relating to the remedy of attachment and prescribing its forms. As the whole subject of attachment is of statutory origin it is manifest that this compilation is of the very essence of the work. As the author remarks "—but little assistance can be obtained in discussing this peculiar remedy by looking beyond the statute by which it is authorized." It is manifest therefore that the merits of such a work as this, is, in the first place in the fidelity, accuracy, and completeness with which the statutory essentials of the proceeding are reproduced; in the second place, the judgment and discrimination displayed in setting before the reader, the modifications of the apparent

intention of the statutes, made in adjudged cases by judicial construction, or it may be said in many cases, by judicial legislation; and in the third place, and not less important than either of the foregoing essentials, it is indispensable that the whole matter of the work be arranged in an orderly and systematic manner, so that whatever authority or information is desired may be promptly and easily found. That is peculiarly essential in a work like this—a book of practice, and often needed under circumstances requiring especial expedition. Of all these considerations the author seems to have been duly sensible, and his work has been prepared with sufficient reference to them.

The work is well worthy of a very favorable reception by the profession.

A TREATISE ON THE LAW OF NOTICE.—As Affecting Civil Rights and Remedies—By William P. Wade—Second Edition—Chicago, Callahan and Company 1886.

The subject of this book is one of the most important to the practitioner in the whole range of legal learning. It is hardly possible for a law suit important or trivial, summary or long drawn out, to arise, run its course and be adjudicated without having evolved some question of notice for the examination of the counsel and the decision of the court. The work before us, now in its second edition, is almost indispensable to the active practitioner, especially as it contains, carefully and methodically arranged all the principles of this important branch of practical law, supported by the citation of many authorities.

The book is divided into thirteen chapters, of which the first treats of the two great divisions of legal notice actual and constructive. The second, of notice to purchasers of different kinds of property; the third, a long and most important chapter, of notice by registration of instruments; the fourth of notice by possession; and the fifth of notice by title papers. The sixth chapter, treats of the notice given by *lis pendens*, and the seventh, also a long and important chapter on the notice by which certain liabilities are created, such as notice of assignments of guaranty, to carriers or bailees; and the eighth of notices by which liabilities are extinguished, such as notices of dissolution of partnership landlord and tenant, carriers etc. The ninth chapter treats of notices affecting the relation of principal and agent; and the tenth of the notice of dishonor of commercial paper. The eleventh chapter treats of the publication of notices, and the twelfth, the most important of any of notices necessary to be served in the course of practice, as of trial, of appeal, of taking depositions etc. The final chapter shows the facts of which courts will take judicial notice.

We think this book, which is well printed and bound, will be very useful to the profession.

JETSAM AND FLOTSAM.

A COMICAL case was recently brought before the Probate Court in this district. A petition was preferred to the court to put a woman under a conservator, on the ground that she proposed marrying a worthless fellow, who was in pursuit of a little money she had saved. It does not appear that she was of unsound mind except in this particular direction. Unluckily the suit was withdrawn, and we shall never know whether a court of probate can be put to any such useful purpose as the petitioners claimed. If it is to place every one under a conservator who designs marrying foolishly it will certainly be a very busy tribunal.—*Exchange*.

The Central Law Journal.*ST. LOUIS, AUGUST 6, 1886.***CURRENT EVENTS.**

INDEPENDENCE OF THE JUDICIARY—"THE CALIFORNIA PLAN."—A question which will interest the legal profession every where is pending in the California Legislature now convened in extra session. The Supreme Court of that State, on the 26 day of April 1886, rendered a decision in the case of *Lux v. Huggin* involving the subject of Eminent Domain, and connected therewith, important riparian and water rights, and seriously affecting the whole irrigation system of the State. The malcontent interest in the community had sufficient influence with the Governor to induce him to convoke the legislature in extra session, not, as might well be supposed at this distance, to limit or define the law of eminent domain, or to revise and amend the irrigation and other water laws of the State, but to re-organize the Supreme Court, for the purpose, avowed without paraphrase or circumlocution, of repealing out of office the judges who concurred in the ruling in *Lux v. Haggin*, and replacing them with judges who will reverse that ruling, and hereafter administer the law in accordance with the views of those at whose instance the Governor has taken this remarkable step.

The Bar Association of California naturally takes much interest in these proceedings, and has adopted a memorial to the legislature protesting in the strongest terms against the proposed action. These gentlemen very properly ignore the *Lux v. Haggin* case and all the Eminent Domain, water, and irrigation doctrines involved in it, and put their opposition to the proposed measure upon the higher ground that the Judiciary of a State is a co-ordinate branch of the government of the State, equal in dignity, and importance to the Executive or Legislative branch; that its independence is one of the chief safeguards of the rights of the people, and especially of the minority, and that irrespective of all reference to transitory emergencies, or temporary expediency it should be scrupulously preserved.

It does not appear by this memorial which is the only document on the subject now in our hands, whether an amendment of the constitution is proposed, or how otherwise the desired object is to be accomplished. The constitution of California provides for the removal of judges by a two thirds vote of both houses of the legislature, but this proceeding, like removal upon an address, is a penal and punitive process, equivalent to impeachment, and only applicable to "high crimes and misdemeanors." These Judges are not charged with any crime, on the contrary, the Executive Committee of the State Irrigation Convention, while actively agitating for the removal of the judges, says: "We do not in any way question the uprightness, integrity, or personal character in any respect of any of the Judges of that high tribunal." The only fault found with them is, that their opinions on certain points of law are very distasteful to those who seek their removal.

When, within living memory, a President of the United States in appointing Justices of the Supreme Court was said to have been controlled in his selection by the known opinions of the aspirants, on certain important legal questions, with a view to secure a decision in accord with the Presidential views, his action so prompted by these (alleged) motives was regarded by large classes of people, by no means political purists, as decidedly sharp practice and "against the rules of the game." The President however was only discharging an official duty, he displaced nobody, his action in no degree disorganized the Supreme Court, and whether his motive was to defeat the deliberate official action of a co-ordinate branch of the government, was at the time a partisan political question and is now a "dead issue."

In the case under consideration there is no "if" or "whether." The avowed purpose is to remove from office, Judges of the highest court of the State, who have been duly elected by the people, whose term of office, fixed by the constitution, has not expired, whose "uprightness, integrity and personal character" are conceded by their adversaries to be above suspicion, because, and only because they do not understand the law on certain points, as their adversaries understand it. This is the proposition, and we

must say that we can recall nothing like it in the history of any constitutional government. There is certainly no judicial parallel.

If this project shall be carried into effect, these Judges removed, others more complaisant put into their places, the dignity and independence of California Courts will have been extinguished, and the highest judges of the land reduced to the status of day laborers liable at any time to be paid up at sundown, and ordered off the premises.

We could not believe upon any authority less respectable than the California Bar Association that gentlemen, acting under the responsibilities of official station, could even contemplate so radical, revolutionary, and destructive a measure as the utter annihilation of the independence of the Judiciary of a State. That, because of their professional opinions, and official decisions in cases pending before them, judges should be asked by any responsible persons, to resign their offices is bad enough; but that judges of the highest court in the land, (or any other judges, for that matter) should on account of their opinions on legal questions be turned out, of office by the legislature upon the recommendation of the Governor, is simply incredible, and we will not believe that it can be done until it has been done. No consequences, however grave, of judicial decisions can justify such a measure. It would be better to resolve society into its original elements, call a convention, abrogate the existing constitution of the State as a failure, and frame a new one, taking care that it shall secure, beyond controversy, the independence of the judiciary as the surest and most effectual safeguard of all rights, public and private.

"I WILL"—A question that troubles young lawyers is, where to locate and what branch of practice to select. This puzzle lasts even into middle life with many able men, and some never solve it—life itself is an unsolved riddle.

Letters from Dakota, Oregon, Iowa, Georgia, and Arkansas, indicate a fast growing settlement in each locality, and where growth is rapid, young lawyers secure more chances of promotion, while in Eastern and Middle State, habits are fixed and titles are estab-

lished, and older men do the leading business.

But there is a place for every one of genius and ability somewhere, and only let him say, *I will reach it*, and he is half to it already. Men live where their hopes are, and prosper when they *will* prosper. Men invent when they have courage to think out problems alone and advance them. The man who surrenders to a theory like this: I'm only a little moth around the candle of the earth, burning my wings with each flutter, and doomed to fall unknown and early into an unforgotten hereafter, is very likely to do so—he is halfway on the journey.

Men who have within them the *I will be a lawyer and a good one*, the *I will live happily, battle bravely*, the *I will succeed inwardly*, must make a bright mark some day, for such lives are never failures; they are heard of, marked, remembered. "Make up your mind to have a front seat in life, and you attract to you the powers that carry you to it."

Confidence in yourself, the "I will" is everything. Look at the leaders of great enterprises! They seem to care little for competition; most of them are sharpened by it. They aspire to be first, and the first is ever just ahead of them. They have already half reached it when once fairly started. *Think to the front and you will get to the front; lag to the rear and it is ever ready for your coming.*

Get out of the notion that the man who cites the most law and reads the most reports, is the best lawyer. No man carried less books to court than did Carpenter, but he carried his manhood there always, his clear insight was thought out by himself, and his facts applied to principles and results demanded. It is not the most learning but the best wisdom that wins. What a weak ambition one must have to spend a life-time in dreaming over the prospects of personal failure! Why not anticipate success and aim for it? The courage of the *I will lawyer* secures him, first standing room; next an opening, and then, early, a front seat in the ranks of his profession. If you never have set your heel down with emphasis, in an "I will" determination to win, the sooner this resolution is reached the nearer you will be to the goal of ambition. The hand is never strong

er than the heart, and the man is never greater than his mind. His life is below or above his true condition, very much as he wills it, and no one will cheer him till he wins something worthy of applause. The world is both stingy and liberal, reluctant to risk on uncertainty, and willing to advance thousands on ventures when successful. The demonstration of success is what they wait for and demand.

J. W. DONOVAN.

NOTES OF RECENT DECISIONS.

CARRIER—NEGLIGENCE—POWER OF CARRIER TO STIPULATE FOR IMMUNITY FROM LIABILITY FOR INJURIES CAUSED BY NEGLIGENCE—LIMITATIONS OF THAT POWER—INFANCY—RESPONDEAT SUPERIOR.—In a recent case,¹ the Supreme Court of Connecticut had occasion to consider the question whether a carrier can contract for exemption from liability for negligence on his part; to what extent, and under what circumstances, such exemption may be obtained, and what degree of negligence, if any, is too gross to be waived by contract.

The facts were, that the plaintiff's intestate, a boy of seventeen years of age, had a free pass on defendant's railroad, being a train-boy who sold refreshments to passengers. The pass stipulated that the person accepting it assumed all the risk of accident, and that the company should not be liable in any event for any injury resulting from the negligence of its agents, or otherwise. The boy, while riding on a train under this pass, was killed, in consequence of a collision of the train with another train. He was not at the time in the exercise of his functions as train-boy.

The court, pretermitted all questions of contributory negligence, held: 1st, that the pass was granted without consideration, and was a gratuity; 2d, that the railroad company had a right, in cases of gratuity, to stipulate against liability for negligence of every grade and degree; 3rd, that the pass in question effectually excluded all liability for all negligence; and, 4th, that the exemp-

tion was in no degree impaired by the fact that the deceased was an infant under the age of twenty-one years.

The court says: "By the English decisions it is clear that the carrier has full power to provide by contract against all liability for negligence in such cases.² In the United States we find much contrariety of opinion. Some State courts of the highest authority follow the English decisions and allow railroad companies, in consideration of free passage, to contract for exemption from all liability for negligence of every degree, provided the exemption is clearly and explicitly stated.³

Other courts, also of high authority, concede the right to make such exemptions in all cases of ordinary negligence, but refuse to apply the principle in cases of gross negligence.⁴ And other State courts of equal authority utterly deny the power to make a valid contract exempting the carrier from liability for any degree of negligence.⁵

The Supreme Court of the United States, in *Railroad Company v. Lockwood*,⁶ where a drover had a free pass to accompany his cattle in their transportation, held, in opposition to the New York and English cases, that the pass was not gratuitous because given as one of the terms for carrying the cattle, for which he paid. The reasoning of Bradley, J., was directed so strongly to the disparagement of the New York decisions, that it might have indicated an opposition to the principle of those cases in other respects, had not the opinion concluded with this distinct disclaimer: "We purposely abstain from expressing any opinion as to what would have been the result of our judgment had we considered the plaintiff a free passenger, instead of a passenger for

² *McCawley v. Furness R. Co.*, L. R. 8 Q. B. 57; *Hall v. N. E. R. Co.*, L. R. 10 Q. B. 487; *Duff v. Great North. R. Co.*, 4 L. R. Ireland, 178; *Alexander v. Toronto & Nipissing R. Co.*, 33 U. C. 474.

³ *Wells v. N. Y. C. R. Co.*, 26 Barb. 641; s. c. 24 N. Y. 181; *Perkins v. N. Y. C. R. Co.*, Id. 208; *Bissell v. N. Y. C. R. Co.*, 25 N. Y. 442; *Poucher v. N. Y. C. R. Co.*, 49 N. Y. 263; *Magnin v. Dinsmore*, 56 N. Y. 168; *Dorr v. N. J. Steam Nav. Co.*, 11 N. Y. 485; *Kinney v. Central R. R. Co.*, 82 N. J. L. 409; s. c. 34 Id. 513; *W. & A. R. R. Co. v. Bishop*, 50 Ga. 465.

⁴ *Ill. Cent. R. R. Co. v. Read*, 87 Ill. 484; *Ind. Cent. R. Co. v. Mundy*, 21 Ind. 48; *Jacobus v. St. Paul & C. R. Co.*, 20 Minn. 125.

⁵ *Cleveland, etc. R. R. Co. v. Curran*, 10 Ohio St. 1; *Mobile & O. R. R. Co. v. Hopkins*, 41 Ala. 486; *Pa. R. R. Co. v. Henderson*, 51 Pa. St. 315; *Flinn v. Phila. W. & B. R. R. Co.*, 1 Houst. (Del.) 469.

⁶ 17 Wall. 357 [84 U. S. bk. 21, L. ed. 627.]

¹ *Griswold v. New York etc. Co.*, S. C. Conn. 11 New ng. Rep. 315.

hire.' The reasoning and the conclusions of the court, therefore, must be considered as all based on the assumption that the passenger paid for his passage.

The conclusions of the court were; '(1) That a common carrier cannot lawfully stipulate for exemption from responsibility, when such exemption is not just and reasonable in the eye of the law; (2) that it is not just and reasonable in the eye of the law for a common carrier to stipulate for exemption from responsibility, for negligence of himself or his servants.' "

Conceding that public policy forbids a contract by which a common carrier may escape responsibility to paying passengers for the negligence of its servants, the question remains: does the same rule apply to free passengers? In the case of paying passengers, it is said, the passenger and the carrier do not stand upon equal terms. He is but one man, the carrier is a powerful corporation. "He cannot," says the court, "higgle upon terms." More reasonably, we think, it might be said that, paying his money for his transportation he is entitled to every possible assurance that he is not paying his money for his own destruction. And public policy should forbid that he be permitted or compelled to bargain away any safeguard that the law affords him. With the paying passenger the transaction is business, a contract upon a valuable consideration; with the free passenger, it is a gift, without consideration, solicited by him and accorded *ex gratia* by the carrier. It seems hardly reasonable to require the latter to insure the life and limbs of the passenger, besides furnishing him with free transportation. The rule of *respondeat superior*, which, in case of paying passengers, is, and should be, imperative, may well be waived in cases of free passengers. The donor annexes a condition to his gift, and the donee has the alternative of accepting it with the condition, or refusing it altogether. He may go free uninsured, or he may pay and go insured. "There is neither hardship nor compulsion in this alternative, and public policy will not intervene in his behalf.

As to infancy, it is manifest that an infant has capacity in law to accept a gift, absolute or conditional. He cannot accept the gift and reject the condition if it is reasonable.

And a condition of self-insurance is reasonable, unless he is of such tender years, or so infirm in body or mind, that it is unsafe for him to travel untended. In such a case, the condition would be unreasonable and the carrier would be liable.

RIGHTS AND LIABILITIES OF SURETIES ON OFFICIAL BONDS.

The title chosen for this article is, perhaps, to some extent a *petitio principii*; for it assumes that bondsmen, or those who become securities on official bond, are sureties which is one of the propositions sought to be established. They are generally denominated sureties, although they are sometimes called sureties and sometimes called guarantors, both in the reports and in the text books. As the rules of law applicable to sureties and those applicable to guarantors are in some respects quite different, it is necessary to determine whether one who signs a bonds as security is a surety or a guarantor, before we can tell what are his rights and liabilities.

The distinction between a surety and a guarantor is very clearly drawn by Mr. Brandt in his work on Suretyship and Guaranty. "A surety," he says, "is usually bound with his principal by the same instrument, executed at the same time and on the same consideration. He is an original promisor and debtor from the beginning, and is held ordinarily to know every default of his principal. . . . On the other hand, the contract of the guarantor is his own separate undertaking, in which the principal does not join. It is usually entered into before or after that of the principal, and is often founded on a separate consideration from that supporting the contract of the principal." ¹

Now one who goes security on a bond is usually bound with his principal by the same instrument, executed at the same time and on the same consideration; and suits on bonds are usually brought against bondsmen and principal jointly, thus recognizing the fact that they are sureties rather than guarantors, for a

¹ Brandt on Suretyship and Guaranty. 1. See also to same effect; *McMillan v. Bull's Head Bank*, 33 Ind. 11; *Kearnes v. Montgomery*, 4 West Va. 29; *Markland etc. Co. v. Kimmel*, 87 Ind. 560, 568.

guarantor can not ordinarily be sued jointly with his principal.

There are few authorities directly in point, but in a late case,² not yet reported, the Supreme Court of Indiana, after a careful examination of the subject, stood equally divided, an opinion being filed on each side of the question. The case was a suit on cashier's bond in the ordinary form. The court, being equally divided, the judgment of the lower court, holding the bondsmen to be guarantors, was affirmed. The reasons for so holding are well and forcibly stated by Mitchell J., in the course of his opinion. "Whether the contract is entered into separately or jointly with the principal," he says, "if by its terms it appears that the principal is separately bound by an original independent contract, to which the contract for security is collateral, and the obligors agree therein that the principal will pay or perform, according to his original engagement, and that they will answer for his default, in the event of failure, they become guarantor. * *

* In no event was it contemplated that they (the bondsmen) or either of them would discharge the duties of cashier, or do the particular things which he might fail to do. The fair import of their contract is, that they will pay any damages which may accrue on account of his default. This constitutes them guarantors; and that Goodwin (the cashier) also joined in this collateral contract, did not make it different." *

On the other hand, in the dissenting opinion, Elliott, J., says: "The contract sued on, an ordinary cashier's bond, undertakes, upon one and the same consideration, that all of the obligors shall be responsible for the conduct of one of their number. It does not guaranty the payment of an existing indebtedness, nor does it guaranty payment for goods to be sold the principal, but it undertakes that one of the obligors shall faithfully perform the duties of a trust confided to him. It is an agreement that one of the obligors will do certain designated things; it is not a guaranty that he will do those things, but a positive, direct, and express

undertaking, that he will do them. The principal joins in the undertaking, and he, surely cannot be justly deemed a guarantor for himself. All the obligors are liable on the contract and all may be sued. There is no precedent liability. One and all of the obligors become liable on the default of one of the obligors to do what all have agreed and promised he shall do. There is no distinct and different liability; the default that makes one liable, therefore, makes all liable; their liability is on the same instrument, accrues at the same instant, and flows from one and the same breach of one and the same contract."⁴

The text books⁵ usually treat of such persons as sureties, and they are usually held to the liabilities of sureties by the courts.⁶

Sureties are favorites of the law, and are not bound beyond the strict terms of their engagement, which, as against them, is said to be *strictissimi juris*.⁷ Thus the surety on a bond cannot, generally, be held liable for a sum greater than the penalty named therein,⁸ nor can he be held liable, as a rule, beyond the term or time limited by his undertaking.⁹ But when the length of the principal's term is fixed by law, or the bond contains a recital of the time during which the principal shall hold his office or perform the prescribed duties, and the sureties bind themselves for such time "and until his successor is elected and qualified," or the like, the courts are not agreed as to the limit of the undertaking. Perhaps the weight of authority is to the effect that the sureties are bound in such case, only for the term specified, and perhaps, for such further time as is reasonably sufficient for the election and qualification of a succes-

⁴ Citing *Burns v. Singer Mfg. Co.*, 87 Ind. 541, opin. 544; *Seavers v. Young*, 16 Vt. 688; *Markland Mining etc. Co. v. Kimmel*, 87 Ind. 560, opin. 566.

⁵ *Thompson on Liabilities of Officers and Agents of Corporations* 494, 544; *Morse on Banking* 211, 247; *Brandt Suretyship and Guar.* § 442 *et seq.*

⁶ *Cassady v. Trustees*, 105 Ill. 560. And see authorities herein after cited in note 22.

⁷ *City of Lafayette v. James*, 92 Ind. 240; s. c. 47 Am. Rep. 140; *Urmston v. State*, 75 Ind. 175; *People v. Pennock*, 60 N. Y. 421; *Miller v. Stewart*, 9 Wheat. 680; *Brandt on Suretyship and Guaranty* § 79, and authorities there cited; *Murfree on Official Bonds* § 620.

⁸ *Clark v. Bush*, 8 Cowen 151; *Brandt Suretyship and Guar.* § 98; *Brown v. Burrows*, 2 Blatchf. 340.

⁹ *Urmston v. State*, 73 Ind. 175; *Kitson v. Julian*, 30 Eng. L. & Eq. 326; *City of Montgomery v. Hughes*, 65 Ala. 201; *Peoples etc. Association v. Wroth*, 43 N. J. L. 70.

² *La Rose et al v. The Logansport Nat. Bank, Mss.* No. 11471.

³ Citing and commenting on *Singer Mfg. Co. v. Litter*, 56 Ia. 601; *Locke v. McBean*, 38 Mich. 473; *Gage v. Lewis*, 68 Ill. 606, as authorities to same effect.

sor, no matter whether any successor is actually chosen or not.¹⁰

There is also some conflict in the authorities as to the liability of sureties for the default of their principal where new duties are imposed upon him after the execution of the bond. Bearing in mind the rule that sureties are favorites of the law, and are not held beyond the strict letter of their contract, it would seem that they ought not to be held liable for default of the principal in performing new and additional duties, where such duties are of a different character from those usually incident to the office, or specified in the bond, and such is believed to be the law.¹¹ But if the new duties are similar in character to the old and within the legitimate scope of the office, or such as may have been reasonably implied and considered when the bond was made, the sureties ought to be liable for default of the principal in the performance thereof.¹² It is believed that this distinction will go far toward reconciling many apparently conflicting authorities.

Where new duties are imposed by law, the sureties remain bound for the faithful performance of the original duties, whether their

liability extends to the new duties or not.¹³ And in a late case, where a book-keeper committed errors, it was held that the sureties were liable therefor, although he also performed the additional duties of teller, the errors not being connected with, nor induced by the latter employment.¹⁴

The undertaking is not merely for the honesty of the principal, but for capacity, and reasonable skill and diligence in the discharge of his duties, and if he fails in any one of these things, and loss is thereby incurred, the sureties are liable to make good the injury.¹⁵

Such being the undertaking of the sureties, good faith requires that the obligee should notify the sureties of any default by the principal in these regards, and any fraud or concealment thereof by the obligee will release the sureties from liability for any loss or injury thereafter incurred.¹⁶ Mere negligence on the part of the obligee, without intentional misrepresentation or concealment, would not, perhaps, release the sureties,¹⁷ unless, at least, the default is of a nature indicating want of integrity in the principal, or unfitness for his position or office, other than mere moral delinquency not affecting his honesty.¹⁸

So, perhaps, a subsequent extension of time by the legislature will not release the sureties on a public officers' bond; but the authorities are conflicting. This is held in Maryland, Mississippi, Virginia;¹⁹ but in Illinois, Missouri, and Tennessee, it is held that

¹⁰ Chelmsford Co. v. Demarest, 7 Gray 1; Mayor v. Crowell, 11 Verm. 207; s. c. 29 Am. Rep. 224; Wapell etc. Co. v. Bigham, 10 Ia. 89; Kingston Mut. Ins. Co. v. Clark, 33 Barb. 196; Lord Arlington v. Merri-cke, 2 Sandd. 408; Peppin v. Cooper, 2 Barn. & Ald. 431; Brandt Suretyship & Guar. § 138 *et seq*; Mutual Loan Association v. Price, 16 Fla. 204; s. c. 26 Am. Rep. 703; See also Urmston v. State, 73 Ind. 175; Rany v. Governor, 4 Blackf. 2; Moss v. State, 10 Mo. 388; s. c. 47 Am. Dec. 118; Dover v. Trombly, 42 N. H. 69. *Contra*, holding liability may extend beyond term, State v. Berg, 50 Ind. 496; Butler v. State, 20 Id. 169; Thompson v. State, 37 Miss. 521; Placer Co. v. Dickerson, 45 Cal. 12; State v. Kurtzeborn, 78 Mo. 98; Compare Moore v. Boudinot, 64 N. C. 190.

¹¹ City of Lafayette v. James, 92 Ind. 240; s. c. 47 Am. Rep. 140; People v. Vilas, 36 N. Y. 459; Manufacturers etc. Bank v. Dickerson, 12 Vroom (N. J.) 448; s. c. 32 Am. Rep. 237; Pybus v. Gibb, 6 E. & B. 902; Bank of Upper Canada v. Covert, 5 Up. Can. K. B. R. 541; Munford v. Memphis etc. R. R. Co., 2 Lea 393; s. c. 31 Am. Rep. 616; People v. Tompkins, 74 Ill. 482; Compare Northern Ry. Co. v. Whinray, 26 Eng. L. & Eq. 488.

¹² German Bank v. Auth., 87 Penn. St. 419; s. c. 30 Am. Rep. 374; Strawbridge v. Baltimore & Ohio R. R. Co., 14 Md. 360; Detroit Savings Bank v. Ziegler, 49 Mich. 167; Where new duties are imposed by law, it is presumed that they were contemplated, and entered into the contract when the bond was executed. Marney v. State, 18 Mo. 7; U. S. v. McCarnay, 1 Fed. Rep. 104; People v. Vilas, 36 N. Y. 459, *op. in*. 461.

¹³ Gausson v. U. S., 97 U. S. 584; Mayor v. Sibberns, 8 Abbot's Rep. 266.

¹⁴ House Savings Bank v. Traube, 75 Mo. 199; s. c. 42 Am. Rep. 402.

¹⁵ See an excellent article in 17 Alb. 340, entitled "Bonds of Bank Officers;" Commercial Bank v. Ten Eyck, 48 N. Y. 305; American Bank v. Adams, 12 Pick. 803.

¹⁶ Phillips v. Foxall, L. R. 7 Q. B. 666; Sanderson v. Aston, L. R. 8 Ex. 73; Franklin Bank v. Cooper, 39 Me. 542; Morse on Banking 230 *et seq*; Densmore v. Tidball, 34 Ohio St. 411.

¹⁷ Bowne v. Mt. Holly Nat. Bank, (N. J. L.) 3 Am. & Eng. Corp. Cas. 339; Roper v. Sangamon Lodge, 91 Ill. 518; Tapley v. Waltham, 116 Mass. 275; Charlotte etc. R. R. v. Gaw, 59 Ga. 685; Wayne v. Bank, 52 Penn. St. 343; Union Bank v. Fastell, 6 La. 411, *Contra*; Graves v. Lebanon Nat. Bank, 10 Bush. 23.

¹⁸ Bostwick v. Van Voorhis, 91 N. Y. 353; s. c. 1 Am. & Eng. Corp. Cas. 387; Atlas Bank v. Brownell, 9 R. I. 61; s. c. 11 Am. Rep. 231; Atlantic and Pacif. Tel. Co. v. Barnes, 64 N. Y. 385; s. c. 21 Am. Rep. 621; Home Ins. Co. v. Holway, 55 Ia. 571.

¹⁹ State v. Carleton etc., 1 Gill 249; State v. Sweeney 60 Miss. 39; s. c. 45 Am. Rep. 406; Commonwealth v. Holmes, 25 Gratt. 771.

such extension will release the sureties;²⁰ and the Supreme Court of North Carolina seems to have held both ways in recent cases.²¹

Although the law favors sureties in many respects, yet, their contract being a direct one, as already shown, they are liable in the first instance, and may be sued jointly with the principal, without notice of the principal's default.²²

But sureties on the bond of a public officer are not, as a general rule, liable for any default of the principal occurring before the execution of the bond.²³ Thus where the treasurer of a town, elected annually for five consecutive terms, served four years without bond, but gave a bond at the beginning of the fifth term for the faithful performance of his duties, it was held that his sureties were not liable for money with which he falsely credited himself during the first year.²⁴

But where a treasurer was re-elected and reported a certain sum in his hands from the preceding term, the sureties on his official bond for the second term were held liable therefor.²⁵

Sureties who are compelled to make good their principal's default have a general right to be subrogated to all other rights and securities of the obligee or creditor.²⁶ The creditor holds collateral securities in trust for the benefit of the sureties, and where he has notice of such relationship, a release by him of the securities, will release the sureties to that

extent.²⁷ This right was well stated by Sir Samuel Romilly in his argument, and approved by Lord Edon, in his opinion in the case of *Craythorne v. Swinburn*.²⁸ "A surety," he says, "will be entitled to every remedy, which the creditor has against the principal debtor; to enforce every security and all means of payment; to stand in the place of the creditor, not only through the medium of contract, but even by means of securities entered into without the knowledge of the surety; having a right to have those securities transferred to him, though there was no stipulation for that; and to avail himself of all those securities against the debtor."²⁹

As between themselves, also, sureties have certain fixed and well established rights. Where one is compelled to pay the entire loss, or any part greater than his share of the loss, occasioned by the principal's default, he may exact contribution from his co-sureties.³⁰ And where one, after all have become bound, without the knowledge or agreement of the other sureties, obtains from the principal anything for his indemnity, it inures to the benefit of all.³¹

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²⁷ *Crine v. Fleming*, 101 Ind. 154; See also *Bunting v. Ricks*, 2 Dev. & Bat. Eq. 130; s. c. 32 Am. Dec. 699.

²⁸ 14 Ves. 159.

²⁹ Quoted with approval by Story in his 1 Eq. Jur. § 499 n. 2.

³⁰ *Brandt Suretyship & Guar.* § 220; *Bigelow's Eq.* 247; 1 Story's Eq. Jur. § 492 *et seq.*; *Camp v. Bostwick*, 20 Ohio St. 337; s. c. 5 Am. Rep. 669.

³¹ *McCune v. Belt*, 45 Mo. 174; *Seibert v. Thompson*, 8 Kans. 65; *Miller v. Sawyer*, 30 Vt. 412; *Hartwell v. Whitman*, 36 Ala. 712; *Shaeffer v. Clendenin*, 100 Penn. St. 565; s. c. 17 Cent. L. J. 299.

²⁰ *Davis v. People*, 1 Gilm. 409; *State v. Roberts*, 68 Mo. 234; s. c. 30 Am. Rep. 788; *Johnson v. Hacker*, 8 Heish. 388.

²¹ *Prairie v. Worth*, 78 N. C. 169; *Prairie v. Jenkins*, 75 N. C. 545.

²² *Dougherty v. Peters*, 2 Robinson (La.) 534; *McGehee v. Gevin*, 25 Ala. 176; *Brandt Suretyship and Guar.* § 1.

²³ *Brandt Suretyship & Guar.* § 449; *Myers v. U. S.*, 1 McLean 493; *Farrar v. U. S.*, 5 Pet. 373; *Bessinger v. Dickerson*, 20 Ia. 261; *U. S. v. Boyd*, 15 Pet. 187.

²⁴ *Inhabitants of Rochester v. Randall*, 105 Mass. 295; s. c. 7 Am. Rep. 519; *Vivian v. Otis*, 24 Wis. 518; s. c. 1 Am. Rep. 199.

²⁵ *Roper v. Sangamon Lodge*, 91 Ill. 518; s. c. 33 Am. Rep. 60; *Morley v. Town of Metamora*, 78 Ill. 395; s. c. 20 Am. Rep. 266. And see *Bruce v. U. S.*, 17 How. 437; *Commonwealth v. Adams*, 5 Bush (Ky.) 41; *Choate v. Arrington*, 116 Mass. 552.

²⁶ *Copis v. Middleton*, 1 Turn & Russ. 224; *Townsend v. Whitney*, 75 N. Y. 425; *Berthold Admx. v. Berthold*, 46 Mo. 557; *Enders v. Brune*, 4 Randolph (Va.) 438; *Bigelow's Equity* 291; 1 *White & Tudor's Lead-Cas.* in Eq. 144 *et seq.* and authorities there cited.

CARRIERS' SERVANTS.

The carrier, like the inn-keeper, is an important person in the eye of the law, for he is compelled to carry on the request of any person who tenders goods to be carried, and he is liable to an action if he refuses, provided always, of course, as in the case of the inn, that there is room or accommodation in the vehicle. It is also a trite maxim, that the carrier is an insurer of the goods till the time of delivery, and is answerable for every loss or injury to the goods, no matter how this is brought about, unless occasioned by

the act of God or the king's enemies. This great responsibility, we are told, long ago weighed heavily on the carrier's mind, and he used to insert notices in the newspapers and elsewhere, to announce that he would not be accountable for goods beyond a certain sum, unless insured and paid for, on delivery to him. Great litigation arose out of these special agreements, and as to the supposed knowledge of the customer, so that a statute had to be passed to simplify the matter. The Carriers' Act,¹ enacted, that in future no common carrier would be liable for loss or injury to goods above the sum of £10, unless the value was declared, and increased charges paid or agreed upon. But by the 8th section nothing in the Act should be deemed to "protect the carrier from liability to answer for loss or injury to any goods or articles whatsoever, arising from the felonious acts of any coachman, guard, bookkeeper, porter, or other servant in his or their employ." As previously stated, a similar enactment has since been passed for the protection of innkeepers, namely, the statutes 26 and 27 Vict. c. 41, limiting the liability to £30. In both cases the felonious acts of servants make an exception to the protection of the acts. But the innkeeper loses his protection also not only for felonies, but for any default or wilful neglect of his servants. Most of the cases, therefore, apply to both carriers and innkeepers, and great difficulty seems to arise in such cases as to what is *prima facie* evidence, to go to the jury, that the felony or default was in the servants of either.

One case, of *Boyce v. Chapman*,² was an action against a carrier for loss of goods, where, the carrier having set up the defence that no notice was given under the Carrier Act, 1 Will. 4 c 68, the reply was that the defendant's servant had stolen the goods. In that case the plaintiff proved only circumstances of suspicion, but the defendant omitted to call the suspected servant as a witness, and on this point, Tindall, C. J., said, that it was incumbent on the defendant to clear up the doubt by calling his servant as a witness, and it was in his power to produce that evidence, the court refused him a new trial. The case of *Metcalf v. London, Brighton,*

and South Coast Railway Company,³ began the same way, and the question was whether there was evidence to go to the jury of a felony by the carrier's servant. All that was proved was, that the plaintiff's box was sent to the carrier by a servant of the house in which the plaintiff lodged and, on its being delivered at the end of the journey, the box had been opened and the contents abstracted. The remarks of Willis, J., in that case, were to this effect. The felony might have been committed either by one of the defendant's servants, or some other person. In order to make out a greater degree of likelihood that the act was committed by a servant of the carrier, than by anybody else, the plaintiff might have shown a *prima facie* case, had the defendants only been carriers of goods, or if it had appeared that the box could not have been exposed, so that other persons coming to the railway might have had access to it. Everybody knows that is so. To complete the circumstantial evidence, therefore, there was in that case wanting, some fact which was more consistent with a loss by felony, or a servant of the company, than with any reasonable view of the case to the contrary.

Two important cases as to felonies by carriers' servants occurred about ten years ago, when these subjects were again very elaborately discussed. The case of *Vaughton v. London and North Western Railway Company*,⁴ was an action against the carriers for the loss of certain articles of jewellery. The plaintiffs were wholesale jewellers at Birmingham, and sent a box of jewellery from that place to their agent at Liverpool without declaring the value. The only question between the parties was, whether the loss had been occasioned by the felonious acts of the railway servants. The practice at Liverpool station was, that such boxes were taken to the parcel office, which was not accessible to the public, and a collecting agent called for them and delivered them. There was an entry made of this box in the collecting agent's book, showing that he received it for delivery to the hotel where the consignee was found. On the arrival at the hotel this box was missing from the collecting agent's van, and was

¹ 11 Geo. 4 & 1 Will. 4, c. 68.

² 9 Ring. N. C. 222.

³ 4 C. B. N. S. 307.

⁴ L. R. 9 E. 98.

never afterwards delivered. About ten days later some of the articles of jewelry which had been in the box were discovered at a pawnbroker's shop, and which had been pawned by one who was not in the company's service. This person, when arrested, said he had found the articles lying loose at a part of the railway station where the public had access. One of the company's clerks was also found in possession of one of the articles of jewelry, and which he said he had picked up on the siding of the station, and other bits of jewelry were picked up by another servant. At the trial, the defendants called no witnesses, but the judge told the jury they must be satisfied that the jewelry must have been stolen by one or more of the railway servants or of the collecting agent's servants. The jury found for the plaintiffs, and afterwards an attempt was made to set aside the verdict as against the weight of evidence. The court held that there was some evidence to support the verdict. One circumstance was treated as of considerable importance, namely, that the company did not call any of their servants as witnesses. Kelly, C. B., said that the circumstance tended to fix suspicion both on the booking clerk and on the collecting agent. And Pigot, B., observed that he thought it enough if the evidence pointed to this, that a felony of the article had been committed, and that it was more consistent with the facts proved, and with the probability that it was committed by the servants of the company than by any other person. That was the test put by Willes, J., in the former case. It was not shown that any of the public could have gone into the parcels office and taken away, or could have gotten into the cart and taken out without being seen, and it must be presumed that nobody could have done so. That seemed to bring the felonious abstraction to a point both of place and time which was more consistent with its having been stolen by one of the company's servants than by anybody else.

That case showed how a company may be fixed with liability under the Carriers Act for the servant's felonies. The next case, however, shows the converse difficulty. The case of *Macqueen v. London and North Western Railway Company*⁵ was an action to recover

the value of some pictures which had been delivered to the defendants at Cardiff, to be forwarded to London. The issue raised under the Carriers Act was whether the pictures were stolen by the railway porters. At the trial it appeared that the case containing the pictures was received at the Cardiff railway station. It was weighed and put on a truck on the line, and covered over with a tarpaulin, and fastened down with ropes. The truck was left standing for about eight hours from the middle of the day till the evening on a siding a mile long, in a very low neighborhood in the town of Cardiff. The railway premises were enclosed and divided from the road by a fence. There was a way across the yard which was used as a thoroughfare, and a gate in the fence which was left open up to six o'clock in the evening, after which hour it was closed, except to foot passengers. During the day there was much traffic. The pictures were contained in a large packing case, which weighed more than a hundred weight. This case was stolen out of the truck on the defendants' premises. No one of the defendants' servants was called to prove that the felony had not been committed by the railway servants. And it was contended on the behalf of the company that there was no evidence to go to the jury that the loss had occurred owing to the felonious acts of the railway servants. The judge left the case to the jury, who found for the plaintiff, but leave was reserved to move to enter a non-suit, if the court should think that there was no evidence to go to the jury. The plaintiffs relied on the dictum of Willes, J., already cited, that if the state of the facts made it more probable that the felony was committed by the company's servants than by third persons, then the verdict for the plaintiff was right.

The propriety of the ruling of the judge at the trial was in question. The court said that it was not necessary to show a taking by any individual servant, but it was enough, if proof was given to the satisfaction of the jury, that the taking was by some one or more of the servants of the company. The evidence, however, only amounted to this, that the railway company's servants had something to make them believe that the box was valuable, but in proving this, it was also

⁵L. R. 10 Q. B. 569.

proved, or came out in cross-examination, that there was also evidence of this being a large station to which a great number of people had access, and where the defense against marauders were slight, and there was ample opportunity for a stranger to come in and steal the goods. There was nothing to show a felony by the company's servants, except their greater facility of access, while on the other side there was the opportunity presented to strangers. The probability would and ought to weigh with a jury when a *prima facie* case had been made out, but the plaintiff failed to do that, if he showed no more than that greater facility existed for the railway company's servants to obtain access to the goods. If it were said that, that was enough to go to the jury, it would be to read the Act so that the owner could recover by showing a loss by a felonious act, leaving out the provision that it must be the act of the company's servants. But the felony must be by the company's servants, and this puts the *prima facie* proof on the plaintiff. He must show something more than that a felony has been committed, and must make out a *prima facie* case that it was committed by the defendants' servants. If this were not so, the Act would be no protection. This case was said to differ from *Vaughton v. London and North Western Railway Company*, because in that case the company's servants had done certain specific acts which fixed the liability to them alone.

Such being the mode of fixing liability on carriers for felonies of their servants, there may be noticed also a curious case where the difficulty was in saying whether the carrier was liable because a person pretended to be their servant, and so got possession of the goods and stole them. In *Way v. Great Eastern Railway Company*,⁶ the action was brought for the loss of pictures. These were properly packed in wooden cases and delivered at the defendants' station at Chelmsford addressed to Rochester. The value was not declared, but if declared to be, as they were, of the value of £1000, then a policeman would have been sent in charge of them. The defendants carried the pictures to their station in London, where, besides the defendants' servants, the public had access. The

pictures were there put into the defendants' van in order to be taken to another railway station for transit to Rochester. The course of business was for a delivery sheet to be got by the defendants' servant before he could pass through the gate, and this required time. During the interval a strange man, professing to be a servant of the collecting agent, got the ticket and so got possession of the van and stole the pictures. The question raised was whether the defendants were liable. The court had no difficulty in saying they were not. Blackburn, J., said they may have been negligence and even gross negligence on the part of the defendants' servants. But that did not come within the 8th section, which took away the protection of the Carriers Act only where there had been a felonious act by the servants. Accordingly judgment was given for the carriers.

These cases will illustrate both the difficulty and the certainty of fixing carriers with their servants' criminal acts.—*Justice of the Peace*. [English.]

AGENCY—PURCHASE BY AGENT OF PRINCIPAL'S PROPERTY—GOOD FAITH INSURANCE—INTEREST—AGENT CHARGEABLE WITH LOSSES.

ROCHESTER v. LEVERING.

Supreme Court of Indiana, January 9, 1886.

1. PRINCIPAL AND AGENT—Rule as to Purchasing Principal's Property—When Confidential Agent may Purchase.—While an agent to sell property cannot, either directly or indirectly, purchase the same from himself, yet a general confidential business agent, in the line of whose duty it is to sell certain real estate, may, if he acts in good faith and discloses all the facts purchase the same from his principal.

2. —. Agent Must Show Good Faith.—When such a transaction is seasonably challenged, however, the burden is on the agent to show that he dealt fairly with his principal, and imparted to him all the information concerning such property possessed by himself.

3. —. Lapse of Time—When Certainty to Common Intent is Sufficient.—Where in such case the transaction has remained unchallenged for a large number of years, and the value of the real estate has fluctuated from time to time, resulting in a final increase, it is sufficient for the agent to show, as regards the original price paid by him, with certainty to a common intent that it was fair and equitable.

4. —. Sale not Affected by Subsequent Independent Transactions.—The sale of the land to the agent

⁶ 1 Q. B. D. 692.

n such case is not affected by independent subsequent transactions, having no relation to the principal transaction.

5. ——. *Insurance—Agent Entitled to Credit, Although Takes Policy in Own Company.*—Where such agent pays insurance premiums on the property of his principal, he is entitled to credit therefor, although he may have been the agent of the insurance company, provided he informed the company that such property was in his control, and they permitted the policies to stand without attempting to avoid them.

6. ——. *Use of Principal's Money—Rate of Interest.*—Where, in such case, the agent had to keep large sums of money constantly available for his principal, he is chargeable with interest only at the rate of 6 per cent., although he mingled some of the property of the principal with his own, and used it in his own business, and although money was bringing at the time 10 per cent. interest.

7. ——. *When Agent is Chargeable With Losses.*—Where the agent loans the money of his principal, and by neglect fails to collect it when he might have done so by proper proceedings, he is chargeable therewith.

8. ——. *Judgment Against Agent Without Relief.*—Under § 577, Rev. St., 1881, the judgment against an agent who has collected money for his principal, and has lost the same through his own neglect, or who is liable for it as for a trust fund, should be rendered without relief from valuation or appraisement laws.

Appeal from Tippecanoe Circuit Court.

S. P. Baird and McDonald, Butler & Mason, for appellant; *F. B. Everett, Coffroth & Stuart*, and *F. H. Levering*, for appellee.

MITCHELL, J. delivered the opinion of the court.

A complaint filed by John Levering against Madeline Rochester, and a cross-complaint filed by the latter against Levering, constitute the basis of the controversy exhibited in the record in this case. The complaint seeks a recovery upon an account exhibited with it for services rendered, money loaned, paid out, and expended by the plaintiff at the defendant's instance and request. The cross-complaint charges that from the year 1862, down to and including the year 1878, the plaintiff, Levering, was in the relation of agent and attorney to the defendant, Mrs. Rochester, having in charge the control and management of all her property and business; and that while in such relation he so managed her affairs and business and dealt with her as that, upon an accounting and proper adjustment of their business, a large sum of money, amounting to over \$20,000, would be due her. Upon issues made, the case was heard, and a special finding of facts, with conclusions of law stated thereon, filed by the court. With the facts as found, both parties are content, while each excepted to, and are yet, by the assignment of errors and cross-errors, respectively, contending against, some of the conclusions of law.

The controversy involves a great variety of transactions, covers a period of more than 18

years of business, and required the adjustment of an account aggregating but little short of \$80,000. That it was reduced to the order and symmetry in which the special findings present it, is abundant evidence that the case was tried with extraordinary care and ability.

The facts upon which the first conclusion of law is based are, in substance, as follows: Mrs. Rochester, in addition to a large amount of other property, was the owner of 30 acres of land, in the extreme south part of the city of La Fayette. Through her agents, Mr. Levering and his brother, she sold 15 acres off the south side of this tract to Owen Ball for \$4,000, in August, 1865. About the same time Ball offered to purchase the remaining 15 acres for \$3,500. This was refused. The appellant and Mr. Levering about that time went to Ball, and solicited him to purchase the remaining 15 acres for \$4,000. Ball again offered \$3,500, and would give no more. Mrs. Rochester then requested the appellee to find a purchaser for this tract, and other unimproved lands owned by her, which she was anxious to sell. This the appellee tried to do, but the highest offer made for the tract in question was \$3,500 by Ball. The tract was unfenced, unimproved, and unproductive, and its main value was probable and prospective for platting into town lots with a view to selling it in lots. The court finds it difficult to state the real value of the tract at the time of the sale to Levering, hereafter mentioned, but its approximate value at that time was found to be \$4,500. It is found that on the nineteenth day of February, 1869, while Mr. Levering was acting as the confidential agent of Mrs. Rochester, and while acting as her agent to sell the tract of land mentioned, he proposed to buy the land from her himself, at the price of \$4,000, agreeing that he would lay it out into lots, as an addition to the city of La Fayette, and that he would pay the price mentioned, with six per cent. interest, in money or notes out of the proceeds of sales of the lots. He represented to her that, in his opinion, it would be better for her to sell it to him than to hold it. It is found by the court that he fully and correctly communicated to her all the facts of which he had knowledge about the tract of land and its value, and that he made no misrepresentation, nor did he conceal from her any fact concerning the land or its value; and that the price offered, so far as could then be known, was not manifestly inadequate. Mrs. Rochester had full confidence in the judgment of her agent, and relied upon his advice as to the propriety of making the sale and concerning the value of the land. Under these circumstances, and without consulting any person other than Mr. Levering, the appellant sold the tract to him on the terms proposed, and executed to him a warranty deed therefor. As evidence of his obligation to her for the purchase price, he executed an instrument of writing, signed by him, in which the purchase of the land is recited, and in which his agreement to pay is stated as follows:

"I am to lay out said land into town lots as an addition to the city of La Fayette, and will pay to said Madeline Rochester, out of the proceeds of the sales of said lots, in money or in promissory notes taken, the sum of four thousand dollars, with interest at the rate of six per cent."

It is found that the tract was laid out into 69 town lots, in the month of April, 1869; that a plat was filed calling it "John Levering's addition to La Fayette;" and that, from May 28, 1869, to August 9, 1874, Levering sold 39 lots, receiving for principal and interest from such sales in the aggregate, \$9,010.85, leaving 30 lots still unsold. The purchase money was never actually paid by Levering, but, in a settlement had on the fifteenth day of June, 1874, which was afterwards found to be erroneous, Levering credited Mrs. Rochester's account with the \$4,000, and the accrued interest thereon, according to the contract as modified. The appellant paid out about \$600 for the improvement of Fourth street, which ran along or through the tract; but this sum was paid by using a judgment which belonged to Mrs. Rochester against one Austin. This judgment was used by Mr. Levering upon an agreement with Mrs. Rochester that he would change his obligation to her, so as to allow ten per cent. interest on the \$4,000 purchase money for the land instead of six. This was accordingly done. The court also found that Levering had a well-appointed and centrally located office in the city of La Fayette, with two or three clerks constantly in attendance; that, by reason of these facilities and his extensive business connections, and his energy and industry, he had great advantage in effecting sales of real estate; that, soon after the purchase from Mrs. Rochester, Fourth street lying along the east line of the addition laid out of the land purchased was improved, and, on that account, lots in that locality became more desirable; that many of them were sold at prices largely in excess of the price paid for the land in bulk. The court finds it impossible to state how much of the advance price obtained was due to the superior facilities and the individual energy, industry, and efforts of Levering. Among other facts found in addition to those above recited, which cast some light on the transaction, it may be stated that it was found that Mrs. Rochester was a lady of superior intelligence, but inexperienced in business matters, or in relation to the value of real estate; that she had entire confidence in the judgment and honesty of Mr. Levering; that he generally explained all business transactions to her—and that he had the entire management and control of her property and business; that he kept her accounts, which were always open to her inspection; and that she frequently examined them.

The first conclusion of law stated by the court was that the sale of the land was valid and binding, and free from actual or legal fraud; and that the plaintiff's (Levering's) account should be charged with the sum of \$4,000, the purchase

price of the land, as so much money received by him at the date of the sale. The conclusion of law which affirms the validity of this sale is the chief subject to which the appellant's argument is directed. It may be remarked that, so far as the contention relates to sales by a trustee or other having a power or agency to sell property which in the execution of such agency the agent or trustee either directly or indirectly sells to himself, the argument is not deemed to be relevant to the case under consideration. That an agent to sell property cannot, either directly or indirectly, become the purchaser from himself, and that such sale is voidable absolutely, at the election of the principal or beneficiary, without regard to its fairness, are inflexibly established propositions. The facts found do not make this a case of that description. While they disclose a relation of the closest and most confidential character between principal and agent, so far as the general management of the financial and business affairs of the principal were concerned, they also showed that the agent had no power to sell; and that he did not, in fact, make the sale. The agency with respect to the particular tract of land is stated in the following language: "That said Madeline was desirous of selling this tract, as well as her other unimproved land, and requested said plaintiff to find a purchaser therefor, which he tried to do; * * * that while acting as the confidential agent of said Madeline, and her agent to sell said fifteen-acre tract, plaintiff proposed to buy it himself." Fairly interpreted, this means that, while in the relation of general confidential business agent to the appellant, Mr. Levering was requested to find a purchaser for the land who would pay a fixed price, and, while so acting as agent to sell, he proposed to purchase the land from his principal, and negotiated with her the purchase which is now the subject in controversy.

The case is one arising out of a transaction between a confidential agent and his principal, who purposely and intentionally dealt with each other concerning a subject-matter involved in the agency. The result of the negotiation between the two was that the principal consciously and knowingly transferred to her confidential agent the land in controversy, at a stipulated price. While a transaction of the character disclosed is not necessarily voidable at the election of the principal, a court of equity, upon grounds of public policy, will nevertheless subject it to the severest scrutiny. Its purpose will be to see that the agent, by reason of the confidence reposed in him by the principal, secures to himself no advantage from the contract. When the transaction is seasonably challenged, a presumption of its invalidity arises, and the agent then assumes the burden of making it affirmatively appear that he dealt fairly, and in the strictest of faith imparted to his principal all the information concerning the property possessed by him. The confidential relation and the transaction having been

shown, the *onus* is upon the agent to show that the bargain was fair and equitable; that he gave all the advice within his knowledge pertaining to the subject of the sale and the value of the property; and that there was no suppression or concealment which might have influenced the conduct of the principal. *McCormick v. Malin*, 5 Blackf. 508-522; *Cook v. Burlin, etc., Co.*, 43 Wis. 433; *Porter v. Woodruff*, 36 N. J. Eq. 174; *Young v. Hughes*, 32 N. J. Eq. 372; *Farnam v. Brooks*, 9 Pick. 212; *Moore v. Mandlebaun*, 8 Mich. 433.

As applicable to cases of the character under consideration, the rule is succinctly stated by a learned author in the following language:

"Passing to dealings connected with the principal's intervention, in any contract of purchase or sale with the principal, or other transaction by which the agent obtains a benefit, a presumption arises against its validity which the agent must overcome, although this presumption is undoubtedly not so weighty and strong as in the case of a trustee. The mere fact that a reasonable consideration is paid, and that no undue advantage is taken, is not of itself sufficient. Any unfairness and underhanded dealing, any use of knowledge not communicated to the principal, any lack of the perfect good faith which equity requires, renders the transaction voidable, so that it will be set aside at the option of the principal. If, on the other hand, the agent imparted all his own knowledge concerning the matter, and advised his principal with candor and disinterestedness as though he himself were a stranger to the bargain, and paid a fair price, and the principal on his side acted with full knowledge of the subject-matter of the transaction, and of the person with whom he was dealing, and gave a full and free consent—if all these are affirmatively proved, the presumption is overcome, and the transaction is valid." 2 Pom. Eq. Jur. § 959.

Subject to the burdens thus imposed, as was stated in *Fisher's Appeal*, 34 Pa. St. 29, "it never has been supposed that a principal might not sell to his agent, or the client to his attorney; and that their titles thus acquired would not be good in the absence of fraud on their part."

In the light of the foregoing principles we may now briefly recur to the facts. Mrs. Rochester and her agent called on Mr. Ball, who had bought half the 30-acre tract, and solicited him to purchase the remaining 15 acres at the price of \$4,000. He refused to pay more than \$3,500. The agent then, being solicited to find a purchaser, was unable to secure an offer in excess of that made by Ball. The property being unproductive, its value purely prospective and largely contingent on events that might or might not happen—such as the growth and improvement of the city to which it lay contiguous, and the demand which might arise for lots in that direction—can it now be said, after this lapse of time, that the price paid was not fair? That it was difficult to ascertain the real value of the land with much certainty at

the time of the sale is disclosed in the special finding of facts, and that it was necessarily so, is inherent in the very nature of the case. Considering the length of time which intervened from the sale until the investigation was set on foot; the condition of affairs at the time the sale was made; the inflation in value, and the speculation in real estate which ensued, and continued until the latter part of 1873, covering the period during which substantially all the lots disposed of were sold by Levering—and the obstacles which lay in the path of the investigation are apparent. That the approximate value, as arrived at under these circumstances, is stated to have been \$4,500, fully justifies the further statement that the price paid was not manifestly inadequate—in effect, that the price was fair. As was said by Mr. Justice Story, in *Prevost v. Gratz*, 6 Wheat. 481:

"Length of time necessarily obscures all human evidence, and, as it thus removes from the parties all the immediate means to verify the nature of the original transactions, it operates, by way of presumption, in favor of innocence and against imputation of fraud. It would be unreasonable, after a great length of time, to require exact proof of all the minute circumstances of any transaction, or to expect a satisfactory explanation of every difficulty, real or apparent, with which it may be incumbered."

When it is remembered that the transaction was had in February, 1869, and that it was permitted to stand unchallenged, through all the changes in the situation and fluctuation of prices, until January, 1883, we think all that can fairly be required of the defendant is to make it certain to a common intent that the price paid was fair and equitable. This has been done. That the purchaser, by the succession of events—the rise in value of the property on his hands, coupled with the energy, ability and industry, and his facilities for selling lots—sold the property for more than he paid for it cannot now be taken as the measure of its value at the time of the purchase, nor can it be assumed on that account that the plaintiff was overreached in the purchase. *Fisher's Appeal*, *supra*. Having paid a fair price for the property, and fully communicated to his principal all the facts within his knowledge about the land and its value—misrepresenting nothing, concealing nothing—the appellee has brought the transaction within the rule which authorizes it to stand.

As related to the subject we are considering, it was urged on the argument that the obligation given for the purchase price was such that the purchaser came under no absolute contract to pay for the land; that his liability to pay was contingent upon his realizing the amount stipulated to be paid from sales of lots; and that this was so unfair as that the sale should have been set aside. We do not think the contract admits of the construction contended for. The contract recited that the land was conveyed at the price of \$4,000. The import of this was a debt for a specified

amount then presently due. The unilateral stipulation contained in the writing, to the effect that the purchaser would lay the land out into lots, specifying no time, and pay the amount with interest, out of the proceeds of sales, in money or promissory notes, was, if of any force whatever, at the most an agreement on his part that he would do so within a reasonable time.

It is insisted that because the Austin judgment which belonged to Mrs. Rochester was used by her agent to pay for the street improvements, and because the amount of the purchase price of the land, and the accrued interest thereon, were liquidated by being included in a partial settlement made in 1874, which was afterwards found to be erroneous, an imputation of bad faith in making the purchase of the land arises. These were all matters occurring long after the transaction which is assailed was completed, and cannot be supposed to have been contemplated. They did not exist at the time the land sale was made, and could, consequently, have exerted no influence upon it, one way or the other. They were matters only relevant to be considered in the adjustment of the accounts between the parties, and in that connection they were considered by the learned court, and properly adjusted. The sale of the land cannot be affected by independent dealings or transactions which were had afterwards, and which had no relation to the principal transaction here involved. *Sherman v. Hogland*, 54 Ind. 578.

Having thus arrived at the conclusion that upon the facts found, the purchase of the land was not in itself impeachable, we need not consider the proposition advanced, and much debated in the briefs, that the plaintiff's proceeding to set it aside has been so long deferred as to bring it within the rule applicable to stale claims.

It was found by the court that during the continuance of Mr. Levering's agency and management of Mrs. Rochester's affairs he attended to procuring insurance against loss by fire upon her property. He was at the same time the agent of the *Ætna Fire Insurance Company*, and from year to year, or as insurance was deemed necessary, policies of insurance were written by him upon her property, and the amount of premiums thus accruing were charged against her in his account. Several hundred dollars was in this manner charged against her, and in taking the account the learned judge, at *nisi prius*, allowed for the items thus charged. It is now insisted that, because the agent of the insurance company was also the agent of Mrs. Rochester, the policies issued by him as agent to cover her property against loss were void; that they afforded no protection, and that the account for premiums paid should have been disallowed. *New York, etc., Co. v. National, etc., Co.*, 14 N. Y. 85.

It is found by the court that while it was known to the insurance company that Mr. Levering was the agent of Mrs. Rochester in effecting the in-

surance, it was stated in his reports made to the company that the property insured was controlled in his office. Insurance so effected would at the most be only voidable, depending upon the relation of the agent of the company to the property, the interest and authority which he had in respect of its management, and the knowledge possessed by the company of such relation and authority. That the insurance company was informed that the property insured was controlled by its agent, or in his office, was presumptively sufficient to indicate to it that the matter of securing indemnity by way of insurance was also under his control. The policies having been permitted to stand with this information, we have no doubt they would have been enforceable against the company. At all events, as the policies were at the utmost only voidable upon the return of the premium paid, we cannot presume that they would have been avoided in case of loss, and by indulging such presumption deny the appellee's right to be reimbursed for the premiums paid.

The next question presented for consideration relates to the right of the appellee to receive compensation for services while conducting the business of Mrs. Rochester. It is found by the court that during the continuance of the agency various items, amounting in the aggregate to about \$3,000, were charged in the account against Mrs. Rochester for service in attending to her business. Concerning these charges, the court made the following specific finding:

"That all of said charges for services are reasonable, and that it was fully worth, substantially, more than the amounts so charged by said agents, and by said plaintiff as such agent, to do the work done by them as such agents, or by said plaintiff as such sole agent."

The account for services was allowed by the court below. Fully recognizing the rule that where an agent has violated his trust, or has been guilty of fraud or gross neglect of duty, thereby imposing upon his principal the necessity of expensive litigation in order to secure his rights, the penalty for such fraudulent conduct or willful violation of duty is the forfeiture of all compensation. Yet this rule should never be applied to mere mistakes in the keeping of an account, or errors of judgment, or other omissions which do not amount to misconduct or gross and culpable neglect or disregard of duty. We are unable to discover anything in the facts of this case which demands the application of the rigorous rule contended for.

The only other objection made to the conclusions reached by the *nisi prius* court is in respect of the rate of interest allowed. It is contended that in stating the account interest at the rate of 10 per cent. instead of 6 should have been charged against the agent for all sums found to have remained in his hands. The findings state that appellee had possession of all appellant's moneys, securities, and books of account, with authority to invest,

reinvest, and collect her moneys, and that she relied upon him to loan and collect the same; that during the agency of appellee, appellant's moneys, as received by him, were mixed with his own moneys, and used in his business; that from the first of July, 1868, to the first of July, 1878, the current rate at which money was loaned, secured by first mortgage on real estate in Tippecanoe county, was 10 per cent. per annum, interest payable yearly, the borrower to pay all expenses of making the loan, so as to net to the owner of the money 10 per cent. per annum. While the manner of mixing and using the moneys belonging to his principal is not to be commended, it is nevertheless inferable from the accounts exhibited in the record, and the general character of the dealings between the parties as shown by the special findings, that for all the current expenses of herself and family, and for all expenses incurred in maintaining her property, Mrs. Rochester relied upon her agent to respond with money, as the occasion might require. This necessarily involves the keeping of the money, either of his own or his principal's, always available. It may be inferred that the character of the business relation between Mrs. Rochester and her agent was such that it imposed upon the agent the entire responsibility of looking after her business, to such an extent that her entire time and thought could be and were devoted to rearing and educating her children, without further concern than to call or make drafts upon her agents as money was needed. Considering that her fortune was such as to involve the handling of the amount exhibited in the account stated, it may well be that the necessity for considerable sums was frequent. The amount on hand uninvested at any one time does not seem to have been large compared with the affairs under control. That investments were not more closely made, cannot, under the circumstances, be imputed to such neglect as should charge the agent with the highest obtainable rate of interest. Indeed, if any error at all was committed by the court below, it was in applying too rigorous a rule against the agent by charging him with compound interest on all sums found to be in his hands, as hereinafter stated.

We have thus disposed of all the errors assigned by the appellant. As there was a judgment against the appellee below, and inasmuch as he excepted to some of the conclusions of law stated, it is proper we should consider the cross-errors signed by him in this court, notwithstanding the conclusion so far reached on the errors assigned by the appellant has resulted in discovering no error. *Kammerling v. Armington*, 58 Ind. 384. The case is not analogous to nor controlled by *Thomas v. Simmons*, 1 Wkly. Rep. 557.

It was found that in the course of his agency the appellee loaned \$482.80 of the funds of his principal to one McBride, who was at the time in debt, but able to pay; that the money so loaned might have been collected if proper steps had been taken

to that end, but that the appellee took no steps to collect it, and the amount was lost. This sum was charged by the court below against the appellee, and this is one of the grounds of complaint made by a cross-error assigned. The facts found, justify the conclusion reached in that regard. It is apparent that the appellee had permitted himself to become so far involved in the affairs of McBride, who was known by him to have come into such financial stress, that he could not with propriety neglect the debt due from him to his principal. We think, while he was not guilty of willful default he was chargeable with such supine negligence as made him properly liable. He was under an obligation, at least, to use the same diligence in behalf of his principal that he used in respect of his own affairs. This, it is shown, he did not do.

The next cross-error assigned relates to the action of the court in charging the appellee with the amount of the Austin judgment, which was used by the appellee in paying for street improvements. Without rehearsing the facts, we think he has no just ground of complaint in that regard.

It is next complained of that the court erred in its sixth conclusion of law, the force of which set aside the transfer of certain lots conveyed by McBride to the appellee, and subsequently conveyed by him to Mrs. Rochester, in liquidation of a debt due from McBride to her, the payment of which the appellee had assumed. The appellee had become so complicated with the affairs of McBride that he found it expedient to accept the conveyance of a number of lots, and to assume the payment of a loan of money belonging to Mrs. Rochester, which he as agent had made to McBride, and which was secured by mortgage on the lots transferred by McBride to the appellee. This debt so assumed and secured, the agent subsequently discharged by transferring some of the lots conveyed by McBride to him to Mrs. Rochester, the transfer of which was accepted in payment of the debt assumed under his advice. They were found to be of much less value than the amount of the debt. Without further rehearsing the facts, it is sufficient to state that, within the rules already referred to, governing dealings between principal and agent, we think the conclusion reached by the court was right.

The fourth cross-error assigned, which relates to the seventh conclusion of law, is not insisted upon in the argument, and is therefore waived.

The next cross-error assigned relates to the method adopted by the court in stating the account and charging interest on balances found to be in the appellee's hands. The method adopted was to consolidate all the accounts, take the difference between the receipts and disbursements for the first current year as the first principal, upon which interest was computed for one year at 6 per cent., and this interest was carried into the account of the second year. At the end of the second year the account was to be balanced, and

interest computed on the balance, and carried into the account for the third year, and so on down through each year to the end of the current year in which the plaintiff ceased to be agent. From thence, down to the date of the taking the final account, interest was computed with annual rests at 6 per cent. Upon the facts as they appear, and in the absence of the evidence, there is nothing before us which authorizes us to say this was wrong. Without a further rehearsal of the facts this much may be said: While the method adopted by the court in stating the account may have resulted in some apparent hardship to the appellee, the impression comes irresistibly from the whole record that he allowed his accounts to come into such a state of confusion and irregularity as must preclude any ground of complaint on his part, even though the court in unravelling the tangled skein felt obliged to cast some doubts in respect of interest in favor of his adversary.

Under section 557, Rev. St. 1881, it was right that the judgment should have been rendered without relief from valuation or appraisement laws. We do not forget that some of the items which went into the account were for property purchased, but the whole was properly treated as money paid into the agent's hands for the property, as it should have been paid for at the time the property was purchased, and as it should have gone into the account if the account had been properly kept. It was in the consideration of the court a trust fund, treated as though it was actually received at the time and in the manner it should have been received.

There was no such ambiguity or inconsistency in the special finding of facts as made the granting of a *venire de novo* proper, nor can we say, in the absence of the evidence, that the motion for a new trial was not properly overruled.

Upon the fullest examination of the whole record, and a careful consideration of all the points made on both sides, we are persuaded that justice was substantially accomplished, and that it would be impossible to arrive at a better result than that already reached.

As we find no error, the judgment is affirmed, at the appellant's costs.

NOTE.—*An Agent Employed to sell Cannot sell to Himself, and an Agent Employed to buy Cannot Purchase of himself.*—A sale is a contract¹ and a contract is an agreement between two or more parties for the doing or not doing of some particular thing.² From the very nature of the thing an agreement and concurrence of the minds of the parties, or a consent and harmony of their intentions is essential to the validity of every contract. Hence one mind cannot make a contract.³ The rule above laid down applies not only to

agents⁴ but also to trustees⁵ and executors,⁶ administrators,⁷ one of several administrators,⁸ guardians,⁹ attorneys,¹⁰ stewards,¹¹ partners,¹² insurance agents,¹³ brokers,¹⁴ commission merchants,¹⁵ assignees,¹⁶ sheriffs,¹⁷ deputy sheriffs,¹⁸ judges of probate at sales ordered by themselves,¹⁹ superintendents of public instruction authorized to sell school lands,²⁰ commissioners in bankruptcy,²¹ county treasurers at sales of lands for delinquent taxes,²² cashiers,²³ broker's clerks,²⁴ attorneys' clerks,²⁵ presidents of insurance companies,²⁶ officers of railroads,²⁷ masters of ships,²⁸ a minority of a board of directors,²⁹ an attorney for a

⁴ Reed v. Warner, 5 Paige, 666; N. Y. Cent. Ins. Co. v. Nat. Prot. Ins. Co., 14 N. Y. 85; Grumley v. Webb, 44 Mo., 444.

⁵ Green v. Winter, 1 John. Ch. 26; Davone v. Fanning, 2 John. Ch. 257; when the property was sold at auction to a third party for the benefit of the wife of the trustee; Oliver v. Court, 8 Price, 170; Whicheote v. Lawrence, 3 Ves. 746.

⁶ Rogers v. Rogers, 1 Hopk. 594; where the executor purchased at a sheriff's sale. Schenck v. Dart, 22 N. Y. 420; Beeson v. Beeson, 9 Burr, 279; Winter v. Geroy, 5 N. J. Eq. 319; Bailey v. Robinson, 1 Gratt. Va. 4; Hudson v. Hudson, 5 Munf. Va. 180; Bruch v. Lantz, 2 Kewle, 392; Dunlap v. Mitchell, 10 Ohio, 117; Williams v. Marshall, 4 Gill & J. 576; Terwilliger v. Brown, 44 N. Y. 240.

⁷ Beaubien v. Poupard, Har. Ch. 306; where the brother in-law purchased at the administrator's sale. Hoffman v. Harrington, 28 Mich. 106; Sheldon v. Rice, 38 Mich. 301; Dwight v. Blackmar, 3 Mich. 330; Obert v. Hummel, 3 Harr. N. J. 74; Coat v. Coat, 63 Ill. 73; Kruse v. Stephens, 47 Ill. 113; where auctioneer bought in his own name for the administrator. Forbes v. Halsey, 36 N. Y. 53; where administrator bought through an agent. Woodruff v. Cook, 2 Edw. Ch. 259; Green v. Sargent, 22 Vt. 466; Drysdale's Appeal, 14 Pa. St. 531; Smith v. Drake, 23 N. J. Eq., 303; in this case suit was commenced seventeen years after the eldest son came of age.

⁸ Ward v. Smith, 3 Sand. Ch. 592.

⁹ Bostwick v. Atkins, 3 Comst. N. Y., 53; Walker v. Walker, 101 Mass. 169; Wyman v. Hooper, 2 Gray, 141.

¹⁰ Condit v. Blackwell, 7 C. E. Green, 481; Hease v. Briant, 6 DeG. M. & G. 623; Cane v. Allen, 2 Dow. 294; Harris v. Tremenhoe, 15 Ves. 34; Greenwood v. Spring, 54 Barb. 375.

¹¹ Selsey v. Rhoades, 2 Sim. & Stew. 49; in this case the bill was dismissed. Lord Hardwicke v. Vernon, 4 Ves. 411.

¹² Dunne v. English, L. R. 18 Eq. 594; Dunlap v. Richards, 2 E. D. Smith, 181; Maddeford v. Anstwick, 1 Sim. Ch. 89.

¹³ N. Y. Central Ins. Co. v. Nat. Prot. Ins. Co. 14 N. Y. 85; Utica Ins. Co. v. Toledo Ins. Co. 17 Barb. 134.

¹⁴ Rothschild v. Brookman, 5 Bligh, N. S. 166.

¹⁵ Beal v. McKiernan, 6 La. 407.

¹⁶ *Ex parte* Lacey, 6 Ves. 626. In this instance another sale was directed; the premises to be put up at the price he gave; and, if no more bid, his purchase to stand. He bought them in at a lower price. *Quære*, how is the assignee to be charged as to that difference?

¹⁷ Lazarus v. Bryson, 3 Bin. 54.

¹⁸ Perkins v. Thompson, 3 N. H. 144.

¹⁹ Walton v. Torrey, Har. Ch. 259.

²⁰ Ingerson v. Starkweather, Walk. Ch. 346.

²¹ *Ex parte* Bennett, 10 Ves. 384.

²² Clute v. Barron, 2 Mich. 192; Pierce v. Baughman, 14 Pick. 346.

²³ Torrey v. Bank of Orleans, 9 Paige, 663.

²⁴ Gardner v. Ogden, 22 N. Y. 337.

²⁵ Hobday v. Peters, 28 Beav. 349.

²⁶ Fisher v. Budlong, 10 R. L. 527.

²⁷ Aberdeen R. R. Co. v. Blakie, 1 McQueen, 461; Flint & P. M. R. R. v. Dewey, 14 Mich. 477; Wardell v. U. P. R. R. Co. 5 Cent. Law Jour. 527.

²⁸ Church v. Marine Ins. Co. 1 Mason, 341, where the master sold the ship at public auction. Barker v. Marine Ins. Co. 3 Mason, 369; Copeland v. Mercantile Ins. Co. 6 Pick. 198.

²⁹ People v. Township Board of Overysel, 11 Mich. 232.

¹ Benjamin on Sales, 1.

² Parsons on Contracts, Vol. 1, p. 6.

³ Lloyd v. Colston, 5 Bush. 590.

majority of the creditors,³⁰ directors,³¹ auctioneers,³² superintendents,³³ corporations,³⁴ assignees.³⁵ In fact the rule extends to all persons in whom a special trust and confidence has been reposed.³⁶ In an Ohio case the court say "there was in effect, a sale by a trustee to himself, or to his own use and benefit. This, equity will never permit, not even where there is good faith and an adequate consideration." "Nothing is better settled in equity, than that such a transaction, on the part of a trustee, does not bind the *cestui que trust*."³⁷

A Trustee Dealing with a Cestui Que Trust is Bound to use the Utmost Good Faith and to Make a full Disclosure.—Each man must know the circumstances under which he is dealing. If one of the parties is in a situation which is not fairly disclosed to the other, which if the other had known, he would not have relied on his judgement or advice, nor have acted upon or adopted any act of his, such a transaction ought not to be allowed. An equality of condition is a circumstance that is absolutely essential to any bargain.³⁸ If an attorney or agent can show he is entitled to purchase property, yet if instead of openly purchasing it, he purchases it in the name of a third person without disclosing the fact, such purchase is void.³⁹ A general land-agent is bound if he purchase any of the estates of which he is agent to communicate to his principal all his knowledge of the real value of the estate, and to give the same advice as if the sale had been to a third party.⁴⁰

A Settlement, When the Principal is Ignorant of his Rights, will be set Aside.—A concealment of a material fact is sufficient to avoid a release obtained by a party whose duty it was to disclose.⁴¹ An adjustment is not binding on an underwriter, although at the time of signing it he had the means of rendering himself acquainted with the history of the voyage and the manner of the loss, if his attention was not drawn to circumstances he afterwards learns, by which the underwriters were discharged.⁴² The agreement of a partner, who superintends exclusively the accounts of the concern and who keeps his co-partner in ignorance, to purchase his co-partner's share for an inadequate consideration, will be set aside.⁴³ A confirmation to be available must be by a person acquainted with his rights, and knowing that the transaction was impeachable.⁴⁴

Any Undue Concealment or Non-Disclosure of Facts which an Agent is under a Moral Obligation to Disclose is a Fraud on the Principal.—In a Rhode Island case, where the president of an insurance company, who professed a desire to aid a stockholder in selling his stock, advised and effected a sale thereof at a certain price and caused the transfer to be made to a third person, whom the stockholder supposed to be the purchaser, but who really took it for the president

and afterwards transferred it to him, it was held that the president was liable to the stockholder for the difference between the real value of the stock and the price for which it was sold.⁴⁵ An agent must communicate all he knows relative to the property; and if any reasonable doubt can exist the transaction cannot be sustained.⁴⁶ Courts of equity will open and examine accounts after any length of time in respect of fraud.⁴⁷

An Agent cannot be Secretly Instructed Adversely to his Principal.—H. & B. were clients of the same solicitor, M. to whom B. gave an authority in writing to sell certain property. M. agreed with H. to sell the property to him. Held, that this was a transaction in which there was a necessity for the utmost openness of dealing, and the court not being satisfied that it existed in this case refused specific performance of the agreement.⁴⁸ A broker employed to sell or exchange property, cannot properly act for a customer; and, if he exacts from a customer a conditional promise of compensation, he cannot recover any compensation from the owner for services, although a sale or exchange is effected with such customer.⁴⁹ Neither could he collect any compensation from the customer.⁵⁰

An Agent Cannot Act for Two Conflicting Principals.—In the case of the Panama and South Pacific Telegraph Company v. India Rubber, Gutta Percha, and Telegraph Company, Sir W. M. James, L. J., lays down the principal that any surreptitious dealing between one principal to a contract and the agent of the other principal is a fraud in equity, and entitles the first named principal to have the contract rescinded, and to refuse to proceed with it any shape.⁵¹ And in a Pennsylvania case, Chief Justice Thompson says: "We have the authority of Holy Writ for saying that: 'no man can serve two masters; for either he will hate the one and love the other, or else he will hold to the one and despise the other.' All human experience sanctions the undoubted truth and purity of this philosophy, and it is received as a cardinal principle in every system of enlightened jurisprudence."⁵² A broker acting for both parties in effecting an exchange of property can recover compensation from neither, unless his double employment was known and assented to by both.⁵³

A director of a joint stock company is in a fiduciary position towards the company, and if he makes any profit on account of transactions of business when he is acting for the company, he must account for them to the company. So, if, acting for himself, he proposes to the company a contract from the execution of which he will derive a profit, that profit belongs to the company.⁵⁴

An Agent Selling to Himself Must Account for any Surplus.—So, where an agent, authorized to sell a tract of land at a given price, sold a portion of it for a larger sum and placed the legal title to the residue

³⁰ Hawley v. Cramer, 4 Cow. 717.

³¹ Cook v. Burlin Co. 43 Wis. 433; N. Y. Cent. Ins. Co. v. Nat. Prot. Ins. Co. 14 N. Y. 85.

³² Oliver v. Court, 8 Price, 170.

³³ Cook v. Burlin Co. 43 Wis. 433.

³⁴ Banks v. Judah, 8 Conn. 146, where a corporation sold its property to a majority of its members. Wilbur v. Lynde, 49 Cal. 290, where a corporation gave its note to its trustees.

³⁵ *Ex parte Lacey*, 6 Ves. 626.

³⁶ Rankin v. Porter, 7 Watts, 387.

³⁷ Godin v. Cincinnati & Whitewater Canal Co. 18 Ohio St. 160.

³⁸ Rothschild v. Brookman, 5 Bligh, 197.

³⁹ Lewis v. Hillman, 3 H. of L. Cas. 607.

⁴⁰ Cane v. Allen, 2 Dow, 289.]

⁴¹ Bowles v. Stewart, 1 Sch. & Lef. 209.

⁴² Shepherd v. Chewter, 1 Camp. 174.

⁴³ Maddeford v. Anstwick, 1 Sim. 90.

⁴⁴ Dunbar v. Tredennick, 3 Ball & B. 304.

⁴⁵ Fisher v. Budlong, 10 R. I. 525; Laidlaw v. Organ, note, 2 Wheat. 178.

⁴⁶ Lady Ormond v. Hutchinson, 16 Ves. 107.

⁴⁷ Beaumont v. Boulbee, 5 Ves. 485.

⁴⁸ Hease v. Bright, 6 DeG. M. & G. 623.

⁴⁹ Walker v. Osgood, 98 Mass. 348.

⁵⁰ Ralstin v. Clark, 41 Md. 158.

⁵¹ P. & S. P. T. Co. v. I. R. G. P. & T. Co. L. R. 10 Ch. Ap. 515.

⁵² Everhart v. Searle, 71 Pa. St. 259; Kimber v. Barber, L. R. 8 Ch. Ap. 56; Farnsworth v. Hemmer, 1 Allen, 494; Fugley v. Murray, 4 E. D. Smith, 245; Walker v. Osgood, 98 Mass. 348; Ralstin v. Clark, 41 Md. 158; Fish v. Leser, 69 Ill. 394.

⁵³ Kice v. Wood, 113 Mass. 133.

⁵⁴ Liquidators v. Coleman. L. R. 6; E. & I. App., Cas. 189.

for his own benefit in a third party, it was held that the residue should be released to the principal and that the agent should account for the excess received for the portion sold.⁵⁵ And if an agent authorized to sell at a fixed price sells for a higher price, he must account to his principal for the excess.⁵⁶ And where an agent purchases land for his principal, if the agent represents that he paid a larger sum than he actually did, he must account to the principal for the difference between the sum he paid and the sum he received from the principal.⁵⁷

An Agent, his Agency being Ended, May deal with the Principal.—In a note to Fox v. Macreath,⁵⁸ the reporter says: "the result of the cases seems now to be that a purchase by a trustee for sale of the trust property may always be set aside and that it is not incumbent upon the party to show an advantage gained by such trustee.⁵⁹ He may purchase, however, if he completely divest himself of the character of trustee, and contract with the *cestui que trust*, the latter being fully apprised of every material fact."⁶⁰ And where a principal, after a full knowledge of all the circumstances, deliberately ratifies the act of the agent, or acquiesces in it for a great length of time, it will become obligatory upon him; not by its own intrinsic force, but because he waives the protection given by the law and deals with the agent as a person, *quoad hoc*, discharged of his agency.⁶¹

Executors using their Testators' Assets will be Charged with Profits if any are Made.—An executor acting with regard to the testator's property in any other manner than the trust requires is answerable for any gain and is liable for any loss.⁶² That the parties whose funds have been misapplied, should, in every case have their option of receiving the actual profits made or interest according to circumstances, appears a rule exposed to no serious objection. And although the court may allow compound interest, yet this seems, generally speaking, much less advisable than an account of actual profits.⁶³

A Deed Obtained by Fraud, Creates a Trust and the Trust may be Proved by Parol Evidence.—In cases of a joint purchase where each purchaser is to have an interest in proportion to his advances, parol evidence is admissible to establish the trust, as well as to rebut, control or vary it. It is a fraud for an agent to avail himself of his confidential relation to drive a bargain or to create an interest adverse to that of his principal in the transaction, and that fraud creates a trust, even when the agency must be proved only by parol. The statute of frauds is never allowed as to protection to frauds or as a means of seducing the unwary into false confidence to their injury.⁶⁴

A Party Rescinding a Contract, Must Return the Consideration Received.—A sale procured by fraud is not absolutely void. The defrauded party has his option to avoid or affirm the sale. But if he designs to rescind the contract, he must restore the parties to the condition in which they were at the time of the sale.⁶⁵

⁵⁵ Kerfoot v. Hyman, 52 Ill. 512.

⁵⁶ Merryman v. David, 31 Ill. 404.

⁵⁷ Ely v. Hunford, 65 Ill. 267; Cottom v. Holliday, 59 Ill. 177.

⁵⁸ Fox v. Macreath, 10 H. of L. Cases, 329.

⁵⁹ *Ex parte* Lacey, 6 Ves. 627.

⁶⁰ Coles v. Trecothick, 9 Ves. 234; Davone v. Fauning,

2 Johns. Ch. 254.

⁶¹ Note to Whichcote v. Lawrence, 3 Ves. 740.

⁶² Piety v. Stace, 4 Ves. 620.

⁶³ Palmer v. Mitchell, 2 Myl. & K. 673.

⁶⁴ Jenkins v. Eldredge, 3 Story, 185.

⁶⁵ Matteawan Co. v. Bently, 13 Barb. 641.

Provided he does so at the earliest moment after discovering the fraud.⁶⁶ And he must restore or offer to restore all he has received under the contract. He cannot rescind in part and affirm as to the residue, even where the sale is of several articles at distinct prices for each.⁶⁷ But where the party who practiced the fraud has entangled and complicated the subject of the contract, so as to render it impossible that he should be restored to his former condition, the injured party may rescind the contract by doing whatever is in his power to annul what has been done.⁶⁸

The Statute of Limitations is Generally a bar in Equity, But it does not Run against a Trust unless it be a mere Constructive Trust.—The statute of limitations is a good plea in equity as well as at law,⁶⁹ but it does not apply to trusts as long as the relation of trustee and *cestui que trust* exists between the parties.⁷⁰ But as to cases of merely constructive trusts, created by courts of equity, or cases which in a sense are treated for some purposes as implied trusts, to which, however, legal remedies are applicable, the doctrine cannot be admitted that the statute of limitations does not embrace them.⁷¹

T. D. HAWLEY.

Detroit, Mich.

⁶⁶ Devendorf v. Beardsley, 23 Barb. 656.

⁶⁷ Voorhees v. Earl, 2 Hill, 238.

⁶⁸ Masson v. Bovet, 1 Denio, 69.

⁶⁹ Bangs v. Hall, 2 Pick. 372.

⁷⁰ Hemmenway v. Gates, 5 Pick. 321; Butler v. Hascall, 4 DeSaus, 706.

⁷¹ Robinson v. Hook, 4 Mason, 153.

WEEKLY DIGEST OF RECENT CASES.

ALABAMA,	1, 5, 14, 20, 22, 25
CALIFORNIA,	11, 16
CONNECTICUT,	19
ILLINOIS,	7
KANSAS,	2, 4, 6, 13, 24
MAINE,	26
MASSACHUSETTS,	3
MICHIGAN,	9, 15
NEVADA,	
NEW YORK,	10
PENNSYLVANIA,	18, 21, 23, 27
RHODE ISLAND,	12
VIRGINIA,	17

1. ACTION—When Transferee May not Bring Action in his own Name on "Labor Tickets."—The printed certificates sued on in this case, issued by the defendant corporation, or by its authority, and denominated "labor tickets," being made payable on their face "to employees only," and indorsed "not transferable," will not support an action by an assignee in his own name. The opinion of the court, delivered by Somerville, J., says: "The certificates show on their faces that they are payable to the employees only, and to no one else. They are expressly declared to be not transferable, which negatives any promise of defendant, otherwise implied, that payment would be made to any assignee or transferee of the holders. They were issued with this express understanding, which was assented to by the employees when they received them, and the plaintiffs took the instruments with full notice of this restriction because it appeared on the face of the paper. The transferability of the paper was thus destroyed by the con-

sent of the original parties to it. *Durr v. State*, 59 Ala. 24." *Tabler, Crudup & Co. v. The Sheffield Land, Iron and Coal Co.*, S. C. Ala., December Term, 1885-86.

2. **ATTORNEY AND CLIENT—Good Faith.**—An attorney, when acting for his client, is bound to the most scrupulous good faith. If he corruptly sells out his client's interest to the other side, a judgment thus obtained may be set aside on the charge of fraud. So, also, if a plaintiff is guilty of so influencing the attorney of the defendant, by the payment of money, without the knowledge or consent of his client, as to make it the interest of said attorney that plaintiff should obtain a judgment against his client, and such attorney, in the absence of his client, does not make any resistance to the rendition of the judgment in favor of the plaintiff, a new action may be sustained by the defendant to set aside the former judgment and open the case for a new and fair hearing. *Haverty v. Haverty*, S. C. Kans., July 9, 1886; Kans. L. J., Vol. 3, No. 23.

3. **COMITY—Attachment—Insolvency.**—Creditors resident in a State which has enacted a system for an equal distribution of the assets of an insolvent, and who are bound by the decree establishing the insolvency, should be restrained from seeking a preference by attachment of the debtor's property in another State. The courts of a State would not sustain the claim of attaching creditors not citizens of the State whose process is invoked, in preference to the claim of an assignee obtaining title under the laws of the State of the insolvent debtor. Although the property of a debtor was attached in another State before the assignment in insolvency was actually executed, yet if done with full knowledge that the debtor was embarrassed and had suspended payment, and with intent on the part of the attaching creditors to avoid the effect of the assignment, it is ineffectual to establish a preference over creditors resident in the same State as the insolvent. *Cunningham v. Butler*, S. Jud. Ct. Mass., May 11, 1886; 2 New Eng. Rep. 388.

4. **COMMERCIAL LAW—Action on Promissory Note Indorsement—Denial Under Oath—Evidence.**—In an action brought to recover upon a promissory note payable to order, by a party claiming to be the indorsee, the answer admitted the execution of the note, but denied the written indorsement thereon by affidavit duly verified; it admitted, however, that the note had been transferred to the plaintiff, and the defense was that the transfer was made after maturity, and that there had been a total failure of consideration for the note. *Held*. The plaintiff is entitled to a judgment as being the holder and in possession of the note, unless the defense of the failure of consideration is established; but, held further, the plaintiff is not protected as a *bona fide* holder of the note, so as to cut off the equities of the maker, in the absence of proof of the execution of the written indorsement, denied under oath. *State Sav. Assn. v. Barber*, S. C. Kans., July 9, 1886; Kans. L. J. Vol. 3, No. 28.

5. **COMMON CARRIER—Duty of Railroad to Stop at Platform—Evidence.**—Where the complaint, claiming damages of a railroad company for the refusal of a conductor to stop his train, and put plaintiff off at the proper station, alleges that he "willfully refused to stop," and carried her several hundred yards beyond, "without her consent, and against her protest;" these averments are material, and if

the evidence shows that the conductor only neglected to stop, or that the plaintiff not only submitted, but consented to alight at the further place, without objection or protest, there is a fatal variance between the averments and the proof. If the defendant's trains were accustomed to stop at the platform at which the plaintiff desired to alight, though it was not owned or constructed by the company, an implied contract that passengers might stop there may be inferred. *Louisville, etc. Co. v. Johnson*, S. C. Ala.

6. **CONTRACT—Time—Proposition by Mail—Acceptance.**—Where a proposition to enter into a contract is made, and no time of acceptance is fixed by the party proposing, it must be accepted within a reasonable time. Where a proposition to sell a stock of merchandise is made to a distant party by letter, in which he asks for an early response, the proposer has a right to expect a prompt reply through the mail, which is the usual mode of accepting an offer made by letter, or else by some other equally expeditious manner. A mere uncommunicated purpose to accept an offer does not constitute an acceptance, and where parties are distant and the contract is to be made by correspondence, the writing of a letter or telegram containing a notice of acceptance, is not of itself sufficient to complete a contract. In such a case the act must involve an irrevocable element, and the letter must be placed in the mail, or the telegram deposited in the office for transmission, and thus placed beyond the power or control of the sender, before the assent becomes effectual to consummate a contract; and not then, unless the offer is still standing. The mere determination to accept an offer received by letter, and the act of the party to whom it is made, in starting on a journey with the intention of meeting the proposer and accepting the offer, where no notice of his intention is sent to or received by the proposer within a reasonable time, is no more than a mere mental assent, and does not amount to an acceptance. *Trounstein v. Sellers*, S. C. Kans., July 9, 1886; Kans. Law J., Vol. 3, No. 23.

7. **CORPORATION—Municipal Corporations—Special Assessment—Benefits—Instruction as to Damages—Deductible Only at Expense Equaling Value.**—An instruction directing the jury to ascertain the depreciation in value, if any, caused to certain property by a certain improvement, implies a calculation both of damages and benefits, and is not faulty as excluding benefits from the consideration of the jury. Where the evidence shows that property might derive a benefit from an improvement if a sum greater than its entire value were expended upon it in putting it into a condition to receive such benefit, a failure to instruct the jury to deduct the benefits to such property from the damages is not clearly erroneous. *Village of Hyde Park v. Washington Ice Co.*, S. C. Ill., May 15, 1886, 7 N. East. Rep., 523.

8. **CRIMINAL LAW—Burglary—Possession of Stolen Money—Evidence—Trial—Reasonable Doubt.**—The mere fact of one of two parties indicted for burglary being in possession of money identical in kind and denomination with that which was stolen is not sufficient evidence to convict him, in the absence of proof that he knew the money to have been stolen when he received it, or was connected with the commission of the crime. *State v. Nelson*, 11 Nev. 340, in regard to instructions as to reasonable doubt, affirmed. *State v. Jones*, S. C. Nevada, July 12, 1886, 11 Pac. Rep. 317.

9. ———. *Homicide—Manslaughter—Unlawful Act—Deadly Weapon—Carelessness—Instruction—Reasonable Doubt—Definition—Verdict—Informal—Sufficiency of.*—Where one chases another with intent to catch him, and slap his face, and draws a pistol with intent to fire in the air, and scare the fugitive, and accidentally shoots and kills him, the offense is manslaughter. *Campbell, C. J., and Morse, J., dissent.* An instruction defining "reasonable doubt" as "a doubt arising out of the facts and circumstances of the case, in maintaining which you can give some good reason," while not accurate, was not of sufficient consequence in this case to be assigned as error. Where the jury reported to the court that they found the respondent guilty of voluntary manslaughter, and the verdict was reduced to form, and the clerk then said: "Gentlemen of the jury, you say you find the respondent, Jacob Steubenvoll, guilty of manslaughter in manner and form as the people in their information charged—so say you, Mr. Foreman; so say you all?" and the jury answered, "We do;" *held*, that the verdict was sufficient. *People v. Steubenvoll, S. C. Mich., July 8, 1886, 28 N. W. Rep. 888.*

10. ———. *Larceny and Receiving Stolen Goods—Indictment—Proof Must Agree With Allegations of Larceny—Embezzlement of Proceeds From Authorized Sale, not a Larceny of Thing Sold.*—The indictment against defendant charged that he "did steal, take and carry away one lace-pin, of the value of eight hundred dollars, * * * the property of James Porteous." The evidence was that Porteous had left it with defendant to be sold, but the former had authorized him to procure a loan upon it, which he did. Defendant asked the court to charge that "the indictment being for the larceny of a certain pin, if the jury believe that the complainant, being the owner of the pin, authorized the defendant to obtain a loan upon it, and the defendant did actually obtain the loan as authorized, they cannot convict under the indictment for the larceny of the pin." The court refused to so charge. *Held* error. An omission to account for the proceeds of a loan obtained on a pin which accused was authorized to pawn, could not, by relation, change the voluntary act of the owner in parting with the pin, into a larcenous taking by the defendant, nor support the allegation of the indictment. *People v. Cruger, N. Y. Ct. Appls., June 1, 1886, 7 N. E. Rep. 555.*

11. ———. *New Trial—Newly-Discovered Evidence—Jury—Challenge for Cause—Exception—Witness—Examination of—Practice—Leading Questions—Evidence—Dying Declarations—Evidence Explaining—What Admissible—Error—Evidence—Exclusion of—Error Without Injury—Credibility of Witness.*—In cases of conflicting testimony, newly-discovered evidence, merely cumulative, will not furnish ground for a new trial. A challenge to a juror on the ground that he is not a resident of the county where the trial of a criminal case is had, is a general challenge for cause, and no exception to the action of the court in disallowing such a challenge is permitted by statute. On the examination of a witness, counsel is not authorized to insert in a question a statement as having been made by the witness which had not in fact been made by him. The allowance of a question to a witness, against the objection of the adverse party that it is leading, improper, and incompetent, cannot be assigned as error on appeal,

the matter of the form of a question being in the discretion of the trial court. Testimony relating to the condition of a witness when his alleged dying declaration was made, is not testimony adding to or contradicting the written statement. Dying declarations are restricted to the act of the killing, and to circumstances immediately attending it, and forming a part of the *res gestæ*. The action of a court in sustaining the objection to a certain question cannot be assigned as error, if elsewhere in the course of the trial the question has been fully answered. On a trial for murder, it is not error to refuse to admit a question put to a witness as to whether he knew of the defendant's arrest for arson, and at whose instigation such arrest was made, if no offer was made to prove that the arrest for arson was instigated or brought about by any witness for the prosecution, or any organization or society hostile to the defendant with which any witness for the prosecution was connected; as in the absence of evidence, or any offer thereof, connecting the witness for the prosecution with such arrest, the answer to the question could not have tended to destroy the credibility of any of them. *People v. Fong Ah Sing, S. C. Cal., May 31, 1886, 11 Pac. Rep. 323.*

12. DESCENT AND DISTRIBUTION—*Will by Minor—Guardian's Sale.*—G., while an infant, inherited from her father and mother real estate belonging to them during their lives in equal moieties as tenants in common. Her guardian sold her said estate, under leave of the court of probate. She died November 21, 1885, 19 years old, leaving a will dated that day, purporting to convey her estate, consisting of the surplus proceeds of the above real estate. Under Pub. St. R. I. c. 182, §§ 1, 2, minors of 18 can dispose of their personal estate by will, but only those of full age can dispose of their real estate by will. Under Pub. St. R. I. c. 179, § 14, if real estate of a ward is sold by guardian by leave of a probate court, the surplus remaining at the death of the ward descends to the heirs of such ward, as the real estate of the ward would have done had no sale been made. *Held*, this clearly means that the conversion of the real estate into money shall not alter the course of descent. *Held, also*, since the will would have been ineffectual to interrupt the descent if the real estate had not been sold, it is likewise ineffectual, notwithstanding the sale as to the surplus proceeds. *Held*, that the surplus proceeds will descend in moieties, according to the canons of descent, one-half to the next of kin of the deceased of the blood of the father, and the other half to the next of kin of the blood of the mother. *In Re McCabe, S. C. Rh. Isl., June 19, 1886, 5 Atl. Rep. 79.*

13. DIVORCE—*Fraud in Procuring Divorce; Review.*—Where an action is commenced by a defendant within six months after the rendition of a decree of divorce, to vacate the same, upon the charge of the fraud of the plaintiff, and in such case a judgment is rendered against the defendant, a subsequent proceeding to review said judgment may be commenced in the supreme court within one year after its rendition. (Sec. 3, ch. 126, Session Laws of 1881.) *Haverty v. Haverty, S. C. Kans., July 9, 1886, Kans. Law J., Vol. 3, No. 28.*

14. DOWER—*Rents and Profits—Alienation of Dower Interest—Equity.*—Until her dower is assigned

to her, the widow has no interest which she can convey to a stranger, so that he may assert it at law, and the heir may recover in ejectment against her grantee; but a court of equity will protect the rights of her alienee, when founded on a valuable consideration, and enforce the transfer against her in a proper case. Where the widow joins with two of the heirs in conveying the lands to a third person, to whom the other heirs had already aliened, the deed being founded on valuable consideration, and containing covenants of warranty, she cannot afterwards maintain a bill in equity against her grantee for assignment of dower. Where the widow, residing with her sons on the homestead lands, before dower has been assigned to her, unites with them in a mortgage of the lands and crops, as security for advances to enable them to make a crop, and the cotton raised is delivered to the mortgagees in payment of the debt, she cannot afterwards maintain a claim against them as for rents and profits before dower as signed. *Reeves v. Brooks*, S. C. Ala.

15. *Equity—Bill to Quiet Title—Fraud—Sale by Guardian.*—Where a guardian sells lands without proper formalities, and the wards, after attaining their majority, presumptively affirm the sale by retaining the purchase money, and later actually do so by giving the owner of the title under the probate sale a deed of the property, he may maintain a bill in equity to quiet title against a third party who, by fraud, obtains a deed of the wards after their majority, and before they execute the deed to complainant. *Fender v. Powers*, S. C. Mich. July 1, 1886. 28 N. W. Rep., 878.

16. *Fixtures—Landlord and Tenant—Machinery, when a Fixture—Execution against Landlord—Conversion—Demand.*—Machinery attached to a building with bolts and screws is a fixture, within the meaning of § 660 of the California Civil Code. Machinery having the character of a fixture may be taken on execution against the owner of the property to which it is attached, notwithstanding it belonged to, and was attached to the realty by, a tenant whose lease has not expired, and who, under the lease, has a right, upon the expiration thereof, to remove such machinery. No demand is necessary before bringing suit for the recovery of property which constituted a fixture, and which was wrongfully severed and removed. *McNally v. Connolly*, S. C. Cal. May 28, 1886. 11 Pac. Rep., 330.

17. *FRAUDULENT CONVEYANCES—Post-Nuptial Settlements—Evidence—Husband and Wife—Proving Consideration—Recital in Deed.*—A Husband is not a competent witness to prove the consideration upon which a post-nuptial settlement upon his wife was made, even though the wife be dead. In equity the consideration for a post-nuptial settlement may be shown by parol proof. A recital in the deed, that the consideration was paid by the husband, does not necessarily imply anything more than the money passed through his hands; it does not at all indicate the ownership thereof. A case in which the evidence satisfactorily shows that the consideration for the settlement upon the wife moved not from the husband, but from the wife's father, and the settlement is sustained. *Marks v. Spencer*, S. C. of App. Va. April 22, 1886. Va. L. J. Vol. 10, 463.

18. *GUARDIAN AND WARD—Account of Guardian—Expenditure without Order of Court—Repairs—*

Subsequent Ratification.—A guardian expended certain sums of money judiciously and in good faith in repairs which resulted to the advantage of the estate, and although there was no order of court previously made authorizing the expenditure, yet when his account was presented to the court it was decided that he was justified in making the repairs. *Held*, that the guardian having taken the risk of being surcharged, yet the subsequent approval by the court relieved him from liability. *Kilpatrick's Appeal*, S. C. Penn., May 10, 1886. 5 Alt. Rep. 10.

19. *LANDLORD AND TENANT—Ejectment.*—Where the husband of the defendant occupied the premises in controversy, as a tenant by the year, and defendant, after his death, continued in possession of the premises with the knowledge of the plaintiff, who made no objection to her occupancy, and by his silence and his acts consented to it, she may be regarded as a tenant at will, and, being lawfully in possession, ejectment will not lie against her until after demand of possession. *Perkins v. Perkins*, S. C. Conn., April 24, 1886. 2 N. Eng. Rep., 311.

20. *MARRIED WOMEN—Disabilities of Coverture—Powers Conferred when Relieved of—*A decree of the chancellor, relieving a married woman of the disabilities of coverture as to her statutory or other separate estate (Code, § 2781), although it does not confer on her a general power to contract, expressly authorizes her to "buy" and "to be sued as a femme sole;" and she is personally bound by a contract of purchase made by her and may be sued at law. In rendering the opinion of the court, upon this point, Somerville, J., says: "It is our opinion that she was personally bound by her contract of purchase. No one contends that the purpose of the statute was to confer on married women a general power to contract. The contrary has been uniformly declared in all of the decisions of this court where the construction of this law has been under our review. *Ashford v. Watking*, 70 Ala. 156; *Meyer v. Sulzbacker*, 76 Ala. 121; *Cohen v. Wollner*, 72 Ala. 233; *Hatcher v. Diggs*, 76 Ala. 189; *Dreyfus v. Wolfe*, 65 Ala. 496. * * * The statute confers on her the express power to buy. This includes the power to buy on credit, and, by necessary implication, the incidental power to promise to pay for what she buys, because her authority is not confined to buying for cash. Then follows the declaration in the statute that she may be sued as a femme sole—that is, just as she could be sued if she were unmarried, or had no husband. In the latter contingency it is perfectly clear that the result of a suit, in the event of a recovery, would be a personal judgment against her." *Parker v. Roswald*, S. C. Ala. Dec. Term, 1885-86.

21. *PARENT AND CHILD—Step-Father—Step-Child—Support of Minor Child—Contract, Express and Implied—Guardian and Ward—Liability of Guardian—Advice of Counsel—Surcharge.*—A step-father is under no legal obligation to support a step-child. If, however, the latter enter into and form a part of the former's family, the law will imply no promise to pay for his doing; but this rule is changed by an express promise to pay. A guardian who has acted according to his best light, under the advice of counsel, and in good faith, will not be surcharged for sums of money expended for the benefit of his wards. *Brown's Appeal*, S. C. Penn. April 5, 1886. 5 Atl. Rep. 13.

22. PARTITION—Procedure in Adverse Claim.—In an application for the sale of property, for division or distribution among several tenants in common, as in an application for partition (Code, §§3498, 3515), the petition must set forth the names and residences of "all the parties interested in the property;" and this statutory requirement, which is jurisdictional, includes the person who files the application. If the petition shows that one of the tenants in common has died, it must show to whom his interest has descended, or in whom it has become vested, and such persons must be made parties. If it appears that the deceased tenant owed debts at the time of his death, the court should appoint an administrator *ad litem* to protect the creditors (Code, § 2625); but such administrator is not authorized to receive the money decreed to him. Although a partition or sale can not be decreed, "where an adverse claim or title is asserted by any one" (Code, § 3512); yet the jurisdiction of the court can not be ousted, or rendered nugatory, by the false assertion of an adverse claim by one of the defendants, without foundation in law or in fact. The surviving husband of a deceased married woman who was one of the tenants in common, having a statutory life estate in his wife's interest in the lands (Code, § 2714), is a proper and necessary party to the proceeding, and is bound by a decree ordering a sale; but, as to how his interest in the proceeds of sale is to be ascertained and determined, in the absence of the statutory provisions, the court decides nothing. *Ballard v. Johns*, S. C. Ala.

23. PARTNERSHIP.—Members of Proposed Corporation—Contract with One of Its Members—Form of Action—Case—Bill in Equity—Account Render.—The members of a proposed corporation are partners liable to contribute, in proportion to their interest, to funds required for the use of the partnership, and entitled to a proportionate share of profits realized. A member of a proposed corporation, who is treated as a partner, cannot bring an action on the case against the other members to recover damages for failure to perform a contract for the purchase of property for firm purposes into which they have entered with him. One partner cannot sue another partner for a partnership debt, except by bill in equity, or action of account render. *Crow v. Green*, S. C. Penn., April 26, 1886. 5 Atl. Rep. 23.

24. STRANGER PAYING DEBT.—Subrogation—Request to pay—Mortgage—Administrator.—Where a mere stranger, a mere volunteer, a mere intermeddler, pays the debt of another, he cannot be subrogated to the rights of the creditor. But where a person pays a debt which is secured by a mortgage, at the instance and request of the debtor, with the agreement that the person paying the debt shall have a mortgage lien upon the real estate then mortgaged to secure such debt, and a new mortgage is given but is void, the party furnishing the money may be subrogated to the rights of the original creditor. And this rule applies where an administrator borrows money to pay a debt of his intestate's estate. In other words, where a debt is due against the estate of a deceased person, and such debt is secured by a mortgage on real estate of such deceased person; and the administrator, whose duty it is to pay such debt, borrows the money therefor from a third person, with the agreement and understanding between them that such third person shall be secured by a mortgage lien upon the previously

mortgaged property of such estate, and for that purpose a mortgage on the previously mortgaged property is executed by the administrator to such third person, which mortgage is void because of a want of power in the administrator to execute the same, but in pursuance of such mortgage and with the agreement and understanding between the administrator and the loaner of the money, the money is loaned and is paid to the original mortgagee; held, that such third person may then be subrogated to the rights of the original mortgagee. *Crippen v. Chappel*, S. C. Kans. July 9, 1886, Kans. L. J. Vol. 3 No. 23.

25. TAX.—Title—Color of Title—Adverse Possession.—Witness.—Five years "after the date of the sale" is the statutory limitation to an action to recover land sold for non-payment of taxes (Code, § 464); and this has been construed to mean five years from the delivery and registration of a deed properly executed and acknowledged. A tax-deed, though invalid as a muniment of title, may constitute color of title, and thus operate to define the boundaries of an actual possession. A fence, or inclosure, is not an essential element of an adverse possession; and permitting a fence to become dilapidated, or even destroyed, during the interval between periods when necessary to protect the crops, does not, of itself, constitute an abandonment, nor interrupt the continuity of the possession. Although a witness may testify corruptly, his testimony should, nevertheless, be received as credible, so far as it may be satisfactorily corroborated by other evidence. *Hughes v. Anderson*, S. C. Ala.

26. WILL.—Specific Devise—Residuary Clause—Estoppel—Deed—Signature—Assumed Name.—A residuary devise, in ordinary terms, carries with it not only the property of the testator in which no interest is devised or bequeathed in other portions of the will, but also reversionary interests in property not otherwise disposed of by him, even when the residuary devisee is also the devisee of the interest specifically devised as a life-estate. A party signing and executing a deed under an assumed name will be estopped from taking advantage of it, and so will all others in privity with him and whose rights are not paramount thereto. *Davis v. Callahan*, S. J. C. Me., June 22, 1886, 5 Atl. Rep. 78.

27. WITNESS.—Transactions With Decedents—Act of April 15, 1869—Competency of Witness—Trial—Testimony of Incompetent Witness—Striking Out—Error Cured—Trusts—Resulting Trusts—Payment of Purchase Money—Intention of Parties—Evidence.—The act of April 15, 1869, forbidding the living party to a contract to testify in relation to it when the other party is dead, applies to suits upon choses in action only. It does not apply to actions involving title to real estate. Where a witness is competent when offered, and when afterwards, in the course of the trial, his incompetency appears, his testimony is stricken out, and the jury instructed to disregard it, its original admission is not error. Where a purchaser of real estate pays the purchase money, and takes title in the name of another, a presumption arises of a resulting trust in his favor. The intention of the parties governs in such a case, and their contemporaneous and subsequent acts and declarations may be admitted in evidence to rebut the presumption. *Warren v. Steer*, S. C. Penn., May 17, 1886, 5 Atl. Rep. 4.

QUERIES AND ANSWERS.*

[Correspondents are requested to draw up their answers in the form in which we print them, and not in the form of letters to the editor. They are also admonished to make their answers as brief as may be.—Ed.]

QUERIES.

15. A. offers to sell a lot for a certain price. B. replies: "I accept your offer, please execute the enclosed deed and send it to S. Bank with instructions to cashier to collect the amount due you and deliver deed. I will pay their charges, you will send with the deed an abstract of title, or if you have not one, please order one. If you prefer to send the deed to any one else, it does not matter much to me, only I do not want anything to do with a real estate agent." Is this an unqualified acceptance? Or do the requests to send it to S. Bank—subsequently modified—and for an abstract constitute new conditions? Please cite authorities. K.

16. A., a physician, gave to B. as collateral security, to secure to B. a running account not due, an order on C., who was indebted to A. B. immediately returns the order to A. for collection and agrees to give a credit when the order is collected and amount paid to him. The order was never accepted by C. and he knew nothing of it. Afterwards C. pays his account to A., and on demand from B., A. fails to pay the money so received from C. over to B. Is A. guilty of embezzlement? Cite authorities. J.

QUERIES ANSWERED.

Query 10. [23 Cent. L. J. 70].—A. loses his house which was insured, by fire. The insurance company believed that A. either did or procured the burning thereof, and refuses payment of loss. A. sues to recover the amount claimed under the policy. The company answers, setting up as their defense, A.'s guilt in regard to the fire. What is the quantity of proof required at the company's hands to release it from liability? Must it establish the guilt "beyond a reasonable doubt" as would be required of the State in a criminal prosecution for the crime, or must it simply show it by "the preponderance of testimony" only as is the rule in other civil cases.

Answer.—The defendant need only show A.'s guilt by a preponderance of the evidence. 2 Greenleaf on Evidence, § 408; Gordon v. Parmlee, 15 Gray (Mass.), 413; Wash. Union Ins. Co. v. Wilson, 7 Wis. 169; Schmidt v. Ins. Co., 1 Gray (Mass.), 529; Blaeser v. Ins. Co. 19 Am. Rep. 747. A. W. L.

Query 37. [22 Cent. L. S. 310].—Section 5010, Rev. Stat. Mo., provides that the Board of Trustees may pass ordinances: "To provide licensing and regulating dram-shops and tippling houses, etc." Under this provision in said section, has the Board of Trustees power to pass an ordinance regulating the sale of liquor by druggists and pharmacists in the village? Please cite authorities. * * *

Answer.—Under the laws of Missouri a dram-shop keeper is one thing (2 Rev. Stat. 1069) and a druggist is another (2 Rev. Stat. 1075). By a familiar rule of construction the Board of Trustees under the authority stated can regulate such establishments only as fall under the statutory definition of dramshops, but cannot regulate drug-stores, nor interfere with the busi-

ness of a drug-store, which under the statute includes the sale of liquors in certain modes and quantities. If however, a druggist so conducts his business as to make his establishment fall under the legal definition of a dram-shop, he becomes amenable to the law and ordinances relative to dram-shops. A. B. C.

RECENT PUBLICATIONS.

A TREATISE ON CONTRACTS FOR FUTURE DELIVERY and Commercial Wagers, Including "Options," "Futures," and "Short Sales." By T. Henry Dewey, of the New York Bar. New York: Baker, Voorhis & Co., Publishers, 66 Nassau Street, 1886.

The subject of this work is of no slight importance to lawyers who are interested in commercial affairs, for, from the necessity of the case much of the business of their clients is speculative. It should, therefore, interest them to be able to distinguish clearly between those classes of contracts which, although confessedly speculative, are nevertheless legal and within the scope of legitimate commercial enterprise, and those which the law condemns as wagering contracts. The line of demarcation is not very distinct, the law, as the author of this work remarks in his preface "is far from being settled and the decisions in many cases are contradictory and unsatisfactory." It is the object of this work to classify and harmonize the numerous rulings, and to enable the practitioner to distinguish clearly, speedily and accurately between those classes of speculation which the law regards as legitimate enterprise, and those which it brands as wagering contracts, and mere gambling, and to the enforcement of which, it steadfastly refuses its aid.

As to whether a given transaction is lawful or unlawful, a legitimate speculation or a mere wager, the author furnishes the following on "The True Test:" "Where the parties to a contract in the form of a sale agree, expressly or by implication at the time it is made, that the contract is not to be enforced, that no delivery is to be made, but the contract is to be settled by the payment of the difference. * * * Such a transaction is a wager." In an English case "the jury was told that if neither party intended to buy or sell, it was no bargain but a mere gambling transaction." The rule seems simple enough, but in its application to transactions complicated by the incidents of boards of trade, "bucket shops," agents, brokers, and other commercial machinery, there has been considerable difficulty, and the cases are not in accord with each other, nor in all respects with the obvious general principle governing the subject.

The work before us is evidently the result of much research, and is well worthy of the consideration of all members of the profession whose line of practice includes commercial transactions of a speculative character.

A TREATISE on the Construction or Interpretation of Commercial and Trade Contracts. By Dwight Arven Jones, of the New York Bar. New York: Baker Voorhis & Co., Law Publishers, 66 Nassau Street, 1886.

This is another work on commercial law, but much broader in its scope than the preceding. That is confined to the law relating to certain morbid developments of commercial activity—this extends to the construction of commercial contracts generally, unaffected by any taint of illegality. At first it would ap-

pear that the subject was too broad to be sufficiently treated in a single volume. It will be observed, however, that the author does not propose to treat the whole subject of the law of contracts, but only "to state simply and clearly the principles which govern the interpretation of all mercantile contracts." Even thus narrowed the subject is sufficiently broad for a single volume. The author has evidently bestowed much labor upon the preparation of this book, which is a very valuable addition to the legal literature of the law of contracts. The arrangement of the matter of the book is very good; the first chapter treats of the nature and scope of construction; the second, who construes the contract; the third, the law which governs the construction; the fourth, the law governing construction in special cases, such as commercial paper. The fifth, sixth, seventh, eighth, eleventh and twelfth chapters are devoted to questions as to admissibility and effect of parol evidence in aid of construction. The ninth and tenth chapters discuss the proof and effect of usage as affecting the interpretation. In the thirteenth, fourteenth and fifteenth chapters, the operation of parol evidence on construction is further discussed. The sixteenth, seventeenth and eighteenth chapters furnish rules for the construction of contracts generally, of the whole contract and of ambiguous contracts. The remaining five chapters are devoted to particular contracts, such as insurance policies, guaranties and the like, and to the effect of alterations of contracts, material or immaterial, by parties or by strangers, with the legal consequences of such alterations, as to presumptions and burden of proof.

The book is divided into sections, with an appropriate head note or catch-word to each, and this we consider a very commendable practice. Just here, however, we are constrained to "hint a fault." The sections are not, in our opinion, sufficiently numerous. If there were more of them, the references in the index might well have been to the sections instead of the pages, which we think the better plan. This, however, is quite a small matter. We regard the book, upon the whole, as very valuable, and cordially commend it to the profession.

JETSAM AND FLOTSAM.

AN ODD JUDGE.—When ignorance and oddity take a seat on the judicial bench, "the unskilful laugh," and "the judicious grieve." Lord Eskgrove, a Scotch judge knew little law and was garrulous in proclaiming his ignorance. When pronouncing sentence of death, he used to signalize himself by offering consolation to the prisoner in a style that shocked the bar and the spectators. His usual formula was:

"Whatever your reelegious persuashon may be, prisoner, or even if, as I suppose, you be of no persuashon at all, there are plenty of reverend gentlemen who will be most happy for to shew you the way to yernal life."

In those days Tory principles were in the ascendant, and Lord Eskgrove was a Tory of the Tories. A Whig was made to suffer severely if he came within reach of the arm of the court. Sir John Henderson, a zealous Scotch Whig, was once up for sentence before the full bench, for some offence the penalty of which was at the discretion of the court.

Lord Eskgrove, being deaf, gave his opinion in a low voice that the fine ought to be fifty pounds.

"I beg you to raise your voice," interrupted the im-

prudent Sir John; "if judges don't speak so as to be heard, they might as well not speak at all."

"What does the fellow say?" asked the nettled judge.

"He says that if you don't speak out, you may as well hold your tongue."

"Oh! My lords, what I was saying was very *simpall*; I was only *sayingg* that in my humble *opinyon*, this fine could not be less than two hundred and fifty pounds *sterlingg*," roaring out the sum as loudly as his old cracked voice could shout.

The London Law Times, apropos of the Queen's Jubilee celebration by the Benchers of the Inner Temple on the 19th ult., "drops into poetry" after the following unique fashion:

A Royal Jubilee rarely occurs in this sublunary sphere,
And it's right that lawyers should welcome it when it
really does appear;
So the Benchers of the Inner Temple, with the hand-
somest designs,
Got up their Hall, themselves, and Church, up to the
very nines,
To celebrate the jubilee of our most gracious Queen—
Queen of England, Scotland, Wales, and of the Island
green
(If Gladstone will of grace permit this loyal observa-
tion,
Which couples with the Saxon cure, the glorious Irish
nation).

But how to celebrate this great event was the impor-
tant question,
Without imposing too much work on anyone's diges-
tion—
Without neglecting any art, good fun, or Christian
duty,
Or subjecting to vulgar gaze the Benchers' daugh-
ters' beauty.

How easily the Benchers solved this very knotty prob-
lem,
And sugared plums for heavy swells with certainty to
nobbler 'em;
How in the early hours of night the guests were piled
with farce—
The old familiar comedy of Bottom and the Ass;
How later on, when dreams had fixed their soft
illusions firm on,
The company at midnight hour submitted to a sermon;
And after with philosophy proverbial as of Tupper,
And organ strains and handsome trains, returned to
hail and supper:
All this is told in humble prose in newspapers most
numerous,
With phrases which almost suggest a lurking spirit
humorous.

This relieves us from a painful suspicion engendered by the "law poetry" which it has been our misfortune to encounter, that when Blackstone penned his farewell to his muse, that lady took him at his word, not only cut his acquaintance, but that of all his professional confreres, and that her "boycott" had descended even to this enlightened generation. [Ed. C. L. J.]

The Central Law Journal.*ST. LOUIS, AUGUST 13, 1886.***CURRENT EVENTS.**

INTER-STATE AND INTERNATIONAL JURISDICTION.—This phase of the general subject of conflict of laws seems to be coming to the front lately. The Cutting case can hardly be reckoned in a proper sense, one of that character, as Mexico has not yet developed a spirit of comity to any appreciable extent, and the question is diplomatic, with strong military tendencies. But the matters of inter-State garnishment, and inter-State attachment, we have always with us. And now, it seems, the English Court of Queen's Bench will to-day (August 11), tackle the question, whether the courts of that country will take jurisdiction of an action for libel between two foreigners, the (alleged) defamatory matter having been published in a foreign country. Mr. Field brought suit in London against Mr. Bennett for libel published in the New York Herald. The jury gave Mr. Field a verdict for \$25,000, and the question was reserved whether, both parties being foreigners, and the publication made in a foreign country, neither having a domicile in Great Britain, the English courts can properly take jurisdiction of the controversy. We shall await the decision with interest, but we must say that at first blush, we do not see much room for discussion. The action is a personal action, the court, of course, had jurisdiction of the person of the defendant, by service of process or otherwise, or else he would not have appeared to the action, and the matter complained of, libel, is actionable, as well in England as in the United States.

SLIPSHOD LEGISLATION.—While the Congress of the United States has been wrestling with the oleomargarine problem, it seems that the English Courts have been occupied with the consideration of similar questions affecting the public health, comfort, and convenience. There were two cases; in one, the plaintiff complained of being poisoned by

lead pipes in which the water used by him was conveyed from the main into his house; the blame was laid upon the water company, which the victim denounced as having "no soul to be saved." In the other case a grumbling consumer presumed to cavil with the unreduced price of gas, supplied by an incorporated company, which "had no body to be killed."

The first of these cases was in the House of Lords, the jury had given the plaintiff a verdict for £2000; the other was in the English Court of Appeals. In both cases the judges were divided in opinion. the defendants were let off "with a caution," and the blame laid on the legislature.

And just there, it may be said, in most cases of hardship and injustice, occurring in courts of justice, in which private corporations are concerned, is where the blame should properly rest. In our country it is too much the practice to charter corporations either in a wholesale way, or upon the *ex parte* representations of the promoters of the enterprise. They are naturally anxious to secure the most extensive privileges attainable and reduce the restrictive clauses to the *minimum*. They and their lobbyists have nothing else to do but to put through their bill with the fullest powers and the scantiest safeguards. They are acute, earnest, personally interested; the other side, the public, is represented by the legislator, who has a thousand things to look after, besides the ever-present problem of re-election, and he, without personal interest, and habitually anxious to conciliate, allows points to escape which, afterwards, work serious wrong to the community, and bring reproach upon the administration of justice. There is much slipshod legislation resulting in injustice and hardships, the blame of which is laid upon the courts. Instances may be found in every State in the Union, but perhaps the English case under consideration is the most perfect specimen. By the act of Parliament the Water Company was vested with the absolute power to prescribe the size, nature, strength, and materials, of the consumers' pipes, they prescribed lead as the material, the water, pure in the iron mains, became impure in the leaden service pipes, the plaintiff and his family were poisoned by its use, but the

courts could give him no redress. The defendant could say, "*Ita lex scripta est*," and it is the duty of courts to interpret the law as it is written, and cause it to be enforced according to its terms. Unless a plaintiff can bring his case within its limits, he must needs fail. "It may be said," observed Lord Bramwell, "that we are deciding the case on technical grounds. Mr. Justice Willes said that law without technicality was impossible. I content myself with saying that, so long as our law says that a plaintiff, to succeed, must do so on the *allegata et probata*, the decision must be governed by them and them alone."

NOTES OF RECENT DECISIONS.

WATERS AND WATERCOURSES — DEED OF LAND ON BANK OF RIVER — LIMIT OF OWNERSHIP — FRANCHISE — REVERSION. — In a very recent case,¹ the Supreme Court of Ohio had under consideration an interesting question, involving the ownership of land covered by water, and the reversion of privileges granted to a corporation, after the termination of the company's corporate existence. It seems that a land company, owning the land on both sides of a river, granted a canal company the privilege of constructing their canal between two walls in the river bed, with flowing water on each side of the canal. The land, on the canal side of the river, subsequently passed, by mesne conveyances, to Day, Williams & Co., and the franchise and rights of the Canal Company, which had ceased to exist as a corporation, had passed to the defendant, a railroad company. The canal itself had been disused and abandoned. The defendant proposed to use the tow-path of the defunct canal as the road-bed of its railroad, and the plaintiffs claimed that upon the dissolution of the canal company, and the disuse of the canal as a navigable waterway, all the rights, in the premises, of that company, reverted to their grantor and consequently to them, and that the defendant took nothing by its conveyance from the representatives of the defunct canal company, because that company had no interest in the

property after the abandonment of the canal as a means for transportation. And so the court held: that upon the *ouster* of the canal company from its corporate franchise, its rights to use the land and water constituting the canal, or the premises in question, could not be conveyed by its trustees, but reverted to the grantor and those holding under him; that conveyances by him to the other persons and from them to the plaintiffs, making no reservation, but constituting the river the boundary of the land conveyed, gave the plaintiff a full title to the middle of the river, and passed to him all the rights which had, previously or subsequently, reverted from the defunct canal company.

It is well settled law, in this country and in England, that when a water-course (above tide-water) is made the boundary of land conveyed, the land covered by the water-course is included, *usque ad filum aquæ*.² Whether this rule applies to navigable streams, above tide-water, is a question which depends for its solution upon the laws of the several States. In Ohio the owners of lands on the banks of navigable rivers own the land to the middle of the stream, and if he owns on both sides of the river, he owns the whole bed of the stream, subject in both cases to the easement of the navigation.³ And the same rule, it is believed, is in force in all the States. In Missouri it is held that a riparian proprietor in St. Louis, whose lot is bounded on one side by the Mississippi River is entitled to alluvial accretions, formed on the shore, as far out as the middle of the stream.⁴

And it is a well settled rule of construction that if a riparian proprietor does not intend to convey the land covered by water to the middle, or thread of the stream, he must use proper words of reservation, or exclusion, in

² Cold Spring Iron Works v. Tolland, 9 Cush. 402; Palmer v. Mulligan, 3 Caines, 319; Canal Commrs. v. People, 5 Wend. 423; Tyler v. Wilkinson, 4 Mason, 397; Claremont v. Carleton, 2 N. H. 369; Ingraham v. Wilkinson, 4 Pick. 468; People v. Seymour, 6 Cowen, 579; Hoeker v. Cummings, 20 Johns. 91; Commrs. v. Kempshall, 28 Wend. 404.

³ June v. Purcell, 36 Ohio St. 396. See also, Gavitt v. Chambers, 3 Ohio, 496; Benner v. Platter, 6 Ohio, 505; Lamb v. Ricketts, 11 Ohio, 311; Walker v. Board, etc., 16 Ohio, 540.

⁴ St. Louis Public Schools v. Risley, 40 Mo. 356; See so, Jones v. Soulard, 24 How. U. S. 21.

¹ Day v. Pittsburg, etc. Co., 7 N. East. Rep. 528.

his deed.⁵ A deed is always taken most strongly against the grantor; and if, by its terms, a water-course is declared to be a boundary of the land conveyed, no words of restriction or reservation being used, the law will give full operation to the terms employed by the grantor, and the courts will hold that, in that connection, the word "river," means the middle of the river.

CARRIERS OF PASSENGERS—LOSS OF BAGGAGE — LIABILITY OF RAILROAD COMPANY — BAGGAGE IN SLEEPING CAR — TICKETS AND BAGGAGE CHECKS.—The Supreme Court of Tennessee recently decided a case involving the liability of railroad companies for the baggage of passengers, taken by them into the "sleeper," attached to the train.⁶ We had occasion to investigate this subject, some time ago,⁷ and recur to it now, as the Tennessee court goes somewhat farther in fixing the liability for loss upon the railroad company, than the cases which then fell under our observation. The Tennessee ruling is, in effect, that the railroad company, by the contract for the passage of the traveler, implies an insurance of his baggage, if placed by him in the custody of the servants of the company, that the porter of a sleeper attached to a train, is for this purpose a servant of the company, and that baggage, placed in his hands by a passenger, is at the risk of the railroad company. And, further, that the liability of a railroad company is not avoided by its contract with the sleeper company, exempting the latter from liability, nor is it affected by the fact that exemption from liability for baggage was expressly stipulated in the sleeping car ticket. And in this ruling the court is very logical, for if the sleeper is *pro hac vice*, the servant of the railroad company, it cannot renounce liabilities of that company already incurred by the sale of the passage ticket. How far the sleeping car is an appendage of the train, and the railroad company responsible for it, is manifest from a ruling of the Supreme Court of the United States,⁸ in which the railroad company was

held liable for the consequences of the imperfection of a sleeping car attached to the train and occupied by its passengers, one of whom was hurt by the falling of an upper-berth. The company was bound to furnish safe and suitable cars, irrespective of their ownership; and, upon the same principle, it is equally bound to furnish honest and competent custodians of the baggage of its passengers.

It is well settled that the liability of a railroad company, for the baggage of passengers, (properly so called,) is that of a common carrier of goods, and not as narrow as that which it incurs for the safety of the passenger himself.⁹ The act of God, or of the public enemy, or of the owner himself, in the absence of any limiting statute, like the English "Carrier's Act," can only exonerate the carrier. The baggage for which a railroad company is responsible, by reason of its contract to carry the passenger, includes only articles intended for personal use. What that embraces is a question too broad for consideration in this connection. Merchandise for sale is not included.¹⁰ Jewelry intended to be worn by the passenger has been held to be baggage for which the carrier is liable.¹¹ A reasonable amount of money may also be carried in a trunk as baggage, for which the carrier will be responsible,¹² but what is "reasonable" is a matter of question. Four hundred and thirty-nine dollars was held to be an unreasonable amount,¹³ and in Connecticut sixty dollars was held to be too much, as the passenger was only going from Waterbury to Bridgeport.¹⁴

There are many like decisions, distinguishing the kind, quantity and value of property which may, or may not, be regarded as baggage; in Kansas the Supreme Court has held that what the station agent receives as baggage is baggage, and that his acceptance fixes the liability of the company.¹⁵ In that

⁹ Story on Bailments, § 499, and cases cited; *Macrow v. Great Western, etc. Co.*, L. R., 6 Q. B. 612.

¹⁰ *Stimson v. Connecticut, etc. Co.* 98 Mass. 83; *Parmalee v. Fisher*, 22 Ill. 212; *Hawkins v. Hoffman*, 6 Hill, (N. Y.), 586.

¹¹ *McGill v. Howard*, 2 Penn. St. 451; *Brook v. Pickwick*, 4 Bing. 218.

¹² *Johnston v. Stone*, 11 Humph. 419.

¹³ *Davis v. Michigan, etc. Co.*, 22 Ill. 278.

¹⁴ *Hickox v. Naugatuck, R. R. Co.*, 31 Conn., 281.

¹⁵ *Chicago, etc. Co. v. Conklin*, 3 Pac. Rep. 762.

⁵ *Angel on Water Courses*, § 9, 17.

⁶ *Louisville & N. etc. Co. v. Katzenberger*, June 10, 1886, 1 S. W. Rep. 44.

⁷ 22 Cent. Law Journal, 505.

⁸ *Pennsylvania, etc. Co. v. Roy*, 102, U. S. 452.

case the property in question was open to inspection, and was manifestly *not* baggage in any proper sense of the term. The rule can hardly be fairly applied in cases in which the property is locked up in a trunk, or otherwise concealed from the inspection of the agent.

The question, however, in the Tennessee case, was not whether the property in question was baggage, technically, or not, but whether the railroad company was responsible for the loss of it when in charge of the sleeping-car porter. A Massachusetts case,¹⁶ is in accord with the Tennessee ruling, except that the court implies that if the passenger had known that the sleeping car was not owned by the defendant railroad company, nor under its exclusive control, the result might have been different. It is probable that if it had been necessary to the decision of the case, the Massachusetts court would have taken the ground assumed by the Supreme Court of Tennessee. Manifestly the sleeping car company, its agents, conductors, and porters, acting in subordination to the railroad company, ministering to the comfort and convenience of its passengers, and going, coming, stopping, and starting, at the will of the railroad company, are in a legal sense the servants of that company *quoad* its passengers. Whatever contract may be made between the two companies as to liability for lost baggage, is binding upon both, but in no respect obligatory upon passengers, nor are they bound by any other contract expressed on the ticket or otherwise, unless they have agreed to the terms of such contract. This is expressly held in an Ohio case,¹⁷ in which the company insisted that the plaintiff was bound by the notice on the ticket that the company limited its responsibility for loss to one hundred dollars, and that the acceptance of the ticket was an assent to that limitation. In a case involving the same point,¹⁸ Mr. Justice Davis said: "The considerations against the relaxation of the common law responsibility by public advertisement apply with equal force to notices, having the same object, attached to receipts given by carriers

on taking the property of those who employ them, into their possession for transportation. Both are attempts to obtain, by indirection, exemption from burdens imposed in the interests of trade upon this particular business. It is not only against the policy of the law, but a serious injury to commerce—." And railroad tickets and checks are within the same rule. Neither a ticket nor a check is evidence of an agreement. The ticket is a voucher that the holder has paid his fare, the check, that he has delivered his baggage.¹⁹ In a New York case, Denio, J., said: "The tickets do not purport to be contracts. They are rather in the nature of receipts for the separate portions of the passage money; and their office is to serve as tokens to the persons having charge of the vessels and carriages of the company to enable them to recognize the bearers as parties entitled to be received on board. They are quite consistent with a more special bargain." ²⁰

In England, however, it has been held, by the House of Lords,²¹ that where a ticket had printed on its face only the usual matter, *e. g.*, "Dublin to Whitehaven," etc., and on its back contain conditions, there being upon the face no reference to the back, not even the customary "over," the passenger was not bound by the conditions, but the face was held to express the whole contract of the parties. In another later case the ticket was in the form of a little book, on the first page was the usual ticket matter, on the second, certain conditions, among them the condition in controversy. Lord Coleridge held that the case was not controlled by the case of *Henderson v. Stevenson*, that, because the book was a continuous work, each page was to be read after the preceding page, and the whole formed the contract of the parties. This ruling, it strikes us, is a remarkable exercise of the power to

"—— distinguish and divide,

A hair twixt north and north-west side."

The Tennessee case under consideration, proceeds upon a new principle, and we think, the correct one, that the sleeping car is an adjunct of the passenger train, that its con-

¹⁶ *Kinsley v. Lake Shore, etc. Co.*, 125 Mass. 54.

¹⁷ *Baltimore and Ohio R. R. Co. v. Campbell*, 36 Ohio St. 647.

¹⁸ *Railroad Co. v. Manfg. Co.*, 16 Wall. 318.

¹⁹ *Lawson on Carriers*, § 106, 107.

²⁰ *Quimby v. Vanderbilt*, 17 N. Y. 306.

²¹ *Henderson v. Stevenson*, L. R. 2 Sc. & Div. 470.

ductor and porter, servants of the sleeping-car company, are also servants of the railroad company, which must answer for them as for their other servants. The passenger may therefore have two remedies for loss or robbery on a sleeping car, one against the sleeping car company, the subordinate, the other against the railroad company, the superior.

EXCUSABLE NEGLIGENCE — WHAT WILL RELIEVE THE MAKER OF A NEGOTIABLE INSTRUMENT FROM HIS LIABILITY TO A BONA FIDE PURCHASER.

I. Introductory.

A. Law as it now exists.

B. Maxim. If one of two persons must suffer etc. as interpreted by some courts.

II. Signing name to a note when intending to sign some other instrument of writing.

1. Relying upon the statements of others as to what it is.

2. Different Views.

A. First View.

B. Second View.

C. Third View.

III. Signing with the intention of signing a note but deceived as to its amount.

1. How different courts draw distinction.

A. Instances.

IV. Signing and not reading because unable to read.

V. Other circumstances which will relieve the maker.

VI. Reason why no general rule can be drawn.

I. *Introductory*.—A. Where it is shown at the time of the signing and delivery of the note that the maker was induced by fraudulent representations as to the character of the paper, to believe that he was signing and delivering an instrument other than a promissory note, or when he intends to sign a promissory note but is fraudulently tricked into signing a different note from that which he intended, if his conduct in signing the instruments was not attributable in whole or in part to his own negligence in the premises, he is not liable even to *bona fide* holder.

Such is the law of perhaps the majority of the courts. The doctrine, is of new and recent date, in 1869 the leading case of *Foster v. Mackinnon*¹ was decided, and it may be classed as the first; and what is very remark-

able among all the cases holding such to be the law, is their wonderful similarity both as to the *subject matter* for which the notes were given, and the frauds practiced in obtaining them. Patent wire fences,² patent wagon tongue supporters,³ patent sulky wheel cultivators,⁴ patent screw hay fork,⁵ patent family medicines,⁶ patent seed drill,⁷ patent plows,⁸ patent pruning shears,⁹ patent washing machines,¹⁰ patent churns,¹¹ patent clothes wringer, etc; were the articles for which the unsuspecting victim was persuaded to take an "agency," and then relying upon the honesty of the agent signed (what he supposed contract of "agency,") a note without reading it.

To carry the similarity of these actions farther it will be found that in almost every instance the unsuspecting farmer is the victim. Having about exhausted the patent right fraud, the ingenious swindlers are now dealing in Bohemian Oats and Red-line Wheat etc.

The law says that in these cases the maker of the note is not liable even to a *bona fide* holder if guilty of no negligences in attaching his signature; and that whether or not there was such negligence is a question of fact for the jury under proper instructions of the court.

B. But how can a person attach his signature to a negotiable instrument and not as a matter of law be guilty of negligence? It is a well known principle of law that when one of two innocent persons must suffer, he who has committed acts, without which acts the wrong could not have been done, and by the aid of which acts the wrong was done, he who has committed such acts, enabling the wrong to be done, must suffer. No one will, or can question the justice of this rule. For what reason should the maker of a negotiable instrument not be judged by this rule.

² *Ort v. Fowler*, 31 Kan. 478.

³ *Super v. Peck*, 51 Mich. 563.

⁴ *Anderson v. Walter*, 34 Mich. 113.

⁵ *Cline v. Guthrie*, 42 Ind. 230; *Gibbs v. Linsabury*, 22 Mich. 488.

⁶ *Williams v. Stoll*, 79 Ind. 80.

⁷ *Ross v. Doland*, 29 O. St. 475.

⁸ *Winchell v. Crider*, 29 O. St. 481.

⁹ *Perkins v. White*, 36 O. St. 581.

¹⁰ *Nat'l. Bank v. Johns*, 22 W. Va. 506; *Phelan v. Moss*, 67 Pa. 67.

¹¹ *Auten v. Gruner*, 90 Ill. 301.

¹ L. R. 4 C. P. 704. *Bigelow on Notes and Bills*.

Why should it not be said as a matter of law, that as he attached his name to the instrument and thereby brought it into existence, and thus gave the means of committing the fraud, the maker should bear the loss, and not the *bona fide* holder.

But the Supreme Court of Michigan,¹² has interpreted the maxim and says that it does not apply to this kind of cases. This Court says, that the maxim supposes the action of the persons upon whom it imposes the loss to have proceeded from intelligence, and not to have been the result of duress. It presumes the assent of the will of the actor. If from any cause, the assent of the will is wanting, the result is the same as if the act were done under duress, or by an insane man.

C. While this may be a true exposition of this maxim under the views of that court yet it does not appear plain to me, why a person, able to contract and not under duress is not guilty of negligence, as maker of a promissory note, to a greater extent, than a *bona fide* holder.

Not being able to see how the maker could attach his signature and not be guilty of negligence. I have used the term "Excusable negligence" as being a more appropriate term to apply to those cases where the maker has been held not liable to a *bona fide* holder of his negotiable paper which bears his signature.

II. *Signing Name with the Intention of Signing an Instrument of Writing other than a Promissory Note.*—1. What diligence must the maker of a promissory note use in attaching his signature? Will the mere relying upon the reading and word of a stranger be such negligence as will make the party so relying liable for the amount of the note in the hands of a *bona fide* holder? If able to read, must he read it, or if unable to read must he have it read to him, and if so, who must he have to read it to him? A person is betrayed or tricked into signing something which he never intended to sign, who is liable? Courts are not united upon their answers to these questions nor in their reasons for them. One class of courts holds that if the makers signature is genuine, no circumstances except perhaps duress and ability to contract, will excuse him.¹³

The other class which holds that there may be circumstances which will excuse the maker where his signature is genuine, arrive at this conclusion from different reasons and in different ways, and it is to this class of decisions that the remarks of this article are addressed and we will now proceed to consider the different views and the decisions under them.

2. *Different Views.*—A. One view is that as the maker never intended to execute the bill or note, it can not be considered his act, and he should not be held liable thereon, any more than if his name had been forged to such instrument.

The best exposition of this view, perhaps, is the case of *Gibbs v. Linabury*,¹⁴ where the court says; "When the defendant unwittingly signs an instrument in the form of a negotiable promissory note, relying upon false representations made to him at the time, that the instrument he is signing is a mere duplicate of a contract just previously signed by him, making him an agent for the sale of a patent hay fork, under circumstances devoid of any negligence on his part, and where fraudulent means are taken to prevent him from noticing the body of such pretended duplicate, and he delivers the same in ignorance of its true character, believing it to be a mere duplicate contract which he supposed he had signed, such instrument is to be regarded as a forgery, and can not be enforced" in the hands of a *bona fide* purchaser. In *Anderson v. Walker*¹⁵ the following language is used. "If the defendant never intended and never agreed to sign a note or give one, and did not suppose or believe he was signing one, but was in fact only to sign, and believed he only was signing, the paper he had heard read, appointing him agent to sell cultivators, it is somewhat difficult to see how he could be held liable upon this note; and it is equally difficult to see how a man signing under such circumstances and belief could at the same time be considered negligent. If he had not agreed to sign a note, but to sign, and believed he was signing, other papers, which he had heard read, and

511 and cases there cited. *Daniel on Neg't Instruments* § 850.

¹² *Supra*, 5.

¹³ *National Bank v. Johns*, 22 W. Va. 508; 46 Am. R.

¹⁴ *Supra*, 5.

¹⁵ *Supra*, 4.

which in no way resembled in size or appearance a note, and which by no possibility could be tortured into a negotiable instrument, or by any ordinary change converted into one, he could not be guilty of negligence in so signing, even if it afterwards turned out in some mysterious manner that one of the papers he supposed he was signing was a note. Under such circumstances he had no intention of signing a note, but an instrument of an entirely different shape and tenor; that it should turn out to be a note would certainly be through no fault or caution, or want of caution on his part."

a. These courts lay down the further proposition of law that when a party to an instrument undertakes to read it over in the presence and hearing of the party thereto, in order that he may understand its contents before signing it, the party reading is both legally and morally bound to read it correctly, and that the other party has a right to rely upon its being so read and need not examine it himself. Ordinarily no negligence can be attributed to one who signs papers, after having so compared them, with further examination.

b. *Instances.*—In *Atchison v. Taylor*,¹⁶ the signer could not read without great difficulty and he asked the payee's agent to read it for him, and he misread it. Held, that the signer was not liable to a *bona fide* transferee. The court said; "If he is unable to read or does so with difficulty, then he may avail himself of the usual means of information, by having it read by some person present; while this may not be the precaution which would have been observed by an unusually cautious man, still we think he acted as the great mass of men not in, or educated to business, act, in such cases."

In *Griffiths v. Kellogg*,¹⁷ the payee's agent misread the amount of the note to the maker, a woman; she did not read because she was unable to without her glasses and they were at the house of a neighbor; two of her children were present who were able to read, but she did not ask them. This was submitted to the jury and they found for the defendant, which was affirmed by the higher court.

In *Soper v. Peck*,¹⁸ it was shown that there was nothing said whatever about a note, that the agent informed him (def't.) that it was; "Nothing more than a statement that he wanted to send to the company to let them know who was their lawful agent," that he signed the paper in an ordinary sized note book; it was opened out like a note book; that he sat down by the gate post and signed it, and the man said nothing to him while he was signing it, and that he took the book in his own hands when he signed it; that he could have gone to the house and got his spectacles and examining the paper if he wanted to; that he supposed it was just as the man represented, and it was not necessary. In reviewing this case the Court says; "It can not be disputed but that the evidence of the defendant tended to show that he had a fraud practiced upon him, and that very probably he had put his name to a note when he supposed he was signing something entirely different. If the jury believed this, he was entitled to their verdict, unless his negligence was so gross as to preclude his making the defense against a *bona fide* holder.

The other cases adopting this view are cited in the notes.¹⁹

B. A second view is, that it is always a question of fact for the jury whether under the circumstances, the party was guilty of negligence.

Perhaps the clearest exposition of this view is the case of *Martin v. Smylie*,²⁰ when it was shown that the defendant signed a note without reading, and it did not appear from the testimony that he could not read. The court left it to the jury to say whether the signature was without fault or negligence and they found for the defendant which was held not to be error, by the Supreme Court upon appeal. *Hopkins v. Hawkeye Ins. Co.*,²¹ may also perhaps be said to come under this class, in which it was said that what constitutes reasonable care and diligence in the execution of an instrument is a question of fact

¹⁶ *Supra*, 3.

¹⁹ *Foster v. McKinnon*, L. R. 4 C. P. 704; *Whitney v. Snyder*, 2 Lans, 477; *Citizens Nat'l Bank v. Smith*, 55 N. H. 593; 3 Cen. Law Jour. 183; *Walt v. Pomeroy*, 20 Mich. 425; *Detwiler v. Bish*, 44 Ind. 78; *Walker v. Egbert* 29 Wis. 194.

²⁰ 55 Mo. 577.

²¹ 57 Ia. 208.

¹⁶ 54 Ill. 196; 5 Am. R. 118.

¹⁷ 30 Wis. 209; 20 Am. R. 48.

for the jury, and where one trusts to an agent of the payee to read a note correctly, it is not as a matter of law negligence. In this case the defendant was unable to read the note on account of the absence of his spectacles. Whether he was justified in relying upon the reading of the agent, and in neglecting to call upon his wife or son who were present, constitutes not a question of law but one of fact. The question is, did he act as persons of reasonable and ordinary care would usually do under like circumstances. If he did, he was not negligent.

C. A third view is, that as a matter of law one must be adjudged guilty of such negligence as to render him liable who possessed of all his faculties and able to read, signs a note or bill relying upon the reading of a stranger that it is a different instrument.

Perhaps the larger number of the courts adopt this view.

Chapman v. Rose,²² may be considered as the leading case adopting this view. This was a hay-fork case. The defendant thought, and was made so to believe by the agent that he was signing a contract of agency and relying upon such statements and belief he signed what afterwards turned out to be a promissory note. Here the Court says: "If it be objected that there must be a duty of care in order to found an allegation of negligence upon the neglect of it, it must be answered that every man is bound to know that he may be deceived in respect to the contents of a paper which he signs without reading. When he signs an obligation without ascertaining its character and extent, which he has means to do, upon the representations of another, he puts confidence in that person; and if injury ensues to an innocent third person by reason of that confidence, his act is the means of the injury, and he ought to suffer.

In Peterson v. Macky²³ it appeared that Peterson supposed he was signing a receipt for a plow, it was read to him by the agent, and read as a receipt; Peterson could not read English and there was no one within a half-mile who could do so. Held that he was liable to a *bona fide*, transferee. The Court said; "Where a party, through neglect

of precautions within his power, affixes his name to that kind of paper without knowing its character, the consequent loss ought not to be shifted from him to a *bona fide* purchaser of the paper.

Tested by this rule, the facts the defendant offered to prove would have been no defense. He signed the paper voluntarily. He was under no controlling necessity to sign without taking such time as might be needed to inform himself of its character. If he could not read it himself, there was no reason, except perhaps his own convenience or haste, why he should not postpone signing until he could have it read by some person upon whom he had a right to rely. Instead of doing that, he chose to rely upon an entire stranger, the party opposed to him in interest and the only person under temptation to deceive him as to the character of the paper he was asked to sign. One who without any necessity so misplaced his confidence ought not to be heard to claim that the paper he is in consequence mislead to sign should be taken out of the rule protecting commercial paper."

In William v. Stoll,²⁴ the evidence showed that two strangers came to the defendant's house, where he and his two sons were at work; that they wished the defendant to take an agency to put up bills and sell patent medicines; that he told the strangers that he was old and could not read or write, and could not be their agent. The strangers then said they would appoint his son, who was a minor, which was finally agreed to. They then said, as the son was a minor, it would be necessary for the father to sign the contract, which he did, relying upon the representations of the strangers. Held, that he was guilty of negligence in not requiring one of his two sons, who were present and could read, to read the instrument.

In Douglass v. Gnatling,²⁵ the facts were substantially similar to the above case, except that it did not appear that there was one present who could read. The defendant was held liable. The court observing: "It is better that the defendant, and others who so carelessly affix their names to paper, the character of which is unknown to them, should suffer from fraud which their reckless-

²² 56 N. Y. 187.

²³ 29 Ia. 408.

²⁴ 73 Ind 518.

²⁵ 56 N. H. 593.

ness invites, than that the character of commercial paper should be impaired and the business of the country thus interfered with and unsettled."

In *Ruddel v. Dillman*,²⁶ it was held that where one signs a negotiable note, relying upon the fraudulent representations of the payee that it is something different, and makes no effort to ascertain its tenor, whether he can read or not, he is liable to a *bona fide* holder.

In *Citizens Nat. Bank v. Smith*,²⁷ the defendant was an old man of limited education and poor eyesight, and not in the habit of writing, except to sign his name. His daughter, an intelligent woman, was present when the note was signed, and had the opportunity to read it, but was not called upon by the defendant to do so, and did not do so. It was held that the defendant was bound by reason of his negligence.

However, in *Webb v. Corwin*,²⁸ where it appeared that the defendant was very weak, sick, and nervous, and his eyesight was so dim from disease and old age that he could not read either print or writing, and he had lost his glasses, and so told the parties; that there was no party in the defendant's house at the time but himself and the strangers; that they said they would read it to him, and he relied upon them to read it correctly; that one of them pretended to read the contract to him; and as it was read it purported to be only a conditional agreement. Held that the defendant was not bound.

It has also been decided that the mere finding of the fact that the defendant was unable to read, was not enough, and was not equivalent to a finding that he was free from negligence.²⁹

The decisions under this view are based upon the maxim that where one of two innocent persons must suffer, he who has given the means by which the fraud was committed must suffer, and are in direct opposition in their reasonings, (if not in their results,) to those courts that hold that this maxim does not apply, as will be found in most, if not all, of those which adopt the first view.³⁰

Space will not permit more than a reference to the other cases adopting the third view. It seems to me if the maker can at all be excused, as between himself and a *bona fide* purchaser, this view is the preferable one.

III. *Signing with the Intention of Signing a Note, but Fraudulently Induced to Sign a Note for a Larger Amount than Intended.*—1. The courts adopting the first and second view above designated, have found it necessary to draw a distinction between, where a person intends to sign a note of some kind and where he intends to sign none at all but does sign one, believing at the time that he is signing another kind of a contract. They have been compelled to make the distinction for the reason that where a man willingly attacks his own signature it can not be a forgery.

A. *Instances.*—In *Rowland v. Fowler*,³¹ it was held that he who signs a note although he misunderstood its effects or was induced by fraudulent representations to execute it, is liable to a *bona fide* purchaser, irrespective of the question of negligence.

To the same effect is *Whitney v. Snyder*.³² In *Savings Bank v. Steffes*³³ the question is "dodged" and *Griffith v. Kellogg*³⁴ heretofore quoted from, and *Bowers v. Thomas*³⁵ are directly to the opposite. In the latter case the evidence showed that the defendant could not read the instrument he was called upon to sign; that the other signer was the father of the person for whose benefit the note was made and he could not read it; but was a man in whom the maker had confidence. The only person present when the note was made was the son for whose benefit the note was made; and that it was read over to him as a note for \$100,00, when it was a note for \$180,00. Held, that if guilty of no negligence he was not liable.

The general rule however seems to be, where the distinction, is at all made, that of the Connecticut Court.³⁶

Hams, 12 Neb. 440; *Putman v. Sullivan*, 4 Mass. 45; *DeCamp v. Hamma*, 29 O. St. 471; *Winchell v. Crider*, 29 O. St. 484; *Shirts v. Over John*, 60 Mo. 306; *Millard v. Barton*, 13 R. I. 601.

²⁶ 47 Conn. 347.

²⁷ 2 Lans. 477.

²⁸ 54 Ia. 214.

²⁹ 39 Wis. 219.

³⁰ 62 Wis. 480.

³¹ *Supra*, 32.

²⁹ 79 Ind. 80.

²⁸ 29 Minn. 298.

²⁷ 78 Ind. 403.

²⁶ *Perkins v. White*, 36 O. St. 531.

²⁵ *Dinsmeri v. Stimbirt*, 12 Neb. 433; *Cole v. Wil-*

IV. *Signing and not Reading because not able to read.*—Some courts mostly those adopting the third view make a distinction in cases where the maker is unable to read, and where he can read. There is however no uniformity upon this question as will be seen from the cases above cited and quoted from. These courts which excuse the maker where he signs that which he does not intend to sign, upon the ground that the instrument is a forgery, will probably make no distinction, while those excusing him but not on that ground, may sometimes draw the distinction.

A writer reviewing some of the cases upon this subject, thinks there is no good reason for any distinction; that one who cannot read is more liable to be selected as a victim by the straggling sharpers, and he ought, before becoming a party to a written obligation, and especially with a stranger, to have its contents examined by some person in whom he may reasonably place confidence; and even then, if his confidence should be misplaced he ought to suffer for the wrongful act of his agent, rather than be allowed to shift the burden to the shoulders of a *bona fide* holder.³⁷

V. *Other Instances.*—The maker is excused in all instances where there is a material alteration or where it is forged or procured by fraud and duress or where there never was a delivery of the instrument. Upon the latter proposition like many other noticed in this contribution, courts are somewhat divided.

What is a material alteration, a forgery or a non-delivery or duress, such as will relieve the maker or *bona fide* holder, the limits of this article will not permit me to discuss. The inquiring reader will find that decided and discussed in some of the cases cited in the notes.*

VI. It is extremely difficult, if not impossible to formulate any rules in reference to what circumstances will release the maker, as between himself and a *bona fide* holder.

The law for each State can only be judged by the decisions of its own supreme Court.

These divergent reasonings and very often similar conclusions of the different courts upon this question seem to have arisen from a great desire to thwart a great wrong that was being carried on. Being a new thing it

arose in quite a number of different courts at the same time, and without precedent they worked out their own conclusions, and very naturally from different reasons.

The ingenious scheme whereby a person was induced to sign that which he did not intend to, in the nature of a promissory negotiable note seems to have occurred at the same time in different parts of the world. The first case arose in England³⁸ in 1869, and in 1870 in June a similar case arose in the Supreme Courts of Ill.³⁹ and Ia.⁴⁰ which view both decided without knowledge of the English case. In the same year in Sept. it arose in N. Y.⁴¹ and in April 1871 in Mich.⁴² and in June of the same year in Wis.⁴³ Most of which decisions were made in ignorance of the others.

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³⁸ Foster v. MacKinnon, L. R. 1 C. P. 704.

³⁹ Taylor v. Atchinson, 54 Ill. 196.

⁴⁰ Douglass v. Matting, 29 Ia. 408.

⁴¹ Whitney v. Snyder, 2 Lans. 477.

⁴² Gibbs v. Linabury, 22 Mich. 483.

⁴³ Walker v. Egbert, 29 Wis. 425; Other cases bearing upon the subject. Nebeker v. Cutsinger, 48 Ind. 436; Fisher v. Behren, 70 Ind. 19; Penn. R. Co. v. Shay, 82 Penn. St. 202; Ruddell v. Phalor, 72 Ind. 533; Rogers v. Place, 29 Ind. 577; Lubright v. Fletcher, 6 Black 308; McCormick v. Molbury, 43 Ia. 561; Cole v. William, 12 Neb. 440; Brown v. Reed, 79 Penn. St. 370; Holmes v. Trumper, 22 Mich. 427; Caulkins v. Whisker, 29 Ia. 495; Garrard v. Hadden, 67 Pa. St. 82; Reddick v. Doll, 54 N. Y. 236; Abbott v. Rose, 62 Me. 194; Puffer v. Smith, 67 Ill. 527; Briggs v. Ewart, 61 Mo. 245; Aude v. Dixon, 6 Exch. 869; Mance v. Lery, 5 Ala. (N. S.) 370; Shephard v. Hall, 7 Conn. 329; Clay v. Schawb, U. S. D. 1871, Vol. 11; Kellogg v. Setefner, 29 Wis. 626; Gerrish v. Glines, 55 N.H. —; Clark v. Johnson, 24 Ill. 296; Mead v. Munson, 60 N. Y. 49; Frederick v. Clemens 60 Mo. 313; Comstock v. Hannah, 78 Ill. 530; Cannon v. Canfield, 13 Cen. L. Jour. 156; and see authorities cited in a former article in this Journal on *bona fide* holder of negotiable instruments. Vol. 22, p. 437.

INTER-STATE GARNISHMENT — EXEMPTION LAWS OF STATE OF DOMICILE.

MISSOURI PACIFIC ETC. CO. v. MALTBY.

Supreme Court of Kansas, October 9, 1885.

In a proceeding in garnishment, where all the parties are non-residents of the State of Kansas, and are residents of the State of Missouri; and the thing attempted to be attached by the garnishment proceeding is a debt created and payable in the State of Missouri, but the garnishee does business in Kansas and is liable to be garnished in this State; and the other parties come temporarily into Kansas; and, while in Kansas, the plaintiff, who is a creditor of the defendant, who is a creditor of the garnishee, commences an action in

* Vol. 2 426, Cen. Law Jour.

Kansas against the defendant, and serves a garnishment summons upon the garnishee; and the debt of the garnishee to the defendant is, by the laws of the State of Missouri, exempt from garnishment process, and such debt also seems to come within the exemption provisions contained in § 490 of the Civil Code of Kansas, and § 157 of the Justices' Code of Kansas, exempting certain earnings of the debtor from the enforced payment of his debts; *Held*, that such debt is exempt from garnishment process in Kansas.

Error from Bourbon County.

David Kelso and J. H. Sallee, attorneys for plaintiff in error; *Messrs. Ware & Ware*, attorneys for defendants in error.

VALENTINE, J., delivered the opinion of the court.

This was an action brought in the district court of Bourbon county, Kansas, by W. J. Maltby and A. N. Maltby, partners as Maltby & Co., against the Missouri Pacific Railway Company and Geo. W. Ridgway, to recover \$116.40 from the railway company because of its failure to answer as garnishee in an action brought by Maltby & Co., against Ridgway, before a justice of the peace of said county. Ridgway and his family and Maltby & Co. were all residents of Sedalia, Missouri, and the railway company was a Missouri corporation, but had been consolidated under the laws of Kansas, with two Kansas railway companies, and did business and operated railroads in Kansas. The action brought before the justice of the peace was for groceries sold and delivered by Maltby & Co. to Ridgway at Sedalia, Missouri. The garnishee summons was served on the agents of the railway company in Bourbon county, Kansas, on July 10, 1883, and the original summons was served personally on Ridgway in the same county on July 17, 1883. The defendant Ridgway appeared personally before the justice of the peace and also by counsel, and judgment was rendered against him and in favor of Maltby & Co. for \$258.68. The railway company did not appear within proper time, but afterward appeared and filed a paper with the justice of the peace, claiming that it was not liable as garnishee; that the court had no jurisdiction over it; and that the sum due from it to Ridgway, to-wit: \$58.20, was exempt from judicial process. The justice, however, refused to act upon the paper. At the time of the service of the garnishment summons upon the railway company, it owed Ridgway just \$58.20. Afterward Maltby & Co. commenced this present action against the railway company, also making Ridgway a defendant, claiming from the railway company \$116.40, because of its refusal to answer as garnishee as aforesaid. The railway company and Ridgway answered in this action separately, each, however, claiming that the debt due from the railway company to Ridgway was exempt from judicial process: that the railway company was not liable to be garnished for the same; and that the railway company was not liable in the action. The case was tried before the

district court without a jury upon an agreed statement of facts. Among the facts admitted were the following: "The money due from the said railway company was for the personal earnings of said Ridgway, and was due to him within sixty days of the beginning of this suit, and was for his personal earnings as engineer upon said railway Missouri, and necessary for the support of himself and family, and said wages are and were exempt from garnishment by the laws of the State of Missouri." "The family of said Ridgway consists of a wife and one child, who are dependent upon him for their support."

"Plaintiffs admit that an action could have been brought in the State of Missouri against said Ridgway, except while he was absent from the State, and that personal service could have been had on said Ridgway in said State, both before and after said suit was begun in Kansas; and that a garnishment summons might have been served in said State upon the defendant railway therein, and that garnishment proceedings against the defendant railway company might have been instituted in the State of Missouri, and that if such proceedings had been instituted, the defendant Ridgway would have by reason of the exemption laws of the State of Missouri, entirely defeated the collection of the plaintiff's claim."

Upon the agreed statement of facts the court rendered judgment in favor of Maltby & Co., and against the railway company for \$58.20, and interest, amounting in all to \$62.25 and costs.

A motion was made for a new trial and overruled, and proper exceptions were taken, and the defendants, the Missouri Pacific Railway Company and Ridgway, now bring the case to this court for review.

The first and principal question which seems to be involved in this case is whether the debt due from the railway company to Ridgway was and is exempt from garnishment process or not. It seems to be admitted by the parties that the laws of a State, including exemption laws, can have no extra territorial force; that no law can be imported into one State from another; yet, that all actions for debts or actions upon contract, wherever they arise, are transitory in their character, and may be brought in any jurisdiction where the debtor or his property may be found; also, that corporations doing business in this State, whether domestic or foreign, may be garnished in this State, and may be garnished by either a resident or non-resident plaintiff; and may also be garnished whether the action arose in this State or elsewhere; and whether the defendant is a resident or non-resident of the State; provided, of course, that the debt or thing attempted to be held in garnishment, is, or may be, the subject of garnishment proceedings. And it has been held by this court that a foreign corporation doing business in this State may be garnished by a person, presumably a resident of Kansas, for a debt due from the foreign corporation to a non-resi-

dent employe of the corporation, not present in Kansas, where the debt was created outside of Kansas, and was exempt from garnishment in the State where the defendant and the garnishee resided, and where the debt was created, but was not exempt under the laws of Kansas. *B. & M. R. R. Co. v. Thompson*, 31 Kas. 180; s. c., 47 Am. Rep. 497; s. c., 18 C. L. J., 192, and note, 194, *et seq.* But the plaintiffs in error, defendants below, claim that no person or corporation can be garnished with regard to property, or choses in action which are beyond the jurisdiction of the State, or are exempt from garnishment process in the State where the *situs* of such property or choses in action may be considered to be; that the *situs* of the debt in question is where it was created, where it was to be paid, and where all the parties reside; but it is also claimed by the plaintiffs in error, defendants below, that such debt is nevertheless exempt from garnishment process, whether its *situs* be considered as in Kansas, or in Missouri, or in both. It is claimed that the debt may be considered as in the nature of a trust fund set apart by the laws of Missouri for the use and benefit of the family of Ridgway, and that garnishment proceedings cannot reach to such fund so as to divert it from the purpose for which it was set apart. It is claimed that the exemption of this fund from judicial process is an incident to the debt itself or a condition thereof, which will follow the debt into whatever jurisdiction the debt itself may be considered as having passed; that the exemption being an incident of the debt is equally transitory with the debt. It is claimed that whenever a debt created under the laws of one State is carried into another, all its incidents and conditions are carried along with it. It is claimed that where the debtor and creditor, and the garnishee are all residents of the same State, and the debt was created in such State, the exemption is not only such a condition or incident to the debt, that it will follow the debt wherever the debt may go; but also, that the relation or *status* existing between the parties by reason of the debt and the exemption laws of the State where all the parties reside, so follow the parties that if a part of such relation or *status* is enforced in any jurisdiction, all must be enforced—the exemption as well as the debt; and many of the various relations existing in society, such as marriage, agency, trusteeship, corporations, partnership, etc. are cited as illustrations of relations created under the laws of one State, and being recognized and enforced in other States. It is also claimed that the exemption is a vested right *in rem*, which follows the debt into any jurisdiction in which the debt may be considered going. It is also claimed that, because all the parties reside in Missouri, and the debt was created there and is payable there, and was exempt from garnishment process under the laws of that State; the debt should be held to be exempt in other States, under the rules of comity existing between States. The plaintiffs in er-

ror, defendants below, cite the following, among other, authorities: *Pierce v. The C. & N. W. Ry. Co.*, 36 Wis. 283; *Baylies v. Houghton*, 15 Vt. 626; *Tingley v. Bateman*, 10 Mass. 343; *Sawyer v. Thompson*, 4 Foster (N. H.), 510.

The defendants in error, plaintiffs below, claim that the debt from the railway company to Ridgway is not exempt from garnishment process in Kansas, and cite, among other authorities, the case of the *B. & M. R. R. Co. v. Thompson*, *ante*, and the authorities there cited. That case, however, is not applicable to the present case for the following reasons: The plaintiff in that case was not shown to have been a resident of the same State as the defendant and garnishee, nor a non-resident of Kansas, and presumably he was a resident of Kansas. In that case it was not shown that the defendant had ever been in Kansas, nor was it shown that his earnings were necessary for the maintenance of his family, and presumably, they were not; and therefore, presumably, such earnings were not exempt from garnishment process under the laws of Kansas, and would not have been even if he had been a resident of Kansas.

We are inclined to think that the debt due from the railway company to Ridgway is exempt under the laws of this State. *Seymour v. Cooper*, 26 Kas. 539; *Muzzy v. Lantry*, 30 Kas. 49; Civil Code, § 490; Justices' Code, § 157. Under the sections above cited, the earnings of a debtor for his personal services at any time within three months next preceding the attempt to subject such earnings to the payment of his debts, are exempt from such payment if it be made to appear by the debtor's affidavit, or otherwise, that such earnings are necessary for the use of his family, supported wholly or partially by his labor, and no distinction is made by such sections between residents and non-residents, or between debts created in Kansas, and debts created elsewhere; and the weight of authority seems to be that where the statutes do not make any distinction, no such distinctions exist; that if the statutes do not restrict the exemption of property for the payment of debts to residents or to some other particular class of persons, the courts have no authority to make such restriction; and the statute will apply to all classes—non-residents as well as residents. *M. P. R. R. Co. v. Barron*, 83 Ill. 365; *Sprout v. McCoy*, 26 O. St. 577; *Hill v. Loomis*, 6 N. H. 263; *Haskill v. Andros*, 4 Vt. 609; *Lowe v. Stringham*, 14 Wis. 222. And the case of *Leiber v. The U. P. Ry. Co.*, 49 Ia. 688, seems to recognize this principle, though the question is not decided. See, also, *Freeman on Executions*, § 220, and cases there cited. And the garnishee may interpose the exemption as well as the debtor himself. *Mull v. Jones*, 33 Kas. 112.

But it makes no difference in this case, as both the garnishee and the debtor have interposed the exemption. Under the general exemption laws of Kansas (Comp. Laws of 1879, Chap. 38), it is

necessary that the party supposed to be entitled to the exemption should be a resident of this State; but such is not the case with regard to the exemption under § 490, of the Civil Code, and § 157 of the Justices' Code.

Not wishing to state the law more or less broadly than the facts of this case will warrant, we shall decide it purely upon its own facts; and, therefore, the decision will be, in substance, as follows: In a proceeding in garnishment, where all the parties are non-residents of the State of Kansas, and are residents of the State of Missouri; and the thing attempted to be attached by the garnishment proceedings is a debt created and payable in the State of Missouri, but the garnishee does business in Kansas, and is liable to be garnished in this State, and the other parties come temporarily into Kansas, and while in Kansas the plaintiff, who is a creditor of the defendant, who is a creditor of the garnishee, commences an action in Kansas against the defendant, and serves a garnishment summons upon the garnishee, and the debt of the garnishee to the defendant is, by the laws of the State of Missouri, exempt from garnishment process; and such debt also seems to come within the exemption provisions contained in § 490, of the Civil Code of Kansas, and § 157 of the Justices' Code of Kansas, exempting certain earnings of the debtor from the enforced payment of his debts; such debt is exempt from garnishment process in Kansas.

The judgment of the court below will be reversed and cause remanded for further proceedings.

NOTE.—In the foregoing case, the court goes only to the threshold of a very difficult and mooted question, the conclusion of the court being applicable only to the facts therein stated. Had it not been that the debt due from the railway company to the defendant was exempt under the laws of Kansas, then the question whether the debt was under the laws of Missouri exempt in the State of Kansas, would have been squarely presented for determination.

The recognition of the exemption statutes of one State by the courts of another is clearly within the doctrine of the extra-territorial force of laws. Such recognition is comity between the States, not a matter of obligation, but merely a matter of voluntary courtesy and favor, extended or withheld at pleasure.¹ Inherent in the law of comity between the States is the principle that whenever the statute law of one State is recognized and enforced in another, it is upon the presumption that it is not inimical to the laws of the latter, its policy or the interests of its people.² Comity extends only to enforce obligations, contracts and rights under provisions of the law of other States, which are analogous or similar to those of the State where the litigation arises,³ and it is never extended to the laws of remedy, but has been generally regarded as extending to matters *ex contractu*.⁴ In consider-

ing the recognition and enforcement of the exemption laws of one State by the courts of another, these principles of comity between the States must necessarily be studiously considered.

What would seem at once to negative the proposition or propriety of giving extra-territorial force to exemption laws is that such laws pertain to the remedy,⁵ and the question of exemptions belongs to the law of the forum.⁶ "Comity only requires that the tribunals of the State shall be open to citizens of other States as they are to its own, and that they shall enforce the same remedies and none other."⁷ The most respectable text writers have said that the operation of exemption laws is restricted to the State in which they are enacted; that they do not constitute a part of the contract between the debtor and creditor to the extent that the former may invoke them wherever he may choose to go.⁸

It is now generally accepted that where the creditor and debtor reside in the same State, the former may be enjoined on the petition of the latter from going into another State to collect his debt, which, by reason of the exemption law of the domicile, could not be collected there.⁹ This principle may furnish the strongest reason for the courts of one State to give force to the exemption laws of another, when a creditor, resident of the latter, slips from the jurisdiction of the courts of the former State and endeavors to evade its laws and collect a debt from a resident of his own State. This would furnish an opportunity for the practice of comity, not an obligation, but a mere matter of voluntary courtesy from the one State to the other.

The Wisconsin case,¹⁰ in which the court attempts to give recognition to the doctrine that the exemption laws of one State will protect a resident thereof when sued in another State by one also a resident of the former, should not be recognized in any way as authority upon the question. That case is condemned by its statement that, in the absence of proof, the statute law of Illinois was presumed to be the same as that of Wisconsin. It has been severely and justly criticised as bearing on its face "unmistakable evidence of having been poorly considered and hastily written, and wholly unsupported by respectable authority."¹¹ Where a planter, a resident of Mississippi, but owning land in Alabama, had his horse seized under an attachment issued by a court of the latter State, it was held he could not claim the horse as exempt from seizure under the law of Alabama, such law being specially restricted to "every family" of that State; nor could he claim the benefit of the exemption law of Mississippi.¹² In the case of Morgan v. Neville,¹³ the facts were there; Morgan owed Neville wages for labor contracted for and performed in Pennsylvania, and Neville owed Shannon for goods sold to him in Pennsylvania where the three parties resided. Shannon, finding Morgan in Maryland, sued out an attachment there and garnished Morgan for the amount due

¹ Rorer on Inter. Law, 4, Story's Conflict of Laws, (8th ed.) 8.

² Bank v. Earle, 18 Pet. 519; Story's Conflict of Laws, (8th ed.) 35, 168; Thompson v. Waters, 25 Mich. 214.

³ Hughes v. Klingender, 14 La. An., 387; Woodward v. Roane, 33 Ark., 523.

⁴ Rorer on Intern. Law, 168; Blanchard v. Russell, 13

Mass., 1; Story's Conflict of Laws, (8th ed.) 374; Greenwood v. Curtis, 6 Mass., 358.

⁵ Newell v. Hayden, 8 Io., 140; Blanchard v. Russell, 13 Mass., 1; Helfenstein v. Cave, 3 Io., 287.

⁶ Wood v. Malin, 5 Halst. 208; Wittemore v. Adams, 2 Cow., 626; Toomer v. Dickerson, 37 Ga. 440; Haskell v. Andros, 4 Vt., 609; Coffin v. Coffin, 16 Pick., 323.

⁷ Bank v. Trimble, 6 B. Mon., 599.

⁸ Freeman on Executions, 209; Rorer on Inters. Law 53; Thompson on Homestead and Ex., 20.

⁹ Snook v. Snetzer, 26 Ohio St. 516.

¹⁰ Pierce v. Chicago etc. Ry. Co., 36 Wis., 388.

¹¹ 2 Cent. L. J., 378.

¹² Boykin v. Edwards, 21 Ala., 261.

¹³ 74 Pa. St. 52.

from him to Neville, Morgan gave notice to this proceeding to Neville. Judgment was rendered against the garnishee by default, and the amount adjudged against him was paid over. Neville afterwards sued Morgan in Pennsylvania and it was there held that payment of the debt in pursuance of the judgment in Maryland was a good defense to the action. In Ohio and Iowa the same principle has been announced.¹⁴ In the case of *Lieber v. The Union Pacific R. R.*,¹⁵ the railroad company was indebted to the defendant debtor for wages payable in Nebraska, where the latter lived, and which was exempt under the law of that State, but was not exempt under the law of Iowa. The court enforced the law of the forum.

The question at issue has been discussed at length in note to the case of *Burlington etc. R. R. Co. v. Thompson*.¹⁶ W. A. ALDERSON.

¹⁴ *Baltimore etc. Ry. Co. v. May*, 35 Ohio St., 347; *Moore v. R. R. Co.*, 43 Io. 388.

¹⁵ 49 Io., 688.

¹⁶ 18 Cent. L. J., 193. See Article, 21 Cent. L. J., 425.

NUISANCE — CORPORATION CHARTER — RAILROAD—EASEMENT.

PENNSYLVANIA RAILROAD COMPANY v. ANGEL.*

*New Jersey Court of Errors and Appeals.**

1. A railroad company using, for the purposes of a terminal yard, a portion of a street over which it has only a right of way, is responsible for any nuisance, public or private, thereby created.

2. An act of the legislature cannot confer upon individuals or private corporations, acting primarily for their own profit, although for public benefit as well, any right to deprive persons of the ordinary enjoyment of their property, except upon condition that just compensation be first made to the owners.

3. A railroad company cannot justify the maintenance of a condition of things which directly renders a dwelling-house in the neighborhood unfit for a place of residence, upon the ground that the nuisance necessarily results from the convenient transaction of the company's lawful business, and such a nuisance will be prohibited by injunction.

This bill charges that the defendant uses its road, in the city of Camden, in such a manner as to create a nuisance, to the injury of the complainants. This nuisance, it is alleged, arises from the use of the several tracks, in distributing cars when loaded trains come in, and in making up loaded trains to go out from the main depot in the city. The noise of the trains, in stopping and starting, in the work of making up and distributing trains, the noise of the bells as they are rung, the noise of engine whistles, the noise of cows and calves bellowing, lambs and sheep bleating, and pigs smelling, and the smoke, dust and cinders cast from the engines, it is alleged, constitute a nuisance to the complainants, who live in the immediate vicinity, and on the line of the street

through which the road passes, and right by, where the work complained of is done.

The testimony shows that the defendant has three main tracks through Bridge avenue, in the city of Camden, for the use of their engines and cars. It has also a track called a "siding," used for shifting cars from one main track to another, and for distributing their cars, and for making up trains. This "siding" terminates at the residence of the complainants. At the point of termination is a switch. When freight trains arrive, they frequently are stopped at or near to this switch, and the cars containing different kinds of merchandise or live stock are, one after the other, or in parcels, distributed to different places at the main station on the banks of the Delaware river. This distribution is made by repeated forward and backward movements of the engine and train, the number of times repeated depending upon the length of the train, and the variety of freight. This work requires also the ringing of the engine bells, the blowing of the engine whistles, the emission of more or less steam, and the discharge of large quantities of smoke. The same process is applied in making up large freight trains for departure. Besides the ordinary freight, large numbers of cattle, sheep and swine are brought to the depot at Camden. This operation of making up and distributing the large freight trains, by means of the siding and switch named, brings the trains, and parts of trains, and engines, backward and forward frequently in front of the dwelling-house in which the complainants reside. In addition to the passing and repassing, these trains and engines are allowed to stand at or near the same locality for several minutes.

Mr. P. L. Voorhees, for appellants; *Mr. J. W. Wartman* and *Mr. J. J. Crandall*, for respondents.

Dixon, J. delivered the opinion of the court.

The complainant are owners and occupants of a dwelling-house on the southerly side of Bridge avenue, between second and third streets, in the city of Camden. The defendant's track run through the central part of Bridge avenue in front of complainants' dwelling, across second street, into its terminal yard, which extends from the westerly side of second street to the Delaware river.

The bill avers that the defendant uses its tracks in front of the complainants' house for the purpose of distributing cars and making up trains in its freight and passenger business, and that it keeps locomotives and cars laden with live stock standing there, so that by reason of the stench, noises, smoke, steam and dirt thereby occasioned, the comfort of the complainants' home is seriously impaired, and hence they pray an injunction to restrain the defendant from continuing in that course of conduct.

The answer denies that the defendant uses its tracks in front of complainants' dwelling for the purpose of distributing cars and making up trains, and a siding for cars, loaded with live stock or otherwise, and generally, alleges that said tracks

*From advance sheets *New Jersey Equity Reports*.

are used only in such modes as the proper transaction of its business necessitates.

The evidence is clear that the tracks mentioned are continually used in the manner set out in the bill. The defendant's trainmaster, at Camden, testifying for the company, states that the company uses Bridge avenue above second street considerably for the purpose of drilling, and that he could not transact the company's business without doing so; that he is not in the habit of permitting cars loaded with cattle, sheep and swine to remain upon the track between second and third streets longer than he must, before getting them down into the yard after they come into the street. These occurrences take place at various hours of the day and up to eleven o'clock at night; ordinarily, he says, not later than that time. The proofs presented by the complainants, and not controverted on behalf of the defendant, establish that the use of the tracks thus admitted results in the nuisance of which complaint is made.

The fact that these nuisances are continuous, and materially diminish the comfort of complainants in their residence, makes the case one proper for an equitable remedy by injunction, unless the defendant can justify its conduct. *Ross v. Butler*, 4 C. E. Gr. 294, and cases there cited.

The defendant's justification was rested, at the argument, upon the ground that the legislature and the common council of Camden had authorized the defendant to use Bridge avenue for its business, that its business requires such use as the defendant has hitherto made, and therefore the use cannot be, in a legal sense, injurious.

There are two sufficient answers to this claim.

The first is that neither the legislature nor the common council has attempted to grant so extensive a privilege as is here set up. The charter of the Camden and Amboy railroad Company, passed February 4th, 1830, authorized it to construct and operate a railroad, with all necessary appendages, within limits embracing the locality now under consideration. In 1834 the Camden common council, by resolution, authorized that company to use Bridge avenue for the purposes of its roadway. In 1855 the legislature (P. L. of 1855 p. 118; Rev. p. 919 § 65) authorized railroad companies, whose incorporating acts limited the quantity of land which they might hold at their stations, to purchase and hold so much land as might be strictly necessary for most conveniently storing and working upon their engines, cars, fuel and materials to be used on their roads, and for receiving and delivering property transported on their roads to the best advantage, and for tracks, wagon-roads, platforms, and all other strictly station and railroad purposes. In 1862 the city council, by "an ordinance to afford facilities to the Camden and Amboy Railroad Company for the running of their trains through the city of Camden," gave its consent and authority to the company to lay side tracks, running obliquely from a point on the railroad, along Bridge avenue, between second

and third streets, to and upon the company's depot property lying west of second street. From these laws and regulations arise whatever rights the defendant, which is the lessee of the Camden and Amboy Railroad Company, appears to have in Bridge avenue, in front of complainant's house. In our judgment, they indicate that those rights are such as pertain to the use of the avenue for the purposes of a way, not for the purposes of a station-yard. The primary privilege given is that of passage; this and its reasonable incidents cover the whole scope of the grant. The right of storing engines and cars, either for a longer or a shorter period, the right of making up or breaking up trains, are not embraced in such a concession. These are strictly station and terminal purposes, and by providing for station-yards the legislature has indicated its intention that business of that nature should be transacted there. We do not say that the company may not, under any circumstances, do upon its roadway what ought commonly to be done in its yards; for, no doubt, unforeseen occurrences may sometimes render such acts almost indispensable, and then other less urgent rights, of the public at least, must give way. But when, in the ordinary course of its business, the company devotes a portion of its roadway to station purposes, it goes beyond express legislative sanction, and can support itself, if at all, only as a private individual might. This is what the defendant did in Bridge avenue. Having a right of passage there, it used its tracks as though they were within its terminal yard, and so used them constantly in its every-day concerns. For this is no legislative or municipal authority.

But, secondly, an act of the legislature cannot confer upon individuals or private corporations, acting primarily for their own profit, although for public benefit as well, any right to deprive persons of the ordinary enjoyment of their property, except upon condition that just compensation be first made to the owners. This principle rests upon the express terms of the constitution. In declaring that private property shall not be taken without recompense, that instrument secures to owners, not only the possession of property, but also those rights which render possession valuable. Whether you flood the farmer's fields so that they cannot be cultivated, or pollute the bleacher's stream so that his fabrics are stained, or fill one's dwelling with smells and noise so that it cannot be occupied in comfort, you equally take away the owner's property. In neither instance has the owner any less of material things than he had before, but in each case the utility of his property has been impaired by a direct invasion of the bounds of his private dominion. This is the taking of his property in a constitutional sense; of course, mere statutory authority will not avail for such an interference with private property. This doctrine has been frequently enforced in our courts. In *Trenton Water Power Co. v. Raff*, 7 Vr. 335, Mr. Justice Depue said: "The destruction of private

property, either total or partial, or the diminution of its value by an act of the government directly, and not merely incidentally affecting it, which deprives the owner of the ordinary use of it, is a taking within the meaning of the constitutional provision. * * * The injuries to which immunity from responsibility attaches are such only as arise incidentally from acts done under a valid act of the legislature, in the execution of a public trust for the public benefit, by persons acting with due skill and caution within the scope of their authority. If the injury be direct, or the work be done for the benefit of an individual or corporation, with private capital and for private emolument, the principle which absolves the parties from liability to action at the suit of persons injured does not apply, even though the public be incidentally benefitted by the improvement." He cites several decisions in this State supporting the doctrine. In *McAndrews v. Collier*, 13 Vr. 189, the chancellor declared, as the opinion of this court, that the proposition that the legislative authority to a private corporation or an individual to do a work for its or his own profit, includes authority to use, at whatever hazard to the persons or property of others, dangerous materials, provided they be necessary to the convenient prosecution of the work, cannot be sustained; that there is an obvious distinction between the liability of a private corporation to public prosecution for a legalized nuisance, and its liability to a private action for damages arising from such nuisance; that in the one case the legislative authority is a protection, and in the other it is not. To the same effect is the language of the Supreme court of the United States in *Baltimore and Potomac Railroad Co. v. Fifth Baptist Church*, 108 U. S. 317: "The acts that a legislature may authorize, which, without such authorization, would constitute nuisances, are those which affect public highways or public streams, or matters in which the public have an interest, and over which the public have control. The legislative authority exempts only from liability to suits, civil or criminal, at the instance of the state; it does not affect any claim of a private citizen for damages for any special inconvenience and discomfort not experienced by the public at large."

It must not be gathered from these propositions that all those inconveniences, which are the necessary concomitants of the location of railroads in populous neighborhoods, are to be considered civil injuries. That railways shall be so constructed and operated is required by the unanimous consent of the community, and the annoyances thence unavoidably arising are not of sufficient importance to be regarded as invasions of those rights of property which society recognizes and protects. They must be classed rather among those limitations which the social State imposes upon the enjoyment of private property for the common good. But if in any case these annoyances become so great as to destroy or substantially impair the

legitimate use of private property, the person injured becomes entitled to redress. Even the common good must then yield to private right, unless compensation be made.

The decree and injunction below, following the prayer of the bill, are therefore, in the main, correct, but perhaps they may be interpreted as going further than they should, in that they absolutely forbid, under any circumstances, the use of defendant's tracks in front of complainants' premises for the purpose of distributing and shifting cars and making up trains, and putting and placing thereon cars laden with cattle, sheep and hogs. Such a use may, sometimes, in extraordinary emergencies, be unavoidable, and if it then should occasion a material injury to complainants, should be paid for in damages rather than be prohibited by injunction. The injunction should be against the use of those tracks, for the purposes indicated, in the transaction of the ordinary business of the defendant, leaving it at liberty to show, in response to any attempt to punish it for violation, that an occasional use was necessitated by an unforeseen contingency.

In order to make this modification, the decree below should be reversed, but without costs to the appellant. The complainants should recover their costs in the court below.

Decree unanimously reversed.

NOTE.—The maxim, *sic utere tuo ut alienum non laedas* is usually difficult to obey, and its observance is beset with many complications in the relations of railroad companies to adjacent proprietors. The tracks of railroads, however long, are of course narrow, and as the operation of the road is always noisy, and sometimes malodorous, it is not remarkable that questions of abuse or excess of chartered rights frequently arise between the railroad company and abutting land-owners.

It is well settled that the dedication of land to public uses as a street or common road, does not confer the right to lay railroad tracks upon it.¹ The dedication, or condemnation, of land for the purposes of a public street, confers only the right of *user* for the purposes of ordinary travel, the use of such street for railway purposes is an *additional* burden, and for this there must be a fresh dedication or condemnation, or at least appropriate compensation to him who owns the fee.² If however the fee has passed from the original owner, and is vested in the State or the city, then of course the original owner has no reversionary interest and no right on that ground at least to complain that the servitude of a railroad track has been added to the ordinary uses of a street.³ And however the right may be obtained the railroad company cannot use it for purposes, or in a manner not clearly within the

¹ *Indianapolis etc. Co. v. Hartley*, 67 Ill. 439; S. C. 16 Am. Rep. 624; *Redfield on Railways*, (3 ed.), § 76; *Kucheman v. Railroad Company*, 46 Iowa, 366; *Barney v. Keokuk*, 94 U. S. 324; *Atchison etc. Co. v. Garside*, 10 Kan. 562, 565.

² *Williams v. New York Central etc. Co.*, 16 N. Y. 97; *Heard v. Brooklyn*, 66 N. Y. 242; *Porter v. North, etc. Co.*, 23 Mo. 128; *South Carolina etc. Co. v. Steiner*, 44 Ga. 546.

³ *Heath v. Baltimore*, 50 N. Y. 302; *Porter v. North etc. Co.*, *supra*; *South Carolina etc. Co. v. Steiner*, *supra*.

terms of the grant, either by its express words or by necessary implication from them.⁴ Hence, in the principal case, the right of way granted to a railroad company to traverse a street as a part of its track did not include the right to make that street a "yard" for "making up" and "breaking up" trains, or as standing room for cars, detained or out of use.

A Georgia case⁵ goes much farther than that under consideration. The soil of a street it was conceded belonged to the State, the city gave a railroad company the privilege of using the street as part of its track, and the legislature ratified the municipal act. Upon suits for damages by the property holders on that street the Supreme Court held that they could recover such damages upon the ground that any injury to property which deprives the owner of the ordinary use of it, is equivalent to a "taking" and entitles him to compensation. And the court says: "Trains, freighted, and driven by steam, with gusts of thick smoke through his windows, and screaming along in front of his door, may affect his health and destroy his peaceful enjoyment of his property." This is farther than any other court has gone in favor of the property holder and against the railroad. In that case the property owner did not own the soil of the street in front of his premises, nor was the injury compained of, any thing more than the usual and necessary consequence of running a railroad.

In a Michigan case,⁶ the true doctrine on this subject is thus stated: "An adjoining proprietor can never be entitled to recover from a railroad company, for the depreciation of the rental or sale value of his premises, because of the location of the track in the street, except upon the assumption that the location is, of itself, unlawful. As already stated, it is unlawful as to him if he owns the soil in the street; but if he does not, and the placing of the track there is permitted by competent authority, the incidental injuries he may suffer from the location of the track, and the proper and reasonable conduct of the business of the railroad company upon it, can afford no ground of action unless the statute gives one. * * * The railroad is not a public nuisance, and no right of action can arise against the company until by negligence or mismanagement, they do, or suffer to be done, something injurious to the abutting proprietor, which the permission to occupy the street will not justify." This ruling was re-affirmed in a later case between the same parties.⁷

It may be said that "every lot owner has a peculiar interest in the adjacent street which neither the local nor the general public can pretend to claim; a private right, in the nature of an incorporeal hereditament, legally attached to the contiguous ground, * * * which can no more be appropriated against his will than any tangible property of which he may be the owner."⁸

The law, therefore, appears to be, that a railroad in a public street, is not a public nuisance, nor indicta-

ble as such;⁹ that it may be so mismanaged as to be a private nuisance, as in the principal case under consideration, or "by ways innumerable, by acts of omission or commission: ¹⁰ that an owner of abutting property is not entitled to compensation for injuries suffered by reason of the location of a road in the street unless he owns the soil of the street; and that if he does own the soil of the street in front of his lot, he is entitled to such compensation, although he, or those under whom he claims, have long ago dedicated that soil to public uses for the ordinary purposes of street travel.

ED. CENT. L. J.

⁹ State v. Louisville etc. Co., 10 Am. & Eng. R. R. Cases 286.

¹⁰ Grand Rapids etc. Co. v. Heisel, *supra*.

WEEKLY DIGEST OF RECENT CASES.

ALABAMA,	1, 8, 10, 17, 22, 31
ARKANSAS,	11, 12
CALIFORNIA,	4, 16, 26
ILLINOIS,	13, 21, 37
INDIANA,	18, 28
KANSAS,	6
KENTUCKY,	15, 35
MASSACHUSETTS,	23, 33, 34
MICHIGAN,	5, 25
MINNESOTA,	2
MISSOURI,	9, 29
NEW YORK,	3, 7, 20, 30
OHIO,	24
PENNSYLVANIA,	14, 36
TENNESSEE,	27
TEXAS,	19
VERMONT,	32

1. ADMINISTRATOR—*Official Bond—Surety—Liability of*—When an administrator, having resigned afterwards becomes his own successor, and a balance is decreed against him on settlement of the first administration, the distributees may, at their election, charge the sureties on either the first or the second bond. When an infant distributee is represented, on final settlement of an administrator's accounts, by a guardian *ad litem* regularly appointed, the decree is as binding on him as if he were an adult. On final settlement of an administrator's accounts, when the estate is not ready for settlement and distribution, a decree against him must be rendered in favor of the succeeding administrator *de bonis non* (Code, § 2596); and if he has been appointed his own successor, the probate court has, ordinarily, no jurisdiction to make the settlement. If the administrator is summoned to settle both administrations on the same day, and a balance is first ascertained against him on the statements of the accounts of the first administration, which at the instance of the distributees, is carried as a debt into the second, they cannot afterwards, by bill of equity, charge the sureties on the first bond with the amount of this balance, on the ground that the court, by reason of the antagonistic positions occupied by the administrator, had no jurisdiction of the first settlement. *Moda- well v. Hudson*, S. C. Ala.

2. AGENCY—*Authority—Variation of Terms—Bathification—Knowledge—Earnest Money*.—Although a written authority directing agents to "sell" land

⁴ Commonwealth v. Erie etc. Co., 27 Penn. St. 351.

⁵ South Carolina etc. Co. v. Shiener, 44 Ga. 546.

⁶ Grand Rapids etc. Co. v. Heisel, 38 Mich. 62, 70.

⁷ Grand Rapids etc. Co. v. Heisel, 47 Mich. 393; See also *Moses v. Pittsburg etc. Co.*, 31 Ill. 516; *Murphy v. Chicago*, 29 Ill. 379; *Stetson v. Chicago etc. Co.*, 75 Ill. 74; *Chicago etc. Co. v. McGinnis*, 79 Ill. 269; *Elizabethtown etc. Co. v. Combs*, 10 Bush. 383; *Carson v. Central etc. Co.*, 35 Cal. 335.

⁸ *Lexington etc. Co. v. Applegate*, 8 Dana. 294; *Haynes v. Thomas*, 7 Ind. 33; *Elizabethtown v. Combs*, *supra*; *Frotsman v. Indianapolis etc. Co.*, 9 Ind. 467; *Stone v. Fairbury etc. Co.*, 63 Ill. 394.

may not be sufficient to authorize a conveyance by the agents, it may be sufficient to empower them to make an executory contract for a sale which will bind their principals. When authority is given to sell on terms that the price should be payable "in" a certain time, a sale on terms of payment "on or before" said time, does not presume the authority given. To render a principal liable upon a contract in making whereof his instructions have been departed from as to terms, on the ground that he has ratified the same, he must have made the ratification with knowledge of the fact that he had not been obeyed. Where earnest money has been paid to agent making an authorized contract, the principal, who has not received the money, may disaffirm the contract without the necessity of seeing that the money is returned. *Jackson v. Badger*, S. C. Minn., March 1, 1886; 22 Rep. 122.

3. **BENEVOLENT SOCIETY—Beneficiary a Stranger.**—Defendant was incorporated under chapter 267, of the Laws of 1876, as amended by chapter 53, Laws of 1876. By its certificate of incorporation its object was declared to be: "To combine the efforts of all its members with the view to effect mutual relief, aid and systematic contributions of benevolence and charity during their life-time, and to their respective families from time to time, when rendered necessary by sickness or pecuniary distress. By its by-laws, passed in 1880, § 2: "The object of this society shall be to secure mutual benefit and protection to its members and to furnish aid to their families or assigns in case of a member's death." A certificate of membership was issued to H., payable on his death, one-fourth to his wife and three-fourths to plaintiff or his representatives. *Held*, that plaintiff, though not a member of H.'s family was entitled to recover; the contract was not one beyond the powers of the defendant. *Massey v. Mutual, etc. Society*, N. Y. Ct. App. June 1, 1886; 5 East. Rep. 810.

4. **COMMERCIAL LAW—Promissory Notes—Proof of Indorsement—Non-Suit.**—Where, in an action on a note, plaintiff made out his case by putting the note in evidence, and rested, and the defendant then moved for a non-suit on the ground that there was no proof of the indorsement of the note, plaintiff's counsel contending that no such proof was necessary, the court, upon deciding that proof of the indorsement was necessary, should have allowed plaintiff's request for leave to open the case, and introduce testimony concerning the indorsement, and a refusal so to do, and granting of a non-suit, where the effect thereof would be to compel plaintiff to commence a new action, to which the statute of limitations would be a bar, is error. *Low v. Warden*, S. C. Cal. June 17, 1886; 11 Pac. R. 350.

5. ———. **Promissory Notes—Assignment—Notice—Evidence—Trial—Instructing Jury—Requests—Duty of Judge.**—In an action by the assignee of a note against the payee, who assigned by writing his name under that of the maker, instead of by endorsement, it is competent for plaintiff, in rebuttal of the claim brought out in the defense, to prove that defendant intended by his act to become a joint maker, and to waive notice. It is the duty of the court in instructing the jury to use, when possible, the precise words contained in the requests to instruct. *Cook v. Brown*, S. C. Mich. July 15, 1886; 29 N. W. Rep. 46.

6. **CONSTITUTIONAL LAW—Title of Act—Passage of Law—Legislature Journals—Errors in—Pre-**

sumption that Bill was Read—House Journal—Third Reading of Bill—Enrollment of Statute.—The title to an act of the legislature reads as follows: "An act authorizing the board of county commissioners of Ottawa county, and other counties therein named, to provide a fund, and appropriate the same, for the purpose of building county buildings in said counties." The "subject" of this act is the creation and use of a fund to build county buildings, and the body of the act expressly applies to the three counties of Ottawa, Washington, and Republic. *Held*, that the act contains only one subject, which is sufficiently expressed in its title, and is therefore not in conflict with that provision of § 16 of article 2, of the constitution, which requires that "no bill shall contain more than one subject, which shall be clearly expressed in its title." The bill was introduced in the senate, and read a first and a second time on the same day, and the senate journal does not show whether a case of emergency existed or not. *Held*, that, although it is necessary, under § 15, of article 2 of the constitution, that "every bill shall be read on three separate days in each house, unless in case of emergency," yet that each house is the exclusive judge as to when a case of emergency arises or exists; and it is not necessary, in order that the reading of the bill shall be considered valid, that the emergency shall be stated upon the journal. From the legislative journals it appears there were several discrepancies or irregularities in the description of the bill, and the title to the bill, but *held*, that the same do not render the act as subsequently passed by the legislature, void. Nothing appearing showing that the bill was not read section by section on its final passage, as required by § 15 of article 2 of the constitution, *held*, that presumptively it was so read. Where the house journal shows expressly and affirmatively that the bill was placed upon its third reading, and that afterwards it "was read the third time," *held*, that it is sufficiently shown that the bill was read three times in the house. The enrolled statute is very strong presumptive evidence of the regularity of the passage of the act, and of its validity, and is conclusive evidence of such regularity and validity, unless the journals of the legislature show clearly, conclusively, and beyond all doubt that the act was not passed regularly and legally. *Weyand v. Stover*, S. C. Kan., July 9, 1886; 11 Pac. Rep. 356.

7. **CONTRACT—Divisible Contract—Part Performance.**—Where a contract of sale contemplates and requires a performance in separable parts, and where the seller delivers an agreed proportion which the buyer accepts, and payment therefore becomes immediately due, the right to recover for such partial payment is at once complete and is not forfeited by a later default. The buyer cannot be compelled to accept a part performance in the inverse order of his contract, but only according to its terms; and where, at its initial point, the seller is in default, the right to rescind or abandon belongs to the buyer and applies to the whole contract remaining unperformed. *Pope v. Porter*, N. Y. Ct. App. June 1, 1886; 3 Cent. Rep. 451.

8. **CONTRIBUTORY NEGLIGENCE.—Burden of Proof—Facts Constituting.**—Contributory negligence is a defense, the burden of which rests on the defendant although negatived by the averments of the complaint; and it must be affirmatively proved by the defendant, unless the plaintiff's own evidence establishes it. In an action by a railroad company

to recover damages for injuries caused by a collision of one of its trains with several empty cars left standing on a side-track by the defendants' servants, if the empty cars were left standing too near the main track, and a collision might have been avoided by the use of reasonable diligence on the part of the persons in charge of the passing train, the defense of contributory negligence would be made out, and in this connection the speed of the train and the fact that it had a watchman so stationed as to see and give notice of obstructions, or the want of these precautions, would be material factors; but, if the empty cars, though not placed too near the main track, insecurely scotched on the down grade of the sidetrack, and being put in motion by the passing train, rolled down on it at the switch, the speed of the train would be immaterial, and contributory negligence could not be imputed to the plaintiff. *Montgomery, etc. R. Co. v. Chambers*, S. C. Ala. Dec. Term, 1885-86.

9. CORPORATION.—*Municipal Corporation—Evidence—Expert Testimony—When Admissible—Defective Ways—Injury to Person—Condition of Health after Accident—Damages—Personal Injury—Possibility of Recovery—Streets—Defects—Notice*—Testimony of an expert as to the nature of injuries, where the knowledge has been derived from an inspection of the injury, and from conversation with the person injured, is admissible. The testimony as to the condition of the health after an accident, of one claiming damages therefor, is admissible. Where there is a probability of a permanent disability, and a bare possibility that the disability would not be permanent, there is a sufficient basis for damages. It is the duty of the city, and not of "passers-by," to notice defects in streets and sidewalks, and repair them. In order to recover for an injury caused by a defect in a street, the plaintiff must show that the defect has existed for such a length of time as would have enabled the city to have discovered it by the use of ordinary care and caution. *Squires v. City of Chillicothe*, S. C. Mo. June 7, 1886, 1 S. W. R. 28.

10. CRIMINAL LAW.—*Aiding Prisoner to Escape—Intent to Liberate Particular Person*.—Under an indictment for aiding a prisoner to escape, a conviction may be had, whether an escape was effected or attempted or not; but it is not necessary that there shall be a specific intent to liberate any particular prisoner, although there must be an intent to liberate, and it must be found by the jury; nor is the consent of the prisoner a necessary ingredient to the offense. In delivering the opinion of the Court, upon the latter point, Stone, C. J. says: "Is it necessary to a conviction that there shall be independent proof that the accused had the specific intent to aid the particular prisoner to escape? Can the offence be committed without the consent of the prisoner? The first of these questions we answer in the negative. All men are presumed to intend the natural consequences of their acts. All men are presumed to be averse to involuntary confinement, and to desire liberty. So, if a prison be opened or so broken as to allow the inmates to escape, this would be proof of a general intent, and would authorize the jury to find a specific intent to liberate each and every prisoner confined therein. And on the same principle, we answer the second of the above questions in the negative. The intent to liberate, however, must exist, and must be found by the jury. We have shown above that a general intent is enough, and have also stated that the jury may infer such intent from

any intentional breaking, or assistance in an attempt to so break the prison as that the prisoners confined therein can escape." *Hurst & Hill v. State*, S. C. Ala. December Term, 1885-86.

11. ———. *Homicide—Self-Defense—Hostility of Parties—Depositions—Criminal Case—Admissibility*.—Where it clearly appears that the accused and deceased had lived in avowed, open hostility, each going armed in anticipation of a deadly assault from the other, it is wholly immaterial which of them struck the first blow, on the occasion of an actual encounter between them fatal to either. Depositions taken in the presence of the accused, and where he had the opportunity of cross-examination, may be afterwards used on the trial, if at the time of using them the deponent is absent from the jurisdiction, or is dead. *Sneed v. State*, S. C. Ark. June 5, 1886; 1 S. W. Rep. 68.

12. ———. *Indictment—Statutory Offense—Gaming—Broker Acting in Option Deals*.—An indictment which merely follows the language of the statute, in charging an offense created by the statute, is good. Under the laws of Arkansas—act of March 20, 1880, (Mansf. Dig. §§ 1848, 1849)—a broker, or middleman, operating between buyer and seller, and bringing them together for the purpose of dealing in "grain futures," no *bona fide* sale and delivery of property being intended, is a gambler, even though he merely receives a commission on the sale, and has no other interest in the transaction. *Fortenbury v. State*, S. C. Ark. June 5, 1886, 1 S. W. Rep. 58.

13. ———. *Perjury—Time, Place, and Details Testified to in Alleged Perjury not Immaterial Issues—Conclusion of Indictment—Formal Conclusion*.—On an indictment for perjury, the alleged perjury consisting of false testimony that at a certain time and place the defendant was offered \$250 by the deceased if he would kill the slayer of the deceased, which was given in evidence on the trial of the slayer for murder, the time, place, and details so testified to, are not immaterial issues of which perjury could not be predicated. An indictment for perjury, concluding, "against the peace and dignity of the State of Illinois," is sufficiently formal. The ancient conclusion, "and so the jurors aforesaid, upon their oaths aforesaid, do say," etc., "that the defendant did commit wilful and corrupt perjury," etc., while appropriate, is not material. 1 Starr & C. St. c. 38, § 227, Par. 283. *Henderson v. People*, S. C. Ill., June 12, 1886, 7 N. East. R. 677.

14. CRIMINAL PRACTICE.—A judgment of conviction upon one count in an indictment for arson, which did not charge the act to have been done "feloniously," and which was not framed under the section of the Penal Code providing for the punishment of the act as a misdemeanor, will be arrested, if defendant has been acquitted upon another count charging the act to have been "feloniously" done. *Commonwealth v. Weiderhold*, S. C. Penn., May 8, 1886, 3 Cent. R. 401.

15. WAYS.—*Eminent Domain—Private Benefit*.—When it is necessary, in order that a man may discharge the duties required of him by law, such as attending courts and elections, that he should have a passway over the land of his neighbor, the right of eminent domain may be invoked for the purpose; following *Robinson v. Swope*, 12 Bush, 21. *Cody v. Rider*, Kentucky Ct. of Appl. June 3, 1886. 1 S. E. Rep. 2.

16. **EQUITY.—Judgment—Execution Sale—Bills Quia Timet.**—One who is not a part or privy to a judgment is not affected by it, and, as to him, the judgment, and all proceedings under it, are void; and therefore neither the judgment, nor an execution sale of land affected by it, can change his rights in the land, or create a cloud upon his title, nor would a deed resulting from such a sale be valid, or work any mischief. Fears of such an injury would be, therefore, unreal; and a court of equity never interferes to enjoin a sale of land upon an idle or groundless suspicion, an unreal fear, or the mere possibility of its casting a cloud over the title of one in actual possession of the land under an unchallenged title. *Roman Catholic Archbishop etc. v. Shipman*, S. O. Cal., May 25, 1886, 11 Pac. Rep. 843.

17. **EQUITY—Specific Performance.**—Where the owner of lands, through or near which it is proposed to run a railroad, binds himself by writing under seal to convey to the projectors, their associates or successors, all the coal and iron upon and in certain designated lands, and to secure to them the right of way, in consideration that they would construct the road to a named point within a specified time; and the road is completed within the specified time, and a bill filed to compel the specific performance of the contract, the objection that it is wanting in mutuality, because of a stipulation that the projectors should not be liable for damages if they failed to construct the road, comes too late after the completion of the work. Since railroads may be built by private enterprise, without the aid of corporate powers, it is no objection to a specific performance that the projectors of the road had not been incorporated when the contract was made. The bond being made payable to the projectors by name, "their associates and successors," and duly assigned by them to a corporation, by which the road was built as stipulated, a bill for specific performance may be maintained by that corporation. The objection that a railroad corporation is not authorized by its charter to acquire any easements or interest in lands not necessary for the operation of its road, can only be raised by the State in a proceeding for the abuse of corporate franchise, and is not available in defense of a suit for the specific performance of a contract. Affirmed. *Wilks v. Georgia, etc. Co.*, S. C. Ala.

18. **EVIDENCE—Witness—Expert Witness—Right to a Preliminary Cross-Examination—Qualifications of an Expert—Municipal Corporations—Sewers—Notice.**—It is not error to refuse to permit the defendant to cross-examine an expert witness called by the plaintiff before the examination in chief by the latter. No standard exists by which to determine the qualifications of an expert witness. If it appears that he is *prima facie* qualified to testify, the court may allow his testimony to go to the jury, allowing the adverse party to cross-examine as to his qualifications, and leaving to the jury the duty of determining the weight of the testimony. In an action to recover for injuries resulting from negligence in constructing a sewer, it is not necessary for the plaintiff to prove that the ordinance directing its construction was regularly adopted. For the purpose of establishing notice of the defective condition of a sewer, it is proper to prove that the sewer gave way at a point not far distant from the break which caused the injury. *City of Fort Wayne v. Coombs*, S. C. Ind., June 16, 1886, 7 N. E. Rep. 743.

19. **EXECUTORS AND ADMINISTRATORS—Sales—Administrator's Deed.**—A deed which, merely from its recitals, purports to have been executed by an administrator upon a sale of lands previously directed and subsequently confirmed by the probate court, is inadmissible in evidence, and proves no conveyance of title, unless coupled with competent proof of the jurisdictional steps thus recited. *Tucker v. Murphy*, S. C. Tex., June 11, 1886, 1 S. W. Rep. 76.

20. **FRAUD—Fraudulent Representations of Value of Property of Stock Company—Misrepresentations as to Boundary of Real Estate—Questions of Fact for the Jury.**—A false and fraudulent representation, as to the property of a corporation, of material facts which necessarily affect the value of shares of stock therein, constitutes a cause of action against a party inducing another, by means of such fraudulent representations, to purchase such shares, quite as sufficient as if the purchase had been of the property of the company with regard to which the representation was made, nor is it material in either case, that the purchase price of the property, or the money advanced on the faith of the representation, be paid to the party making it for his individual benefit. If known to be false, and made with intent to deceive and defraud the person who is thereby induced to pay out his money, the person guilty of the fraud is liable to respond in damages, on the same principle on which one person is held liable in damages for fraudulently giving a false recommendation by which another is induced to give credit to a third party. The purchaser of an interest in real estate may rely upon the owner's representations as to its boundary line, there being nothing to indicate to the purchaser, at the time of inspecting the premises before purchase, that the line was different from that described by the owner; and the purchaser may maintain an action for damages sustained by reason of such false and fraudulent representations. Where there is a conflict in the evidence as to whether the representations were fraudulently or mistakenly made, it becomes a question for the jury. *Schwenck v. Naylor*, N. Y. Ct. App. June 1, 1886, 6 E. Rep. 868.

21. **GUARANTY—Condition That Co-Guaranty be Secured—Leaving of Instrument by Obligor With His Agent, With Condition for Delivery, not an Escrow—Evidence—Parol Evidence as to Written Contract—Parol Directions as to Delivery of Document Admissible—Executors and Administrators—Invalid Written Claim Presented—Recovery on Former Claim, of Which This was Renewal, not Allowed.**—Where the president of a corporation, as a guarantor of a draft by the corporation upon a bank, directed the treasurer of the corporation to inform the cashier of the bank that the draft was not to be taken unless A. placed his name on the back of it, which the treasurer communicated to the bank cashier, and A. did not place his name on the back of the draft, but gave a subsidiary separate writing of guaranty, whereupon the bank took the draft, there was no performance of the condition, and no guaranty by the president. The leaving of the draft in the hands of the drawer's own treasurer, as above stated, by the company, and its president as guarantor, do not constitute a delivery in escrow by such guarantor. Directions to an agent as to the delivery of a written contract may be shown by parol in an action on the contract. Where a written obligation

is presented as a claim against an estate, and such instrument proves to be invalid, but was given in renewal of a former obligation, a recovery upon the former obligation cannot be allowed in that proceeding. *Belleville, etc., Bank v. Bornman*, 8. C. Ill., May 12, 1886, 7 N. E. Rep. 686.

- 22. INFANCY—Guardian and Ward—Disability—Statutory Relief From.**—In relieving minors of the disabilities of infancy (Code, §§ 2785-41), the chancery court exercises a special and limited jurisdiction, and its decrees stand on the same footing as the judgments of courts of limited and inferior jurisdiction, whose recitals of notice or appearance may be impeached and contradicted, in a collateral proceeding, by extrinsic evidence. When the infant has a guardian, the petition asking to be relieved of the disabilities of non-age must be signed by the infant in person, and the guardian must join in the petition; and if the petition is signed by the guardian, in the name of the infant, but without his knowledge or consent, the decree founded on it is a fraud on the jurisdiction of the court, which the court will set aside on a direct proceeding, or, without setting it aside, will prevent the guardian from using it against the infant. A settlement of a guardian's accounts in the probate court, made during the minority of the ward, before the resignation of the guardian, and without the appointment of a guardian *ad litem*, is void for want of jurisdiction; and a decree in chancery removing the ward's disabilities as an infant, fraudulently procured by the guardian, imparts no validity to the settlement. A bill in equity filed by a ward within twelve months after attaining majority, seeking to compel a settlement of the accounts of his guardian, and to set aside conveyances executed by him to his guardian during his minority, based on a void settlement rendered by the probate court, is neither multifarious, nor wanting in equity. *Cox v. Johnson*, S. C. Ala.

- 23. LAND LAW—Entry Writ of—Unrecorded Deed—Attachment—Judgment—Execution—Levy and Sale.**—In a writ of entry, A.'s title to certain premises was by deed of one B., executed and delivered in 1878, and recorded in 1880. C.'s title was under a levy and sale on execution in 1881 in a suit against B., in which the premises were attached in 1879. A. held an unrecorded deed when the premises were attached as the property of his grantor, B., but had recorded his deed before judgment and execution. *Held*, that A.'s right was collaterally affected by the judgment against B.; and, as he was not a party or privy to that judgment so that he could reverse it on error, he could avoid it by proof, and was entitled to judgment in the writ of entry. *Safford v. Weare*, S. Jud. Ct. Mass., July 2, 1886, 7 N. E. Rep. 730.

- 24. MECHANICS' LIEN—Construction of Statute—Action by Mechanic—Set-Off—Claim Against Contractor.**—The statutes of this State upon the subject of mechanics' liens, being remedial in their nature, are to be liberally construed in order to carry out the purpose of the legislature in their enactment. Where a mechanic, who, under the employment of a contractor, and with the knowledge of the owner, has performed labor upon the construction of a building, and, the account not being paid, takes all necessary steps, as provided by §§ 3193, 3196, 3201 and 3202 of the Revised Statutes, to fix the liability of the owner, and to obtain a lien upon the premises, and brings his ac-

tion against the owner to recover the amount due, and have the same declared a lien, such account being less than the balance unpaid on the contract, such owner cannot be allowed to set off a claim against the contractor, not growing out of the contract, acquired by him after the labor was performed, although such claim was acquired before notice that the mechanic's demand had not been paid. *Bullock v. Horn*, S. C. Ohio, June 29, 1886; 7 N. East. Rep. 737.

- 25. MORTGAGE—Foreclosure—Sale—Palpable Error—Validity, how Affected—Surplus After Sale Tender—Burden of Proof.**—When the deed of mortgage contains a palpable clerical error in the figures of the sum due, the mortgagee may, after default, foreclose, and sell the property to satisfy the amount really due, without a previous reformation of the deed. The burden of proof is not upon the party claiming under a foreclosure of mortgage to show that the surplus over the amount due was, after sale, tendered the mortgagor. *Damon v. Deeves*, S. C. Mich. July 15, 1886; 29 N. W. Rep. 42.

- 26. NEGLIGENCE—Landlord and Tenant—Liability for Nuisance—Fall of Awning, Liability for—Landlord and Tenant.**—A landlord is not liable for the consequences of a nuisance in connection with his building, which is in the possession and control of his tenants, unless the nuisance occasioning the injury existed at the time the premises were demised, or the building was defectively constructed, or was in such a condition, at the time of the demise of the building, that it constituted a nuisance, or would be likely to become such in the ordinary uses for the purposes for which it was constructed. A landlord is not liable for an injury caused to a bystander by the fall of an awning belonging to his building, which is in the possession of tenants, if the fall of the awning was attributable to an improper and negligent use of the awning by the tenant in permitting crowds of people to go upon it, when the only purpose of the awning was as a protection from sun and rain, and when, but for such crowd upon it, it would not have fallen. *Kalis v. Shattuck*, S. C. Cal., May 25, 1886; 11 Pac. Rep. 346.

- 27. —. Pleading—Injury to Servant—Master and Servant—Duty to Furnish Suitable Tools—Youth and Inexperience of Employee.**—In an action against a railroad company for an injury to the plaintiff's eyes by a fragment of steel, struck off by him in working on an engine, with a cold-chisel, if the declaration fails to aver any fact tending to show that he was not rightfully put at the particular work, or that the cutting of steel with a cold-chisel was not such work as an employee of the plaintiff's age and experience might be employed at, the declaration would be fatally defective on demurrer. It is the duty of the master to furnish his employe with suitable tools for the performance of the duties to which he may be assigned, and to give such instructions to a youthful and inexperienced employe as would enable him, with the exercise of ordinary care, to perform the duties of his employment with safety to himself. A declaration would be good on demurrer, which averred that the plaintiff, a youth of about 19 years of age, had never in fact been employed in the particular work in the doing of which the injury sued for was incurred, and was ignorant of the proper tools to perform the work with safety, was not instructed by the defendant as to the dan-

ger of the work, nor furnished with suitable tools to do the work. *Whitelaw v. Memphis, etc. R. R. Co.*, S. C. Tenn., June 5, 1886; 1 S. W. Rep. 37.

28. **Pleading—Injury to Property—Contributory Negligence—Municipal Corporations—Sewers—Notice of Defects—Wabash & Erie Canal—Use of Highways—Use of Private Property—Liability to Property Owners Who Make Connection With Sewer for their Private Benefit.**—A complaint to recover for injuries to property caused by negligence must show that the plaintiff was not guilty of contributory negligence. Where a municipal corporation itself constructs a sewer, it is bound to use ordinary care and skill, and is liable for injuries resulting from its negligence, without proof that it had notice of defects in the work or materials. The right of the public to construct sewers under the Wabash & Erie canal was not extinguished by the sale of the canal by the State. A municipal corporation may rightfully use highways for the purpose of constructing sewers. A city is liable for negligence in constructing and maintaining a sewer, although it is constructed in part on private property, and in order to obtain the right to make use of such property the municipal authorities were compelled to build the sewer according to the plans and specifications furnished by the owner of such property. A municipal corporation is liable for injuries arising from the negligent construction of a sewer to property owners who make connection with such sewer for their private benefit. *City of Fort Wayne v. Coombs*, S. C. Ind. June 16, 1886; 7 N. East. Rep. 743.

29. **RAILROAD COMPANIES—Fences—Negligence—Double Damage Act.**—If a railroad company has, within six months, duly fenced its road, it is necessary to show some neglect on the part of the company in maintaining the fence, or that it had notice of its being out of repair, or that it had remained so long out of repair that want of knowledge could be imputed to the negligence of the company, in order to recover for injury to cattle under the double damage act. *Townsend v. Mo. Pac. etc. Co.*, S. C. Mo. June 7, 1886; 1 S. W. Rep. 15.

30. **RAILROAD—Fire Caused by Defective Smoke-Stack—Question for Jury.**—Plaintiff's barn took fire soon after the passing of three of defendant's engines. There was some evidence that the fire-screens on two were in good order, but there was no proof given as to the condition of the third. Held, that it was by no means conclusive that the fire was caused by either of the two engines which it was claimed were in perfect order, and it was a question of fact for the jury to determine which engine caused the fire, and a non-suit was improperly granted. *Seeley v. New York, etc. R. R. Co.*, N. Y. Ct. App., June 1, 1886; 7 N. East. Rep. 734.

31. **RAILWAY COMPANIES—Liability as Warehouseman—Time Within Which Goods Must be Removed.**—The consignee is allowed a reasonable time to remove the goods after they arrive at the place of destination, and if not present on their arrival, the company may deposit them in its depot or warehouse for safe keeping without additional charge until such reasonable time expires. Until the consignee has had a reasonable opportunity to remove the goods, the liability of the railroad company as a carrier continues; but on his failure to do so, the company is only responsible thereafter as a warehouseman or keeper for hire. Ala.

& Tenn. *Rivers R. R. Co. v. Kidd*, 35 Ala. 209; S. & N. Ala. R. R. Co. v. Wood, 66 Ala. 67; *Kennedy v. Mo. & Gir. R. R. Co.*, 74 Ala. 430; *McGuire v. L. & N. R. R. Co.* (Dec. Term, 1885), 1 So. Law Times, 492. What length of time will be reasonable, must of necessity depend in a great measure upon the attendant facts and circumstances, which must be submitted to the jury under proper instructions from the court. It may be generally said, that in determining what constitutes a reasonable opportunity, the convenience or necessities of the consignee will not ordinarily be taken into consideration. The question is, has suitable time been allowed to a person, living in the vicinity of the place of delivery, to remove the goods in the ordinary course and in the usual hours of business; more prompt diligence being required, if the consignee has been informed of the shipment of the goods by receipt of a duplicate bill of lading or otherwise. *Hutch. on Car. § 377. Louisville & Nashville R. R. Co. v. Oden*, S. C. Ala., Dec. Term, 1885-86.

32. **SALE—Implied Warranty—Goods for Particular Purpose—Warranty—Recoupment of Damages.**—When specific chattles are purchased for a particular purpose understood by vendee and vendor, and the vendee has no opportunity to inspect them, there is an implied warranty, usually, that they shall be reasonably fit for that purpose. Where there is a warranty, express or implied, in the sale of goods, the vendee need not return, or offer to return, the goods in order to establish his right to recoup the damages he sustains by a breach of such warranty. *Best v. Flint*, S. C. Vt., July 19, 1886, 5 Atl. 192.

33. **TRUST—Resulting Trust—Purchase—With Money of Third Party—Promise to Devise—Laches.**—Where funds of A. were used by M. in the purchase of real estate, with the implied consent of A., M. promising that at her death the property should be A.'s, and M. died, leaving a will in which the property was left to B., to whom she was indebted, on condition that he should pay to A. a certain sum, and A. was notified of the provisions of the will, but took no steps in the premises for 23 years, A. is to be presumed to have acquiesced in the provisions of the will, and cannot maintain a bill in equity to compel B. to convey to him the estate purchased by him. *McGivney v. McGivney*, S. Jud. Ct. Mass., June 30, 1886, 7 N. E. Rep. 721.

34. **WILL—Bequest in Trust to Testator's Children and Descendants—Public Charity—Rule Against Perpetuities.**—A bequest to trustees, their heirs and assigns, forever, in trust, "to appropriate such part of the principal and interest as they may deem best for the aid and support of those of my (the testator's) children, and their descendants, who may be destitute, and, in the opinion of the trustees, need such aid," will not admit of being construed as a gift to the testator's children and their descendants who might be living at the time of the testator's decease, or that of the last of his children. Such a bequest is not a public charity, and, being too remote, as tending to create a perpetuity, is to be deemed invalid and without effect. *Kent v. Dunham*, S. Jud. Ct. Mass., July 6, 1886, 7 N. E. Rep. 730.

35. **Contesting Probate—Verdict—Certainty of—New Trial—Separation of Jury Before Verdict—Competency of Testator—Undue Influence—**

Importunity — Instruction to Jury — Error. — Where the validity of a will was involved, and the verdict of the jury was written upon the back of one of the judge's instructions as follows: "We, the jury, find this not to be the will of the testator, Samuel Bledsoe. D. B. DAILEY, Foreman;" held, that the verdict was sufficiently certain and responsive to the issue. The fact that two of the jurymen separated from the others for a few moments after the cause had been submitted to them for a verdict, and before its rendition, will not vitiate the verdict, where it does not appear that there was any corrupt purpose upon the part of any one, or that during such separation the two jurymen were approached as to the case, or that anything occurred during such absence which influenced or produced the verdict. Undue influence, obtained by importunity, and which gave dominion over the will of the testator to such an extent as to destroy his free agency, will vitiate a writing, purporting to be a will, which was the product of such importunity or influence. If a testator has capacity to make a will, and is not unduly influenced, he may make as unequal a disposition of his property among his children as he pleases; and it is error to single such unequal distribution out from other evidence and to instruct especially as to that, thus giving it undue prominence and tending to lead the minds of the jury from the real issue of capacity or undue influence. *Bledsoe v. Bledsoe*, Kentucky Ct. App., June 17, 1886, 1 S. W. Rep. 10.

36. — *Estate Less Than one of Inheritance* — Act of April 8, 1833. — Where a devise is that A. shall retain property devised by the will to B., and pay to the latter the interest thereof annually during his natural life, and that after B.'s death "his share" shall be "equally divided among his children, if he should have any," there is a sufficient indication of the testator's intention to give B. less than the fee, to satisfy the requirements of the act of April 8, 1833, which provides that by a devise without words of inheritance or of perpetuity the whole estate of the testator shall pass unless the contrary appear by a devise over or by words of limitation, or otherwise in the will. Under such a devise the only interest given to B. is a right to the income for life. *McDevitt's Appeal*, S. C. Penn., May 31, 1886, 22 Rep. 125.

37. — *General Power of Disposal to Devisee Accompanying a Life Estate* — *Circumstances Showing Intent to Give Power of Absolute Disposition* — *Extrinsic Evidence* — *Evidence of Condition of Property Admissible to Determine Extent of Power*. — Where a power of disposal accompanies a bequest or devise of a life-estate, the power of disposal is only co-extensive with the estate which the devisee takes under the will, and means such disposal as a tenant for life could make, unless there are other words clearly indicating that a larger power was intended. Where the life-tenant is given a power of disposition for a certain purpose, which it would be impossible to accomplish by a sale of the life-estate, and which can be accomplished only by a disposal of the fee, the power must be held to be that which is necessary for the accomplishment of the purpose. And where the life-estate is, in the main, in unimproved and unproductive realty, and the purpose is the support of the family, the power will be held to allow an absolute disposition. In interpreting such a power the court will look at the circumstances under which the deviser makes the will, at the state of

his property, of his family, and the like; and the admission of such evidence is not a violation of the rule forbidding the variation of the will by parol evidence. *Kauffman v. Breckenridge*, S. C. Ill., June 12, 1886, 7 N. E. Rep. 674.

QUERIES AND ANSWERS.*

[Correspondents are requested to draw up their answers in the form in which we print them, and not in the form of letters to the editor. They are also admonished to make their answers as brief as may be. — Ed.]

QUERIES.

17. A county purchases a track of land (under the provisions of an act of congress) upon which to locate a Co. seat. The town is platted into blocks, lots, streets and alleys. The plat, is acknowledged by the county commissioner, and recorded. Would non-user of a street or alley for 25 years amount to an abandonment? If not, what length of time would amount to an abandonment.

W. H.

QUERIES ANSWERED.

Query 10. [21 Cent. L. J. 258]. Can a State constitutionally enact that a creditor shall not under the penalty of a fine, transfer the claim against a citizen debtor to be collected by attachment garnishment or other process out of the debtor's wages in the courts of other States when the creditor, debtor and person owing the money are all within the jurisdiction of the courts of the State, enacting the law. * * *

C.

Answer. — Ohio has the following statute, passed May 11, 1878, and amended, March, 1882. Sec. 7014. Whoever assigns or transfers any claim for debt against a resident of this State, for the purpose of having the same collected by proceedings in attachment in courts outside of this State, or whoever, with intent to deprive a resident of this State of a right to have his personal earnings exempt from application to the payment of his debts, sends out of this State any claim for debt against such person for the purpose aforesaid, where the creditor and debtor and the person or corporation owing the money intended to be reached by such proceedings are within the jurisdiction of the courts of this State, shall be fined not more than fifty nor less than twenty dollars; and the person whose personal earnings are so attached shall have a right of action before any court of this State having jurisdiction, to recover the amount attached, and any costs paid by him in such attachment proceedings, either from the person so assigning, transferring, or sending such claim out of this State to be collected as aforesaid, or the person to whom such claim is assigned, transferred, or sent as aforesaid, or both, at the option of the person bringing such suit. The assignment, transfer, or sending of such claim to a person not a resident of this State, and the commencement of such proceedings in attachment, shall be considered *prima facie* evidence of a violation of this section. J. E. P.

Warren, Ohio.

The question is not answered because it is not shown whether the statute is constitutional or not. There seems to be no ruling on that point. Ed. Cent. L. J.

Query 34. [22 Cent. L. J. 287]. — A. offers for sale to B. a horse for \$100, on six months credit. B. accepts the offer, whereupon A. says: "Then you must give me your note for the amount due in six months." This B. declines to do—whereupon A. says "Well,

take the horse and you need not give the note,"—whereupon B. says: "Well, I decline to take the horse." Is there any contract by which the parties can be held liable to each other. JAS. B. STUBBS.
Galveston, Tex.

Answer.—To make a contract, the minds of the two parties must agree. When B. accepted A's offer, there was a contract, but A. withdrew his offer by insisting upon additional conditions. B. evidently did not try to hold A. on his original proposition, so the offer and acceptance were mutually withdrawn. After that, the minds of the two parties did not come together, for when A. renewed his offer, B. declined it. But the whole contract would be invalidated by the statute of frauds, which in this case would require both on acceptance and delivery of the property to make the contract binding. In this case there was no delivery.

S. S. M.

RECENT PUBLICATIONS.

FEDERAL DECISIONS.—Cases argued and determined by the Supreme, Circuit and District Courts of the United States. Comprising the opinions of those courts from the time of their organization, to the present date, together with extracts from the Opinions of the Court of Claims, and the Attorneys-General, and the Opinions of general impatienc of the Territorial courts. Arranged by William G. Myer, Author of an Index to the United States Supreme Court Reports; also Indexes to the Reports of Illinois, Ohio, Iowa, Missouri, and Tennessee, a Digest of the Texas Reports, and local works on Pleading and Practice. Vol. XIV. Dedication—Equitable Suits. St. Louis, Mo: The Gilbert Book Company, 1886.

The learned editors and enterprising publishers of this valuable collection are pushing along their work bravely and energetically. Within the last four months we have had occasion to notice the issuance of four volumes of the series and the fifth now before us is in no respect inferior to its predecessors. Considering the subjects included in it, it is perhaps more important than any of them. Four hundred and thirty two pages are devoted to Domestic Relations, than which no more important and all-pervading topic is to be found in the Law. The other subjects to which this volume is devoted, are, Dedication, Domicile, Dureas, Easements, Elections and Eminent Domain, all, little less important than which occupies more than half the book. This volume is fully up to the standard of the general work in editorial ability and acumen, as well as mechanical execution, and we could give it no higher praise.

We learn that Vol. XV will soon be issued, and the remaining volumes of the series will follow in rapid succession. When the thirty volumes which it is understood will constitute the whole work, shall have been placed before the public, they will, in our judgment, form the most valuable and important compilation of living law within the same compass, now extant in the English language.—

JETSAM AND FLOTSAM.

GOOD ADVICE.—The late Thomas Corwin of Ohio, once gave this wholesome advice to a law-student:

"After all, you must have one thing at command, without which all books are useless—a mind that hungers and thirsts after truth. This last and greatest requisite you can command if you will. If you have it,

you have one of the rarest attributes in the character of our young men.

"Young men seem to me not to know that they have work to do. It is one of the most discouraging signs of our times, that young men live in the habitual idea that they are to be fed with a pap-spoon. They will learn, when it may be too late, that God has sent just one message to every man and woman which He has created or will create. It is short, simple, and can not be misunderstood:

"Know thy work, and do it."

RETORT COURTEOUS.—Exciting as are the political contests of these days, they are mild in comparison with those which seventy-five years ago arrayed Federalists and Democrats against each other.

The War of 1812 was strongly favored by the Democrats, and as strongly opposed by the Federalists. One of the incidents of the war was the famous Hartford Convention, which the Democrats denounced as "infamous."

Roger Minot Sherman and Calvin Goddard, who had been members of the Convention, were one day talking with Judge Peters, a strong Democrat, and one of the United States District judges. The conversation having drifted on the subject of the Convention, Judge Peters said, half facetiously and half in earnest:

"Well, gentlemen, if you had been tried before me for that matter, I would have hanged you both, not only without law and evidence, but, if need be, against both."

"That only proves your honor's remarkable impartiality," answered Sherman, making a low bow—"that you would decide our case on the same principle that you do the greater part of the cases which come before you."

ACCENT.—Homer nods, and even the most skillful of jury lawyers may err through excess of zeal. Sir James Scarlett was noted for his tact in cross-examining a witness; but occasionally he would get a fall, from not looking ahead and seeing where he was going.

Once a boy whom he was examining said, "I suppose."

"Suppose!" interrupted Scarlett, "you have no business to suppose anything."

The examination went on, and to a question of Scarlett's the boy answered, "I don't know."

"Don't know!" rejoined the irritated lawyer, "perhaps you can't even suppose?"

"I suppose I have no business to suppose anything," replied the boy, amid the laughter of court and bar.

But the great advocate's severest "tumble" was while examining a witness named Tom Cooke. One music publisher had sued another for violating his copyright of an arrangement of the song, "The Fine Old English Gentleman." Said Scarlett, in cross-examining Cooke.

"Now, sir, you say that the two melodies are the same, but different. What do you mean by that?"

"I said that the notes in the two copies were alike," answered Cooke, "but with a different accent, the one being in common time, the other in six-eight time; and consequently, the position of the accented notes was different."

"Now, sir, don't beat about the bush, but explain to the jury the meaning of what you call accent," said Scarlett, in his roughest style.

The lawyer's manner put the witness on his mettle, and he answered.—

"Accent in music is a certain stress laid upon a particular note, in the same manner as you would lay a stress upon any given word for the purpose of being better understood.

"Thus, if I were to say, 'You are an *ass*,' it rests on *ass*; but if I were to say, 'You are an *ass*, it rests on you, Sir James."

The shouts of laughter which followed this explanation caused Sir James to become *scarlet* in more than name, and in a great huff he said,—

"The witness may go down."

The Central Law Journal.

ST. LOUIS, AUGUST 20, 1886.

CURRENT EVENTS.

LORD CHANCELLOR OF ENGLAND.—In the last number of the *Solicitor's Journal*, of London, it is said that "there is a general feeling of regret, among lawyers, that the necessities of party government should soon remove Lord Herschell from the Chancellorship." Then follows a very handsome and appreciative compliment to the ability and learning of the retiring judge. We fail to perceive, however, in this notice, nor have we elsewhere observed any expression of regret that the highest law officer of the Kingdom should hold his office at the mercy of the "necessities of party government," that he should go out of office with the party under whose auspices he came in.

The conservatism of the English people is nowhere more manifest than in the tenacity with which they cling to forms, laws, and customs, which have outlived their usefulness. There is no reason why the Lord Chancellor should be a political officer at all, or if there is, why the functions of the office should not be divided and vested in two officials, the political, who might well share the fate of his party, and the judicial, who should cease to be an anomaly, and hold his office like other judges by a life tenure.

This is a change rather to be desired than expected, for notwithstanding the many reforms of the nineteenth century, the *nolimus leges Angliæ mutare* is still too strong in the English heart to permit any change which has not been peremptorily demanded by urgent necessity or insistent public sentiment.

NATURALIZATION LAWS.—A contemporary suggests that it would be a wise measure to revise, amend, and strengthen our naturalization laws, in view of the disorderly conduct and destructive doctrines of the anarchists and socialists, who are chiefly men of foreign birth. We do not see that the process indicated would mend the matter at all, for the

class of persons, proposed to be affected, scorn alike all political and social ties, and are equally dangerous, whether they are citizens or aliens. The naturalization laws are well enough, if they were properly enforced, but as long as the foreign vote is so largely a political factor, and aliens are naturalized in shoals upon the eve of every election, it is manifest that a proper enforcement of naturalization laws can hardly be expected. The law requires,¹ that it must appear to the satisfaction of the court that the applicant is "a man of good moral character, attached to the principles of the constitution of the United States, and well disposed to the good order and happiness of the same." All this has become mere form. No means are used to satisfy the court on these points, and no court is satisfied judicially, or personally, or in any other respect, that the average applicant, who comes before him, knows anything about the Constitution of the United States, or its principles. The truth is, the privileges of citizenship have been too much cheapened by these mere *pro forma* proceedings, and would be more highly valued by our adopted citizens if they were less easily come by.

THE CALIFORNIA JUDICIARY.—In a recent number of this Journal,² we called the attention of our readers to the extraordinary proceedings pending in the California Legislature against the Judges of the Supreme Court of that State. It now appears to have been discovered that two of the the obnoxious judges have, since their election, by means of disease become, now are and "for all time hereafter will be, totally incapacitated, by means of physical and mental infirmity, to discharge the duties of" the office. Such is the tenor and effect of a petition to the California Legislature, signed by David S. Terry, which was duly referred, in each House, to a committee.

The charge is sufficiently broad to cover the case, for it includes the past, present and future, and implies in the petitioner, prophetic powers of a very high order, for nobody but a prophet could speak so positively

¹ Rev. Stat. U. S. § 2165, sub. sec. 3.² 28 Cent. L. J. 121.

for "all time hereafter." It is not a little remarkable, however, that the mental and physical incapacity of these judges, should now be brought to the front for the first time, as would seem to be the case. The Executive Committee of the State Irrigation Convention, while agitating actively for the removal of the judges, and admitting their uprightness, integrity and personal character, does not seem to have impugned their physical health or mental capacity; and the California Bar Association, while vigorously protesting against any change in the existing *status*, do not intimate that there have been made against the judges any charges of physical incapacitation or mental imbecility.

The whole affair is singularly discreditable to the State. The only substantial charge made against the judges seems to be that they decided the case, of *Lux v. Haggin*, according to the law, as they understood the law. All the other charges made against them, and the alleged imperfection of the judiciary system of the State, are manifestly afterthoughts which, but for the case of *Lux v. Haggin*, would probably have never been heard of. And the question arises: have the victors in *Lux v. Haggin* no rights which anybody is bound to respect? And if that case is to be regarded as *res judicata*, are other people, who hold the same rights, under like circumstances, to be deprived of those rights by the judgment of a court to be organized expressly and avowedly to decide against them? And if so, is such proceeding due process of law?

NOTES OF RECENT DECISIONS.

ABSOLUTE AND QUALIFIED PROPERTY—LESSOR AND LESSEE—FERRE NATURÆ—NATURAL GAS.—The Supreme Court of West Virginia, in a recent case,¹ adjudicated a question relating to the legal status of a very peculiar style of property. The facts were, that the plaintiffs held the fee of certain lands in the oil regions of West Virginia. The defendants held, under the plaintiffs' grantor, a lease for fifteen years of the land in question, for

the purpose (and for that only) of boring for oil and extracting it from the earth, being bound to pay a royalty in kind for the privilege. The defendants in due time "struck oil," but the well was quite indifferent and the supply of oil scanty, and required pumping to bring it to the surface. A strong stream of natural gas, however, issued from the well, and this the lessees secured and utilized as fuel. The lessors regarded this gas as their property, demanded payment for the quantity used by the lessees, and filed a bill for an account and for payment. Their demand was sustained by the court below, but upon appeal, the Supreme Court reversed its decree and *held* that natural, or hydrocarbon gas, which issues by its own force from the earth, is not absolute property, but the subject of only qualified property.

There is, however, this qualification: if the gas did not, of its own force, issue from the well, the lessee could not, without the consent of the lessor, pump it from the well. It is not explained by the court, and it is a little hard to see, why the lessee should be permitted to catch and cage the fugitive aeriform fluid, above the surface of the earth, and not below it, for the title of the lessor is the same to the space above the surface as to the bottom of the well. *Cujus est solum, ejus est usque ad cælum.*

The court puts its ruling upon the ground that the gas in question is in the nature of air and water, and of animals *ferre naturæ*; and therefore that the lessee is no more bound to pay for the gas that he burns, than for the air he breathes, the water he drinks, or the deer that he shoots upon the leased premises.

The court assumes, upon scientific authorities, that the supply of gas from wells of this description is inexhaustible, and infers that it "cannot be the subject of compensation for appropriation and waste, where the access is rightful." We do not see that the quantity of the gas which issues from the well is material. If the owner of the land has no title to the inexhaustible stream, why should he have a title to that which flows only for a hundred days. If the gas is *ferre naturæ*, the lessor can have no more property in it, whether there is little or much, than he can have in the wolf or the deer. *They are cer-*

¹ Wood etc. Co. v. West Virginia etc. Co., S. C. W. Va., June 27, 1886; 34 Pitts. Leg. Jour. 7.

certainly exhaustible. The rule is stated by the court to be that, in a case in which a trespass is committed upon anything in which the owner has only a qualified property, as air, water, &c., no damage can be recovered, for the trespass is *damnum absque injuria*. And the same rule applies when no trespass is committed, and the lawful action of one party deprives another of his whole supply of such qualified property, as where one man digging a well on his own land drains the well of his neighbor.²

BILL TO QUIET TITLE—EXECUTION SALE OF LAND—SHERIFF'S RETURN—AMENDMENT OF—NOTICE—BOUNDARIES—EVIDENCE.—In recent case,³ the Supreme Court of Kansas has adjudicated several interesting points connected with the sale of real estate upon execution. The facts were, that Miss Hathaway had a judgment against the Blue Rapids Town Company, upon which execution was issued and levied by the sheriff upon a certain town lot, which was exposed to sale, after appraisement, and struck off to W. H. H. Freeman, who however refused to pay the amount of his bid. The sheriff returned the execution unsatisfied. At the next term of the court the execution plaintiff showed that Freeman's bid was for her, and the sheriff was required to amend his return, she paid the difference and received a sheriff's deed for the land. Of all this, the execution defendant had no previous notice, and subsequently sold its interest in the property to the grantors of the present defendant. This suit was brought by the grantees of Miss Hathaway, to quiet title, against the defendant claiming by mesne conveyances under the Blue Rapids Town Company.

The court held that the sheriff's amendment of his return, although he resisted the application, and made it under the order of the court, was regular and obligatory on all concerned; that the proceeding was one between the officer and the court, is *ex parte* in its very nature, and that no one has an absolute right to notice of it; that the amended

return, being made under the same sanction and responsibility as the original, becomes the return in the case, and cannot be questioned collaterally by the parties to the action or their privies.⁴

There are cases, however, in which notice to amend a sheriff's return must be given, as when a long time has passed after the return was made, or where the case has been stricken from the docket, or where a return has been made upon an execution which shows that it has been satisfied, and the amendment would restore the liability of the defendant.⁵ Unless some such circumstances exist, no notice is necessary. The court says: "The parties are deemed to be in court until the sale is confirmed." But in this case, it may be observed, the original return of the sheriff showed no sale to confirm. On the contrary, after stating Freeman's bid and his failure to pay, the sheriff returns the lot "not sold for want of good and sufficient bids." We think that just here there is a "missing link" in the chain of the court's reasoning. As, however, the defendants did not buy upon the faith of the original return, they were not entitled to notice, especially as it appeared by the process, that the lot had been levied on, was in *custodia legis* and was not sold only for want of bidders. They were put upon inquiry by the very terms of the original return, and that of itself was equivalent to notice. And, of course, if the defendants came into the matter by purchase after the amendment had been made, *a fortiori*, they were not entitled to notice.⁶

The judgment of the court, however, might be rested on a still broader ground; that if a judgment and execution are undoubtedly valid, the sheriff's deed, based thereon, cannot be attacked collaterally by anyone, nor the proceedings impeached by strangers.⁷

⁴ Rickards v. Ladd, 6 Sawy. 40; Morris v. Trustees, 15 Ill. 269; Dunn v. Rogers, 43 Ill. 260; Wright's Appeal, 25 Penn. St. 373; Kitchen v. Remsky, 42 Mo. 427.

⁵ Coopwood v. Morgan, 34 Miss. 368; Thatcher v. Miller, 13 Mass. 271; Hovey v. Wait, 17 Pick. 197; O'Connor v. Wilson, 57 Ill. 226; Williams v. Doe, 9 Miss. 559.

⁶ Baker v. Binniger, 14 N. Y. 270.

⁷ Freeman on Executions, §§ 334, 339, 364, 365; Rorer on Judicial Sales, §§ 479, 480, 789, 1059; Rounsaville v. Hazen, 33 Kan. 344; s. c., 6 Pac. R. 630; Cross v. Knox, 32 Kan. 725; s. c., 5 Pac. R. 32; Pritchard v. Madren, 31 Kan. 38; s. c., 2 Pac. R. 691.

Brown v. Illins, 25 Conn. 594; s. c., 27 Conn. 94; Emporia v. Sodan, 25 Kan. 608.

³ Stetson v. Freeman, S. C. Kan., July 9, 1886; 11 c. Rep. 431.

Another question of some interest was considered and decided by the court: *i. e.*, whether, in the absence of evidence of a higher grade, it is competent to admit testimony of hearsay and reputation to establish boundaries and identity of land conveyed by a sheriff's deed. The lot in question was laid off, with many others, on a recorded plat as No. 11. There were no monuments to mark its precise situation, and the court below admitted parol testimony of old residents to show where lot No. 11 was always reputed to be. And, for want of better or higher evidence, the Supreme Court held that this kind of evidence was admissible.⁸

WILL—REVOCATION—MARRIAGE AND THE BIRTH OF A CHILD.—The Court of Appeals of Maryland have recently considered the question whether marriage and the birth of a child will operate as a revocation of a will.⁹ The testator, James Spriggs, made his will in the life-time of his first wife, giving his whole estate to her and to her children. After her death he contracted a second marriage, of which several children were the issue. Upon his death the will was offered for probate and rejected on the ground that the second marriage, and the birth of a second set of children, operated a revocation of the will. The appellate court sustained the decision of the trial court.

There is no statute on the subject in Maryland, and the ruling is based wholly upon common law authorities. The rule of the common law is, that marriage and the birth of a child, after the execution of a will, revokes it, because it effects a total change in the situation of the testator's family.¹⁰ The *rationale* of the rule, however, does not seem to have been very easily or clearly settled by the authorities. Lord Mansfield thought,¹¹ that it rested upon the presumption that the testa-

tor intended to revoke his will, and that it therefore followed that the presumption might be rebutted by parol evidence, "by every kind of evidence." Lord Kenyon, however, in a later case,¹² held that the rule was founded upon a different principle; that a tacit condition was annexed to the will when made, that it should not take effect if there should be a total change in the situation of the testator's family. This view was also taken by Lord Ellenborough,¹³ and at a much later date re-affirmed in *Marston v. Fox*.¹⁴ And that rule, so expressed, seems to control the whole subject. The fact that the testator afterwards acquires property has no bearing upon the question, for if the revocation depends upon the total change in the situation of the testator's family, that change takes place when the first child of the marriage is born, *eo instanti* the will is revoked and nothing occurring subsequently can reinstate it.

¹² *Doe v. Lancashire*, (1792) 5 Durn. & E. 49.

¹³ *Kenebel v. Scafton*, (1802) 2 East. 590.

¹⁴ *Supra*.

PERSONAL LIABILITIES OF BANK OFFICERS.

GENERAL OBSERVATIONS.

In general terms bank officers undertake for good faith and honesty, and ordinary diligence and prudence,¹ and are liable for the consequences of their fraud, misconduct, or gross negligence in the discharge of the business of their offices.² They are usually not liable for anything less than gross negligence,³ and are never liable for an error of judgment, unless the act is so grossly wrong as

⁸ *Boardman v. Reed*, 6 Pet. (U. S.) 328; *Kenney v. Farnsworth*, 17 Conn. 355; *Harriman v. Brown*, 8 Leigh, 697; *Ralston v. Miller*, 3 Rand. 44; *Cox v. State*, 41 Tex. 1; *Conn. v. Penn.*, 1 Pet. C. C. 496.

⁹ *Baldwin v. Spriggs*, Ct. App. Md., June 22, 1886; 5 Atl. Rep. 295.

¹⁰ *Brush v. Wilkins*, 4 Johns. Ch. 506; *Christopher v. Christopher*, (1771) 2 Dickins. 445; *Sprague v. Stone*, (1773) Ambler, 721; see also the later case of *Marston v. Fox*, (1838) 8 Add. & E. 14.

¹¹ *Brady v. Corbitt*, (1778) 1 Doug. 81.

¹ *United Society of Shakers v. Underwood*, 9 Bush. 609; *Graves v. Lebanon Nat. Bank*, 10 Bush. 23; *German Savings Bank v. Wulfekuhler*, 19 Kan. 60; *Paine v. Irwin*, 59 How. Pr. 316; *Williams v. McDonald*, 37 N. J. Eq. 409; *Bank v. St. John*, 25 Ala. (N. S.) 566; *Brannon v. Loring*, S. C. Ky. 20 Cent. L. J. 57; *Hauser v. Tate*, 85 N. C. 81; *State Bank v. Locke*, 4 Dev. L. 529.

² *Chester v. Halliard*, 34 N. J. Eq. 341; *Brinkerhoff v. Bostwick*, 88 N. Y. 52.

³ *Brannon v. Loving*, S. C. Ky. 20 Cent. L. J. 57; *Mutual Building Fund & C. Sav. Bank v. Bossieux*, 4 Hughes C. Ct. 387; *Ackermann v. Halsey*, 37 N. J. Eq. 356; *Sperling's Appeal*, 71 Pa. St. 11; *Gobold v. Mobile Bank*, 11 Ala. 191.

to warrant the imputation of fraud or a want of the knowledge necessary for the performance of the duty assumed.⁴

These latter are the rules where the officer keeps within his authority and does not violate any law of the corporation, and where he is known to be such officer, and acts and contracts as such, without misrepresentation as to his power or other material matter. But bank officers are but agents of the corporation, and if they transcend or abuse their powers, or violate any law of the corporation, they are responsible to their principal,⁵ and are personally liable on contracts made beyond such limits, as are agents of an individual.⁶

So, too, where the officer does not make it known that he is such officer, and contracts personally;⁷ or where he misrepresents the authority he possesses, and thereby secures a contract between the corporation and another party, which for any reason cannot be enforced against it, the other party not knowing of such want of power, he becomes liable on the contract.⁸ And it does not matter that he misrepresents his power in good faith.⁹ But an officer will not incur this liability if the other party knew, or had equal means with the officer of knowing, that the act was beyond his powers; and, as observed in a former article, he is bound to take notice of such powers as are given or limited by statute, or the fundamental law of the corporation,¹⁰ and, according to some authorities, by the by-laws themselves.¹¹

LIABILITIES OF THE DIRECTORS.

Generally.—The liabilities of directors form no exception to the general rules above stated. It is their duty to use at any rate ordinary dili-

gence in conducting and in acquiring knowledge of the business of the bank. Failing in this, they become liable for the consequences, as well as for their fraudulent practices, and cannot be heard to say that they were not apprised of facts, the existence of which is shown by the books, accounts, and correspondence of the bank, or which, with the exercise of such diligence, might otherwise have been known.¹²

Thus, where by their gross negligence or misconduct, they allow the funds of the bank to be lost or wasted, they are liable for the damages in an action by the bank,¹³ or its receiver,¹⁴ or in case the bank or receiver refuses to sue, or the receiver is a director, by a stockholder who has been compelled to contribute to the payment of the loss,¹⁵ or a depositor who has suffered thereby.¹⁶

Must Have Accepted Office.—But to incur this liability, the office of director must, in general terms, have been accepted, or something must have been done or said by the person sought to be charged, that would reasonably lead to the belief that he was a director.¹⁷ But the fact that the owners of a bank published, for more than four years, an advertisement containing the names of certain persons as directors, was held, in a Tennessee case, not to render them liable as such.¹⁸ The persons elected directors need not, however, have acted.¹⁹

For Acts of Others—Good Faith and Ordinary Care and Prudence.—Where the liability of the directors for a breach of duty is joint, the innocence or dissent of one will not shield him;²⁰ but directors of an institu-

¹² *United Society of Shakers v. Underwood*, 9 Bush. 609; *Graves v. Lebanon Nat. Bank*, 10 Bush. 23; *German Sav. Bank v. Wulfekuhler*, 19 Kan. 60; *Paine v. Irwin*, 59 How. Pr. 316; *Williams v. McDonald*, 37 N. J. Eq. 409; *Bank v. St. John*, 25 Ala. (N. S.) 566.

¹³ *Chester v. Halliard*, 34 N. J. Eq. 341.

¹⁴ *Brinkerhoff v. Bostwick*, 88 N. Y. 52; *Mutual Building Fund, etc., Sav. Bank v. Bossieux*, 4 Hughes C. Ct. 387; *Van Dyck v. McQuade*, 45 N. Y. Super. Ct. 620.

¹⁵ *Brinkerhoff v. Bostwick*, *supra*; *Nelson v. Burrows*, 9 Abb. N. Cas. 280; *Ackerman v. Halsey*, 37 N. J. Eq. 356; 2 *Atlantic Rep.* 83; *contra*, *Conway v. Halsey*, 44 N. J. L. 462.

¹⁶ *Chester v. Halliard*, 34 N. J. Eq. 356; 2 *Atlantic Rep.* 83; *Malsch v. Savings Fund*, 5 Phila. 30.

¹⁷ *Hume v. Commercial Bank*, 9 Lea. 728.

¹⁸ *Hume v. Commercial Bank*, *supra*.

¹⁹ *Ridenour v. Mayo*, 40 O. S. 9.

²⁰ *Bank v. Darden*, 18 Ga. 318.

⁴ *Gobold v. Bank at Mobile*, 11 Ala. 191.

⁵ *Dustin v. Daniels*, 4 Den. 299; *First Nat. Bank of Sturgis v. Reed*, 36 Mich. 263. And see *Franklin Ins. Co. v. Jenkins*, 3 Wend. 130.

⁶ *First Nat. Bank v. Bennett*, 33 Mich. 520.

⁷ *Story on Agency*, §§ 266, 147; *Field on Corporations*, § 210.

⁸ *Field on Corporations*, § 215.

⁹ *Story on Agency*, §§ 56, 264; *Paly on Agency*, by Lloyd, 201; *Field on Corporations*, 231; *Walker v. Bank of New York*, 9 N. Y. 582; *Hauser v. Tate*, 85 N. C. 81.

¹⁰ *Bank of Augusta v. Earle*, 13 Pet. 587.

¹¹ *Wild v. Bank of Passamaquoddy*, 3 Mason, 505; *State v. Commercial Bank*, 6 S. & M. 218; *North River Bank v. Aymor*, 8 Hill, 262; *Mechanics' Bank v. N. Y., etc., R. Co.* 13 N. Y. 599. And see *Field on Corporations*, §§ 218, 219.

tion, guiltless of fraud or misconduct themselves, and innocent successors of those guilty of fraud or misconduct, are not bound by the acts or conduct of their predecessors.²¹ Nor are they liable for losses sustained by the bank by the dishonesty or carelessness of the cashier, or other persons employed by them,²² or for loss resulting from investments by them made,²³ if they have acted in good faith and with ordinary care and prudence.²⁴

Nor, again, are those not members of the investment committee, to whose hands the business of loaning has been committed, liable, in the absence of cognizance or complicity, for irregular or unsafe investments.²⁵

For Exercise of Discretionary Powers.—The directors are not liable for the exercise of discretionary powers intrusted to them, nor for their non-exercise, although loss thereby results to the bank. Thus, where they may in their discretion require a bond from the president, and they see fit not to do so, and loss is sustained as the result, they cannot be held therefor.²⁶

For Illegal Issuance of Bank Bills.—Regarding the illegal issuance of bank bills, it has been held that the directors are liable to the holders, if the bank becomes insolvent, for the issuance of bank bills contrary to their charter; as where they issue before the prescribed amount of capital is subscribed and paid in.²⁷

But by the expiration of the charter, it has also been held, the personal liability of directors for over issues is extinguished.²⁸

They are not, however, released from liability by an assignment to which the creditors are not parties, nor consenting.²⁹

For Depreciation in Bank's Bills.—The directors are not liable to a holder of the

bills of the bank for depreciation therein, not even where it is caused by their misconduct.³⁰

For Excess of Debts Over Limit.—Sometimes it is provided by statute that the debts of the bank shall not exceed a certain limit, and that in case of excess, the directors shall be liable for the same. Where such is the provision, and the limit has been exceeded, it will not avail a single director to show that he was absent, or that he dissented. Such a provision is remedial, not penal, and the liability is joint, not several.³¹ Nor will it exempt the directory to show a judgment of forfeiture, or the expiration of the charter by its own limitation.³²

Certificates of deposit are debts within the meaning of a statute providing that the debts shall not exceed a prescribed amount, "whether by bond, bill, note or other security."³³

In Case of Insolvency.—Sometimes, too, it is provided that the directors shall be liable for the bank's debts in case of insolvency. But, in a Michigan case, it was held that where the statute authorizing the forming of the bank is unconstitutional, the directors cannot be made to respond under such a provision, the bank being illegal.³⁴

In Missouri the point was made, that where the bank operates under a special charter, such an act impairs the contract between it and the State, and is therefore unconstitutional; but the court refused to sustain this view, saying that no charter can exempt a bank or its officers from regulations properly made in the exercise of the police power of the State.³⁵

These provisions are not, however, self-enforcing, but require to be enforced by the ordinary remedies.³⁶

Again, it is sometimes provided by statute that an officer of a bank receiving a deposit with knowledge of its insolvent condition shall be personally liable therefor. In an action under such a statute, it is only neces-

²¹ Schley v. Dixon, 24 Ga. 273.

²² Dunn v. Kyle, 14 Bush. 134; Brannon v. Loving, S. C. Ky. Dig. 20 Cent. L. J. 57. But see Paine v. Irwin, 59 How. Pr. 316.

²³ Williams v. McDonald, 37 N. J. Eq. 409.

²⁴ Spring's Appeal, 71 Pa. St. 11; Gobold v. Mobile Bank, 11 Ala. 191; Bank v. St. John, 25 Ala. (N. S.) 566.

²⁵ Williams v. Halliard, 38 N. J. Eq. 553.

²⁶ Williams v. Halliard, 38 N. J. Eq. 373.

²⁷ Schley v. Dixon, 24 Ga. 273.

²⁸ Moultrie v. Hoge, 21 Ga. 513. But compare Hargroves v. Chambers, 30 Ga. 580.

²⁹ Schley v. Dixon, 24 Ga. 273.

³⁰ Branch v. Roberts, 50 Barb. 435.

³¹ Banks v. Darden, 18 Ga. 318. But see Sturges Burton, 8 O. S. 215.

³² Hargroves v. Chambers, 30 Ga. 580. But compare Moultrie v. Hoge, 21 Ga. 513.

³³ Hargroves v. Chambers, 30 Ga. 580.

³⁴ Brooks v. Hill, 1 Mich. 118.

³⁵ Cummings v. Spaunhorst, 5 Mo. App. 21.

³⁶ Fusz v. Spaunhorst, 67 Mo. 256.

sary to show that the bank was insolvent. The burden of proof of the want of knowledge of the insolvency is on the officer sued.⁵⁷

For False Statement in Articles of Association and Former Violations of Law.—The directors are not liable to one who becomes a stockholder, for false statements in the articles of association respecting the amount of capital actually subscribed and paid in, by which he was induced to become a stockholder.⁵⁸

Nor can one who purchases stock in a banking association, maintain an action against a director therein, for a violation of law which occurred before he became a stockholder, although the value of the stock is depreciated thereby.⁵⁹

For Payment of Unearned Dividend Declared.—The trustees of a savings bank are jointly and severally liable for a payment of dividends, not earned, under a resolution declaring dividends, and passed either with their concurrence or subsequent approval.⁶⁰

For Fraudulent Sale to Bank and Unauthorized Purchase of Its Own Stock.—The directors are liable to the bank for loss occasioned by the fraudulent sale to it of its own stock.⁶¹ But they are not liable to one from whom, in the name of the bank, they make an unauthorized purchase of its stock, which the bank repudiates.⁶²

For Allowance of Extra Services.—The allowance by the directors to themselves, or one or more of their number, of more than the ordinary or stipulated compensation, is usually to be regarded with something of suspicion, and where it is not done in good faith, it certainly cannot be upheld; but, in *Goldbold v. Bank at Mobile*,⁶³ it was held that the giving of compensation to one of the directors, for extra services as an agent of the bank, though it may be unlawful, is not such an act as will expose the directory to liability, if done in good faith, and with the honest intent of benefitting the bank.

May Plead Statute of Limitations.—Directors sought to be made personally liable, may plead the statute of limitations.⁶⁴

LIABILITIES OF THE PRESIDENT.

The president is usually the officer principally charged with the supervision and proper conduct of the executive business of the bank; and hence it is sometimes said that of him a higher degree of diligence is required than of a director, or, perhaps, of any other officer;⁶⁵ but this is not the requirement of the courts, according to the generally accepted rule. This holds him, with the others, as previously observed, to the exercise of only ordinary or reasonable care in the discharge of his duties, or such as men of ordinary prudence usually exercise in their own affairs of like character.⁶⁶

On Warranty of Legality of Bank.—The president, however, in a sense, warrants the legal organization and existence of the bank; for an ostensible president of a spurious bank is liable for debts contracted by his assistance, and he must respond in damages to the same extent that the bank, if legally constituted, would have been liable. Nor can this liability be escaped by showing that he supposed himself the president of a legally constituted bank, if he has contributed the influence of his reputation to give undeserved credit to a spurious corporation.⁶⁷

For Allowing Indebtedness to Exceed Limit.—Where the charter provides that the bank shall not at any time be indebted in excess of a certain amount, as that of its paid-up capital, the president is personally liable for the amount of a bill which he indorses when the bank is indebted in excess of that amount.⁶⁸

For Overdrafts.—So he is liable for overdrafts which he has directed or allowed.⁶⁹

For Permitting Securities to be Taken Away.—And it has been held that he is liable for a loss caused by his permitting a customer to take securities of the bank away for inspection.

⁵⁷ *Williams v. Halliard*, 38 N. J. Eq. 373.

⁵⁸ *Brannin v. Loving*, S. C. Ky. Dig. 20 Cent. L. J. 57.

⁵⁹ *Dunn v. Kyle*, 14 Bush. 134; *Hauser v. Tate*, 85 N. C. 81.

⁶⁰ *Hauser v. Tate*, *supra*. But consult *Brooker v. Hill*, 1 Mich. 118.

⁶¹ *Brannin v. Loving*, S. C. Ky. 20 Cent. L. J. 57.

⁶² *Oakland Savings Bank v. Wilcox*, 60 Cal. 126.

⁵⁷ *Dodge v. Mastin*, 17 Fed. Rep. 660.

⁵⁸ *Mabey v. Adams*, 3 Bosw. 346.

⁵⁹ *Maybey v. Adams*, 3 Bosw. 346.

⁶⁰ *Van Dyck v. McQuade*, 45 N. Y. Super. Ct. 620.

⁶¹ *Shultz v. Christman*, 6 Mo. App. 338.

⁶² *Abeles v. Cochran*, 22 Kan. 405.

⁶³ 11 Ala. 191.

tion; and that evidence is inadmissible to show that such was the usual custom among banks.⁵⁰

Court will not Interfere by Injunction.—But notwithstanding an alleged malfeasance in office, a court of equity will not, according to one authority, grant an injunction restraining the president or cashier in the exercise of his official duties.⁵¹

Court cannot Declare Officer Trustee, When.—Nor can a court where an officer of a bank fraudulently abstracts the funds, and invests them in his own name, declare him a trustee and indemnify the bank out of the investment.⁵²

LIABILITIES OF THE CASHIER.

Generally.—The liabilities of the cashier of a bank are not different, in any respect, from those stated at the beginning of this article. He is bound for ordinary diligence and honesty, and is liable for the results of the want of either.⁵³ Nor is it a defense in an action brought by the bank for his wrongful appropriation of moneys, that, at the time of such appropriation, he was the owner of the greater part of the stock of the bank, and has since that time sold it to other parties who are now the officers and managing authorities.⁵⁴

For Application of the Notes of the Bank to his own Use.—As an example of his liability, if he applies the notes of the bank to his own use, he must respond therefor, and to the full nominal amount. He cannot avail himself of their depreciation.⁵⁵

But a statute affixing a penalty for the conversion by a cashier of any "money, bank bill, or note," does not extend to promissory notes (other than bank notes,) or to other commercial paper.⁵⁶

For Allowing Overdrafts.—A cashier may be held liable for negligently or dishonestly allowing overdrafts by which the bank suffers, but he is not liable for permitting it where the transaction is in reality a loan upon sufficient security.⁵⁷

For Funds paid to Bank Without Authority.—If he receives money from an officer of another bank, knowing that that other has no authority to make such payment, he is personally liable for it, and this, though he has paid it over to his principal.⁵⁸

For Misrepresentation as to Amount of Deposit.—A cashier is not liable for erroneous information given in good faith to a party respecting the amount of money deposited to his credit by a third person, which mistake causes him loss.⁵⁹

For not Consulting Other officers.—Nor, where the duty is imposed on him of carrying on the bank's business, can he be held responsible for a neglect of duty in not consulting other officers of the bank, or committees, whom, by the by-laws, he is required to consult in making discounts, where such committees hold no meetings, and the officers systematically absent themselves from the performance of their duties.⁶⁰

LIABILITIES OF CASHIER AND SURETIES ON HIS BOND.

Generally.—*Well and Truly to Perform.*—A cashier's bond is commonly "well and truly" to perform the duties of the office. Such a bond includes not only honesty, but reasonable skill and diligence. If therefore he performs those duties negligently or unskillfully, or if he violates them from a want of capacity and care, the condition of his bond is broken, and his sureties are liable for his misdoings.⁶¹ It extends also to all defaults in the duties annexed to such office, from time to time, by those who are authorized to control the affairs of the bank;⁶² for the sureties enter into the contract with reference to the rights and authority of the president and directors under the charter and by-laws.

And it is no defense to show, in an action on such a bond, wherein it is alleged that the cashier has received money for which he has not accounted, that he had the character of

⁵⁰ Citizen's Bank v. Wiegand, 12 Phila. 496.

⁵¹ Bayless v. Orne, 1 Freem. Ch. 161. And see Ogden v. Kip, 6 Johns. Ch. 160.

⁵² Pascoag Bank, v. Hunt, 3 Edw. 583.

⁵³ State Bank v. Locke, 4 Dev. L. 529.

⁵⁴ Fort Scott Bank v. Drake, 29 Kan. 311.

⁵⁵ Pendleton v. Bank of Kentucky, 1 T. B. Mon. 177. But see Barrington v. Bank of Washington, 14 Serg. & R. 405, as the measure of damages.

⁵⁶ State v. Stimson, 24 N. J. L. 9.

⁵⁷ Commercial Bank v. Ten Eyck, 48 N. Y. 305.

⁵⁸ American Bank v. Wheelock, 45 N. Y. Super. Ct. 205.

⁵⁹ Herrin v. Franklin Co. Bank, 32 Vt. 274.

⁶⁰ Oswego Bank v. Burt, 93 N. Y. 233.

⁶¹ Minor v. Mechanics' Bank, 1 Pet. 46; State Bank v. Chetwood, 8 N. J. L. 25; Barrington v. Bank of Washington, 14 Serg. & R. 405; American Bank v. Adams, 12 Pick. 303; Bank of Washington v. Barrington, 3 Pa. 27; Batchelor v. Planters' Bank, 78 Ky. 435; contra, Union Bank v. Clossey, 10 Johns. 371.

⁶² Minor v. Mechanics' Bank, supra.

an honest, careful, and vigilant officer, and that similar losses by bank officers are frequent, and that the directors have expressed their belief that the loss in question was caused by accidental overpayments, and that they continued to employ him after the loss.⁶³ Nor is any act or vote of the directors, contrary to their duties, and in fraud of the stockholders' rights and interests, an excuse or defense.⁶⁴ Thus the fact that the directors know of overdrafts allowed by the cashier, will not release the sureties from liability for losses caused by such overdrafts.⁶⁵

However it has been decided, that, where the law requires the removal of a cashier for ascertained delinquency, and the managers of the bank retain him in service after knowing such cause of removal, and connive at his misconduct, his sureties are not liable for any breach of his bond, subsequent to the discovery of his misdoings.⁶⁶

Bond Should be Approved.—To render it binding, the bond should be approved; but it may be shown to have been approved by the directors (according to the rules prescribed in the charter of the bank), by presumptive evidence; a record, or other written evidence of such approval, not being necessary.⁶⁷ Indeed it is held that if a cashier be duly appointed, and permitted to act in his office for a long time, under the directors' sanction, his bond need not be accepted according to the terms of the charter, in order to render his sureties liable for his breach of duty.⁶⁸

In Case of Misnomer.—And although a surety is entitled to have his undertaking strictly construed, a misnomer of the corporation in the bond, by the omission of the words "and company," does not vitiate it.⁶⁹

Where Deposit Received away from Bank.—

A cashier who receives money for deposit out of the bank, and not in banking hours, or receives its funds at places distant from the bank, and does not account for them, is liable on his bond.⁷⁰

For Changing Securities.—So where he exceeds his power by changing the securities of the bank, without the knowledge of the directors, he thereby makes himself and his sureties liable.⁷¹

In Case of Robbery, Failure of the Bank, etc.—But, on the other hand from the above, the obligors are not responsible for money of which the cashier is robbed in the discharge of his duty,⁷² nor, on failure of the bank, for funds deposited in accordance with the by-laws.⁷³ Nor again can sureties be held, who become such on the faith of a statement by the directors of the condition of the bank which turns out to be false.⁷⁴

Notice not Necessary.—It is not necessary, in order to charge a cashier's sureties, to give them notice, where damages are caused by his default.⁷⁵

Period of Liability.—As to the time up to which the sureties on the cashier's bond are liable, it may be said that it is up to the time of his actual discharge,⁷⁶ or the expiration of the charter, or term of the bond. Beyond this they are not liable.⁷⁷ And in *Grocer's Bank v. Kingman*,⁷⁸ it was held that where the sureties undertake to save the bank harmless from every loss that may arise from the cashier's mistakes, as well as from losses arising from his fraud or negligence in the performance of his duties, they are, by an increase of the capital stock of the bank after the making of the bond, exonerated from liability for his acts after the additional capital has been put in.

So, no action can be maintained against the

⁶³ *American Bank v. Adams*, 12 Pick. 303; *State Bank v. Chetwood*, 8 N. J. L. 28. And see *Mussey v. Eagle Bank*, 9 Metc. 306; *Citizens' Bank v. Wiegand*, 12 Phila. 496.

⁶⁴ *Minor v. Mechanics' Bank*, 1 Pet. 46; *Bank of Washington v. Barrington*, 2 Pa. 27. But see *Dedham Bank v. Chickering*, 4 Pick. 314.

⁶⁵ *Market Street Bank v. Stumpe*, 2 Mo. App. 545.

⁶⁶ *Taylor v. Bank of Kentucky*, 2 J. J. Marsh. 568.

⁶⁷ *Bank of United States v. Daudridge*, 12 Wheat. 64; *Union Bank v. Ridgely*, 1 Har. & G. 413, 429. And see *Dedham Bank v. Chickering*, 3 Pick. 335.

⁶⁸ *Bank of United States v. Daudridge*, *supra*.

⁶⁹ *Pendleton v. Bank of Kentucky*, 1 T. B. Mon. 176.

⁷⁰ *Pendleton v. Bank of Kentucky*, *supra*.

⁷¹ *Barrington v. Bank of Washington*, 14 Serg. & R. 405.

⁷² *Huntsville Bank v. Hill*, 1 Stew. 201.

⁷³ 26 N. W. Rep. 282.

⁷⁴ *Graves v. Lebanon Nat. Bank*, 10 Bush. 28.

⁷⁵ *State Bank v. Chetwood*, 8 N. J. L. 1.

⁷⁶ *McGill v. Bank of United States*, 12 Wheat. 511. And see *Exeter Bank v. Rogers*, 7 N. H. 21.

⁷⁷ *Thompson v. Young*, 2 O. 334. And see *Bank of Washington v. Barrington*, 2 Pa. 27. But consult *Union Bank of Georgetown v. Forrest*, 3 Cranch C. Ct. 218.

⁷⁸ 82 Mass. 478.

sureties for something occurring after a reappointment, and after the giving and acceptance of a new bond.⁷⁹ L. K. MICHILLS.

Akron, O.

⁷⁹ Frankfort Bank v. Johnson, 23 Mo. 322. But see Amherst Bank v. Root, 2 Metc. 522.

TRUST — TRUSTEE — PURCHASE BY, OF TRUST PROPERTY — WHEN VOIDABLE — ELECTION OF BENEFICIARY.

SCHOLLE v. SCHOLLE.

New York Court of Appeals, Jan. 19, 1886.

TRUSTEE—Purchasing Trust Property. — The general rule is that the purchase by a trustee, directly or indirectly, of any part of a trust estate which he is empowered to sell as trustee, whether at public auction or private sale, is voidable at the election of the beneficiaries of the trust; and this rule will be enforced without regard to the question of good faith or adequacy of price, and whether the trustee has, or has not a personal interest in the same property.

But where a trustee has an interest to protect by bidding at a sale of the trust property, and he makes special application to the court for permission to bid, which, upon the hearing of all the parties interested, is granted by the court, then he can make a purchase which is valid and binding upon all the parties interested, and under which he can obtain a perfect title.

Appeal from order of general term of the Superior court of the city of New York, affirming an order of the special term requiring the appellant to complete the purchase of the lots made by him at the sale in this action. The facts appear in the opinion.

Alex. B. Johnson, for appellant; *Ferdinand R. Minraz*, for respondents.

EARL, J., delivered the opinion of the court.

Prior to March 15, 1880, Abraham Scholle, together with the plaintiff, William Scholle, and the defendant, Jacob Scholle, were seized of certain real estate in the city of New York, as equal tenants in common. Abraham Scholle died in March, 1880, leaving a will whereby he appointed his brothers, Jacob and William Scholle, his widow, Barbetta, Julius Ephrann, and Simon Davidson, executors and trustees, all of whom but William Scholle qualified as such. Davidson was subsequently discharged by order of the surrogate's court and the other three acted as sole trustees and executors of the will. The will was also admitted to probate in California, and there William Scholle qualified as executor. By the provisions of the will, the testator gave his executors power to sell his real estate and he directed them to sell the same and invest the proceeds as directed, and pay the income thereof to his children, during their lives, and at their deaths, the share of each parent was to go to his or her children *per stirpes*.

The testator left two sons and two daughters, the daughters having infant children living, all of whom were made defendants in this action, and the infants were represented therein by a guardian *ad litem* duly appointed. The action was brought by William Scholle for the partition of all the real estate held in common by him, Jacob, and the testator. The action was referred to a referee, who reported that a large portion of the property was incapable of partition and would have to be sold, and a judgment in accordance with this report was entered. Thereupon plaintiff and the defendant, Jacob Scholle, presented to the court their petition, setting forth their individual interests in the property and various other facts, and asking for leave to buy at the sale.

The petition came on for a hearing before the court on notice to all parties including the guardian *ad litem* for the infants and all the other beneficiaries under the bill, and the matter was referred to a referee to take testimony and report to the court together with his opinion whether Jacob and William Scholle could with safety be permitted to purchase. The referee after hearing the testimony, and full notice to all parties, reported that Jacob and William Scholle should be permitted to purchase, provided their bids were made subject to confirmation by the court, both as to their adequacy and fairness, and his report was subsequently confirmed by the court on notice to all parties. The property was subsequently exposed for sale by the referee appointed for that purpose, and Jacob and William Scholle were the highest bidders for property amounting in value to about \$200,000. In pursuance of the directions contained in the interlocutory judgment, the same referee summoned all the parties before him, and took evidence as to the adequacy of the bids and prices paid, and after hearing all the parties found that they were adequate and so reported to the court, and his report was confirmed. Subsequently William and Jacob Scholle made a petition to the court to be relieved from their purchase on the ground that they could not obtain a good title because they were trustees named in the will, and at the same time the referee, appointed under the interlocutory judgment to sell the property, made a motion to compel them to complete their purchase. Both motions came on before the court at the same time on due notice to all parties interested in the property, including all the beneficiaries, and the court made an order directing William and Jacob Scholle to complete their purchase and denied their application to be relieved therefrom, and they appealed from that order to the general term, and from affirmance there to this court.

The general rule is not disputed that the purchase by a trustee, directly or indirectly, of any part of a trust estate, which he is empowered to sell as a trustee, whether at public auction or private sale, is voidable at the election of the beneficiaries of the trust; and this rule will be enforced without regard to the question of good

faith or adequacy of price, and whether the trustee has or has not a personal interest in the same property. Nor is it sufficient to enable a trustee to make such a purchase that the formal leave to buy, which is usually granted to the parties in a foreclosure or partition sale, have been inserted in the judgment. Such a provision is inserted merely to obviate the technical rule that parties to the action cannot buy, and is not intended to determine equities between the parties to the action, or between such parties and others. *Fulton v. Whitney*, 66 N. Y. 548; *Torrey v. Band of New Orleans*, 9 Paige, 649; *Conger v. Ring*, 11 Barb. 356. But where the trustee has an interest to protect by bidding at a sale of the trust property, and he makes special application to the court for permission to bid, which upon the hearing of all the parties interested is granted by the court, then he can make a purchase which is valid and binding upon all the parties interested, and under which he can obtain a perfect title. See *DeCaters v. DeChaumont*, 3 Paige, 178; *Gallatin v. Cunningham*, 8 Cowen, 361; *Davone v. Fanning*, 2 Johns. Ch. 252; *Bergen v. Bennett*, 1 Cal. Cas. 20; *Chapin v. Weed*, 1 Clark Ch. 469; *Colgate, ex'r v. Colgate*, 23 N. J. Eq. 372; *Froneberger v. Lewis*, 79 N. C. 426; *Faucett v. Faucett*, 1 Bush, 511; *Michoud v. Girod*, 4 How. (U. S.) 503; *Campbell v. Walker*, 5 Vesey, Jr. 678; *Farmer v. Dean*, 32 Beav. 327; *Potter's Willard's Eq. Jur.* 607; *Lewin Trusts*, 7th ed., 443; *Godefroy Trusts*, 184. Here, upon notice to all the beneficiaries, an order was made allowing these appellants to bid. After they had made their bids and signed the terms of sale, a further hearing was had upon notice to all the parties as to the fairness of the sales and the adequacy of the prices, and the sales were approved and confirmed by the court. Under such circumstances there can be no doubt that those appellants would get a good and perfect title to the lands purchased by them. And their title would be good, not only as against all the living parties to the suit, but as against unborn grandchildren, if any such should hereafter come into being. Code of Civ. Pro., §§ 1557-1577.

The order appealed from should, therefore, be affirmed, with costs.

All concur, except Miller J., absent.

Order affirmed.

The control of trusts and trustees belongs to equity, for trusts were not strictly cognizable at common law, but solely in equity;¹ for the most part, at least, there being few cases, except bailments and rights founded in contracts, and remediable by assumpsit, as for instance, in actions for money had and received, in which courts of law can give a remedy.² Courts of equity exercise a jealous and scrupulous examination

into dealings between the trustee and *cestui qui trust*.³ The trustee's duties are, to carry out the trust, to use care and diligence, to act with good faith.⁴ Hence, the trustee can acquire in and for his own benefit the trust property, only as he can do so consistently with the sweeping and overlapping requirements.⁵ The restrictions grow out of the relationship, and the relationship constitutes the protection to the *cestui qui trust*, not the good faith or want thereof of the trustee,⁶ for it is for the former to abide or not by the transaction, and his action is controlling.⁷ The general rule follows that a trustee may not so manage the trust as to gain personal advantage other than that contemplated by the inception of the trust, *e. g.*, his regular compensation, and if he does, the gain or advantage may be claimed by the *cestui qui trust*.⁸

He can not be allowed by his acts or declarations to work a disadvantage to a sale of the trust property.⁹ The *cestui qui trust* may claim the trust property in whatsoever hands he may find it, or through whatever hands it may have passed, except where the rights of *bona fide* purchasers for value without notice intervene.¹⁰ But not to commit a breach of peace.¹¹ It is not necessary to trace the trust fund into some specific property in order to enforce the trust. If it can be traced into the estate of the defaulting agent or trustee, this is sufficient.¹² If property is bought with trust funds by a trustee, it will be impressed with the original trust.¹³ If the trustee speculates with trust funds, the advantage may be claimed by the *cestui*.¹⁴ The latter may take the profits, or the principal with compound interest;¹⁵ or he may proceed against the trustee personally or follow up the property which was the object of the trust.¹⁶ But he cannot proceed

³ 1 Story Eq. Jur. § 321; Willard's Eq. 187; *Puzev v. Senier*, 9 Wis. 370; *Stewart v. Kissam*, 2 Barb. Sup. Ct. 494; *Davone v. Fanning*, 2 J. C. R. 252; *Gibson v. Jeyes*, 6 Ves. Jr., 286.

⁴ 2 Pomeroy's Eq. par. 1061; See *Graham v. King*, 50 Mo. 632; *Howard v. Thornton*, id. 291.

⁵ *Davone v. Fanning*, *supra*; *Farnum v. Brooks*, 9 Pick., 212.

⁶ *Davone v. Fanning*, *supra*.

⁷ *Campbell v. Walker*, 5 Ves. 678, 680; *Olliver v. Platt*, 3 How. 333; *Pooley v. Quilter*, 2 DeG. & J., 327; *Harrison v. Monk*, 10 Ala. 185; *Crane v. Mitchell*, Sandf. Ch. 251; *Green v. Winter*, 1 Johns. Ch. 27; *Harvey v. Mancius*, 7 Johns. Ch. 174.

⁸ See note to 2 Story Eq., par. 1075, 1076.

⁹ *Goodwin v. Mix*, 38 Ill. 115; *Goode v. Comfort*, 39 Mo. 313; *Thomas v. James*, 32 Ala. 733.

¹⁰ See 2 Pom. Eq. par. 1048, 1058; *Olliver v. Platt*, *supra*; *Cook v. Tullis*, 18 Wall. 332; *U. S. v. State Bank*, 83 U. S., 30; *Nat. Bank v. Ins. Co.*, 104 U. S. 54; *Waife v. Bate*, 9 B. Mon. (Ky.), 208; *Shannon's App.* 27 Pa. St. 64; *Her's Est.* 1 Grant (Pa.) Cas. 272; *Rosenbergers App.* 26 Pa. St. 67; *Treadwell v. McKean*, 7 Bax. (Tenn.), 201; *Miller v. Birdsong*, id. 531.

¹¹ *Brush v. Blanchard*, 91 Ill. 31.

¹² *Frith v. Cartland*, 2 Hern. & M. 417; *Pennell v. Deffel* 4 DeG. M. & G. 372; *Knottbull v. Hallett*, 13 Ch. Div., 696; *Nat. Bank v. Ins. Co.*, *supra*; *Van Alen v. Amer. Nat. Bank*, 52 N. Y. 1; *People v. City Bank of Rochester*, 96 N. Y. 32; *Farmers' & M. Nat. Bank v. King*, 57 Pa. St. 208; *Peak v. Elliot*, 30 Kan. 156; s. c., 1 Pac. Rep. 499; *McLeod v. Evans*, N. W. Rep. Vol. 28, No. 3, p. 173 (Wis.).

¹³ *Breit v. Yeaton*, 10 Ill. 242.

¹⁴ *Schneffelin v. Stewart*, 1 John. Ch. 620; *Ringgold v. Swain*, 1 Herr. & Gill, 11-89; *Harland's Acc.*, Rawle, 323.

¹⁵ 2 Kent Com. 230 (8 ed.); *Gully v. Dnnlap*, 24 Miss. 410; *Crowder v. Shackelford*, 35 Miss. 360.

¹⁶ *Flagg v. Mann*, 3 Grimm. 475, 486; *Calhoun v. Burnett*, 40 Miss. 599; *Roberts v. Mansfield*, 38 Ga. 452; *Freeman v. Cook*, 6 Ired. (N. C.) Eq. 379; *Hawkins v. Hawkins*, 1 Dru. & Sm. 75; *Norman v. Cunningham*, 5 Gratt. (Va.) 72; *Lathrop v. Hampton*, 31 Cal. 17.

¹ *Wadkins v. Holman*, 16 Pet. 26.

² Story's Eq. Jur. Vol. 2, p. 164, par. 961, 962; *Milf. Eq. Pl.* by Jar., 4; id. 133, 134; *Cooper on Eq. Pl. Int.* p. 27; 1 Bl. Com. 432; *Foubl. Eq. B. 2 Ch. 1*; 2 Pom. Eq., par. 78.

against both, nor can he claim profit¹⁷ of the investment together with the original fund and interest.¹⁸ So long as the property can be identified,¹⁹ it may be followed, whether the title was taken in the trustee or a third person with notice.²⁰ As to a purchaser with notice.²¹ But a purchaser without notice for a valuable consideration is fully protected.²² But the purchaser must clearly show that he is an innocent purchaser for value.²³ If he is a mere volunteer, the *cestui qui trust* may follow the property into his hands, whether he had notice or not.²⁴ But third parties cannot require the *cestui qui trust* to follow the trust property into the hands of purchasers for their protection.²⁵ And he cannot follow his property into the hands of a receiver, unless it can be identified.²⁶

If a trustee change the investment of trust property without an order of court, he acts at his peril.²⁷ And where a trust instrument provides for a certain investment for certain persons, consent of the *cestui qui trust* will not validate a change.²⁸ Nor if the change be contrary to the provisions of the trust instrument.²⁹ And where the trust property is inalienable by statute, the consent to a change by the *cestui* will not validate it.³⁰ If a sale of the trust property by the trustee

appears to be disproportionate and moved by the trustee's private interests, it will not be allowed to stand.³¹ So a sale to pay debts, but disadvantageous to the trust property or interests.³² But mere inadequacy of price will not invalidate a sale.³³ If, on a sale by the trustee the property cannot be identified, the trustee is personally liable.³⁴ But not if he has acted with good faith, or with the consent of the *cestui* in a proper case.³⁵ As to money.³⁶ But a court may direct a change to protect the trustee.³⁷ But the trustee cannot set up his office to avoid the sale for his own benefit.³⁸ He cannot dispute the trust, nor set up adverse title.³⁹ He cannot make admissions against trust fund or the *cestui*.⁴⁰ A husband who is trustee for his wife cannot, against her will, grant a license to cut timber off from trust property, nor submit the question of the right to do so to arbitration.⁴¹ A trustee cannot settle a debt due him as trustee by cancelling one due from him individually to the trust debtor.⁴² Nor can a trustee deed trust property to his wife—she then has only an equity subservient to that of the *cestui*.⁴³ He will not be allowed to derive a profit from the trust property.⁴⁴ And the great general rule is that he cannot purchase the trust property himself.⁴⁵ Notwithstanding the *cestui* consents that trust funds remain in the trustee's hands, it is still a debt due by

¹⁷ *Barker v. Barker*, 14 Wis. 181; See *Bounce v. Holland*, 68 Ga. 718.

¹⁸ *Baker v. Dishrow*, 25 Hun. 29; *Gaines v. Ligardi*, 1 Woods, 56.

¹⁹ *Ferris v. Van Vechten*, 78 N. Y. 118,

²⁰ *Ex parte Montefiore*, 9 Bank Reg. 171; *Georges v. Pyle* 7 Brr. C. C. 221; *S. P. Pierce v. McKesham*, 3 Watts & S. (Pa.) 290; *Bush v. Strohle*, (S. C.) Eq. 377; *Bonsall's App.* 1 Rawle, (Pa.) 274; *Pailey v. Ingles*, 2 Paige, 278; *Kaufman v. Crawford*, 9 Watts & S. (Pa.) 234; *Hetta v. Richmond, R. R. Co.*, 4 Gratt. (Va.) 482; *Barkedale v. Finney*, id. 338; *Turner v. Pettigrew*, 9 Humph. (Tenn.) 428; *Blaisdell v. Stevens*, 16 Vt. 179; *Moffat v. McDonald*, 11 Humph. (Tenn.) 457; *Bonner v. Mullins*, 4 Rice. (S. C.) Eq. 80; *Sollee v. Croft*, 7 id. 84; *Martin v. Greer*, 1 Ga. Dec. 109; *Cheshies v. Cheshies*, 3 Ired. (N. C.) Eq. 569; See *Parker v. Jones*, 67 Ala. 234; *Allen v. Russell*, 78 Ky., 105; *Lathrop v. Bampton*, *supra*.

²¹ *McLeod v. First Nat. Bank*, 42 Miss. 99; *Jones v. Haddock*, 41 Ala. 262; *Joor v. Williams*, 38 Miss. 548; *Lathrop v. Bampton*, 31 Cal. 17; *Aynesworth v. Halderman*, 2 Dana (Ky.) 655; *Ryan v. Doyle*, 31 Ia., 58; *Smith v. Walter*, 49 Mo. 320; *Joiner v. Cowling*, 17 Hun. 256; *Liggett v. Wall*, 2 G. K. Morse, 149; *Denn v. McKnight*, 6 Halst. (N. J.) 385; *Hood v. Falmstock*, 1 Pa. St. 470; *Wright v. Dame*, 22 Pick. 55; *Wigg v. Wigg*, 1 Atk. 382.

²² *Gerrard v. Saunders*, 2 Ves. 457; *Fagg's Case*, 1 Vern. 52; 1 Ch. Cas. 68; *Willoughby v. Willoughby*, 1 T. R. 763; *Boone v. Ohiler*, 10 Pet. 177; *Varick v. Briggs*, 6 Paige, 325; *High v. Batte*, 10 Yerg. (Tenn.) 335; *Halstead v. Bk.* 4 J. J. Marsh, (Ky.) 534; *Dixon v. Caldwell*, 15 Ohio St. 412; *Dillaye v. Com. Bank*, 51 N. Y. 345; *Colesbury v. Dart*, 58 Ala. 573; *Hamilton v. Mount City Mut. S. Ins. Co.* 3 Tenn. Ch. 124; *Heilner v. Imbrie*, 6 Serg. & R. (Pa.) 401; *Tomkins v. Powell*, 6 Leigh (Va.), 576.

²³ *Marshall v. Frank*, 8 Pr. Ch. 480; *Dobson v. Leadbeater*, 13 Ves. 230; *Hardingham v. Nichols*, 3 Atk. 304; *Kelsal v. Bennett*, 1 id. 522; *Hughes v. Garner*, 2 Younge & C. Exch. 328; *Hughes v. Garth*, Amb. 421.

²⁴ *Mansell v. Mansell*, 2 P. Wms. 679; *Saunders v. Dehen*, 2 Vern. 27; *Pye v. George*, 2 Yaek. 680; *Boursett v. Savage*, L. R. 2 Eq. 134; *Syford v. Thurston*, 16 N. H. 399.

²⁵ *Barr v. Cubbage*, 52 Mo. 404; *Smith v. Bowen*, 35 N. Y. 83.

²⁶ *Illinois Trust & Sav. Bank v. Buffalo Bank*, 15 Fed. Rep. 858.

²⁷ *Carniverse v. Bourguin*, 2 Ga. 15; See *Quick v. Fisher*, 9 N. J. Eq. 802; *Washington v. Emery*, 4 Johns. Eq. 32.

²⁸ *Wood v. Wood*, 5 Paige, 596; *Ex parte Calmes*, 1 Hill, (S. C.) Ch. 112; See *Worrell's App.* 23 Pa. St. 44.

²⁹ *Mundy v. Nawter*, 3 Gratt. (Va.) 518.

³⁰ *Matter of Turner*, 10 Barb. 552; *Troy v. Troy*, 1 Bush (N. C.) Eq. 85.

³¹ *Wormley v. Wormley*, 8 Wheht. 421; *Cadwell v. Brown*, 36 Ill. 103.

³² *Hunt v. Bass*, 2 Dev. (N. C.) Eq. 292.

³³ *Singleton v. Scott*, 11 Ia. 539; *Franklin v. Osgood*, 14 Johns. 527; *Hintz v. Stingel*, 1 Md. Ch. 283; *Johnson v. Dorsey*, 7 Gill (Md.) 369; *Gibbs v. Cunningham*, 1 Md. Ch. 44.

³⁴ *Lathrop v. Bampton*, *supra*; See *Hunt v. Bass*, 2 Dev. (N. C.) Eq. 292.

³⁵ *Campbell v. Miller*, 38 Ga. 304; But see *Plympton v. Plympton*, 6 Allen, 178, as to scope of consent.

³⁶ *School Trustees v. Kerwin*, 25 Ill. 73.

³⁷ *Wood v. Wood*, *supra*; *Burrill v. Shiel*, 2 Barb. 457; *N. A. Coal Co. v. Dyett*, 7 Paige.

³⁸ *McClure v. Miller*, 1 Bailey (S. C.) Ch. 107.

³⁹ *Benjamin v. Gill*, 45 Ga. 110; See *Lockhart v. Camfield*, 48 Miss. 470.

⁴⁰ *Thomas v. Bowman*, 29 Ill. 426; Same, 30 Ill. 84; *Mayraut v. Gingward*, 3 Strob. (S. C.) Eq. 112; *McKissick v. Pickle*, 16 Pa. St. 140; *Nordauns v. McLeran*, 4 Melvin, 3 Johns. Eq. (N. C.) 195.

⁴¹ *Thomas v. James*, 32 Ala. 723.

⁴² *Sweet v. Jeffrie*, 67 Mo. 420.

⁴³ *Leitch v. Wells*, 48 Barb. 637.

⁴⁴ *Coltrane v. Worrell*, 30 Gratt. 434; *Loring v. Sallabury*, 125 Mass. 138.

⁴⁵ *Sallee v. Chandler*, 26 Mo. 124; *Jamison v. Glascock*, 29 Mo. 191; *Flagg v. Ely*, 1 Edm. see Cas. (N. Y.) 306; *Davis v. Wright*, 2 Hill (S. C.), 560; *Freeman v. Harwood*, 49 Me. 195; *Puzev v. Senier*, 9 Wis. 370; *Cook v. Berlin Mill*, 43 Wis. 435; *In re, Taylor Orphan Ass.* 36 Wis. 534; *Carson v. Marshall*, 37 N. J. Eq. 213; *Dodge v. Stevens*, 34 N. Y. 209; *Cavagnaro v. Don*, 63 Cal. 227; *Toole v. McKeenan*, 48 N. Y. Sup. C. 163; *Hollman's Estate*, 13 Phila. 562; *McAleer's App.* 99 Pa. St. 128; *Munn v. Berger*, 70 Ill. 604; *Brush v. Sherman*, 80 id. 160; *Star Fire Ins. Co. v. Palmer*, 41 N. Y. Sup. Ct. 267; *Spencer's App.* 80 Pa. St. 317; *Un. Slate Co. v. Tilton*, 69 Me. 244; *James v. James*, 55 Ala. 525; *Higgins v. Curtis*, 32 Ill. 28; *Ferguson v. Lowry*, 54 Ala. 510; *Mitchoud v. Girod*, 4 Hov. 508; *Childs v. Braze*, 4 Paige, 309; *DeCaters v. LeRoy de Chaumont*, 3 id. 78; *Boyd v. Hawkins*, 2 Ired. (N. C.) Eq. 304; *Campbell v. Johnson*, 1 Sandf. Ch. 148; *Thorp v. McCullum*, 6 Ill. 614; *Cram v. Mitchell*, 1 Sandf. Ch. 251; *Lenox v. Nortribe*, *Hempst.* 251; *Renew v. Butler*, 30 Ga. 954; *Remick v. Butterfield*, 31 N. H. 70; *Den v. Wright*, id. 175; *Sheldon v. Sheldon*, 13 Johns. 220; *Abert v. Hammel*, 18 N. J. L. 73; *Bank of Orleans v. v. Torrey*, 7 Hill, 260; *Freeman v. Harwood*, 49 Me. 195; *Boynnton v. Braslow*, 53 Me. 262; *Deaton v. Cobb*, 1 Dev. (N. C.) Eq. 459; *Sloo v. Law*, 3 Blatch. 439; *Page v. Naglee*, 6 Cal. 241; *Buell v. Buckingham*, 16 Ia. 284; *Pugh v. Bell*, 1 J. J. Marsh (Ky.), 399;

the latter in his fiduciary capacity.⁴⁵ A sale by a trustee to himself is voidable.⁴⁷ And a breach of trust may be formally released by the *cestui*.⁴⁸ After the lapse of time, the *cestui* will be presumed in a proper case to have consented to or acquiesced in the disposition of the trust property.⁴⁹ The trustee may purchase from third parties to whom he has sold,⁵⁰ if the sale was in good faith,⁵¹ but he must, at least, prove full price.⁵² A purchase from a *cestui qui trust* by a trustee will only be sustained when it is *bond fide*, understood and agreed that the trust relation is dissolved, and no objection cognizable in equity arises.⁵³ The rule is stated to require on the part of the trustee, no fraud, no concealment, and no advantage of information.⁵⁴ But it was held that an administrator, who was interested in the estate, and the sale was fairly conducted, that he might purchase himself.⁵⁵

While the *cestui* may consent to such a sale or ratify it, the mere receipt and acceptance by the beneficiary is not such a ratification as will prevent him from avoiding the sale.⁵⁶

In some cases the rule is stated that the trustee cannot purchase unless he acts with the utmost fairness.⁵⁷ But the purchase by a trustee cannot be questioned by third parties.⁵⁸ A trustee for creditors cannot purchase trust property to hold for his own benefit.⁵⁹

A sale by a trustee to a corporation of which he is owner of a large number of stocks, is invalid.⁶⁰ But where a trustee's public sale was duly advertised and fairly conducted, the fact that the sale was to a corporation which was the payee of the note secured by the trust deed, and was for a grossly inadequate sum, and that the trustee was the actuary of the corporation, was not sufficient to set aside such sale.⁶¹ The fact that a trustee who holds certain mortgage securi-

ties, makes a declaration of trust to a bank in which it is stated that he held the mortgage securities to secure the indebtedness of the *cestui qui trust* to the bank, will not prevent the latter from buying in other claims against the estate.⁶² A sale by trustees of a corporation who are trustees of another, of the property of the former to the latter, cannot stand.⁶³ Nor may a trustee sell to his co-trustees.⁶⁴ But to render such a sale utterly void, it is necessary to connect the purchaser with the acts of the seller.⁶⁵ Nor can a trustee purchase at a sale under a prior incumbrance to the prejudice of the *cestui que trust*.⁶⁶ He cannot defeat the trust by a purchase at a partition sale.⁶⁷ In such a case, the statute of limitations cannot be set up by him against the *cestui que trust*.⁶⁸ The intervention of third parties in an indirect sale by a trustee to himself is regarded with suspicion,⁶⁹ and will be scrupulously guarded,⁷⁰ as where a trustee caused a sale to his son and afterwards took the property for him.⁷¹ An agent cannot sell his principal's property for the purpose of repurchasing it.⁷² So, if executors appropriate assets to pay personal debts with the knowledge of the creditor, the latter may be required to repay the money to the estate.⁷³ Where a trustee loaned money to his *cestui*, a profligate, the court refused to authorize him to sell trust property to reimburse himself.⁷⁴ And if a trustee is incompetent to purchase for himself, he cannot purchase for third parties.⁷⁵

It is a violation of the trust for several persons holding together a fiduciary relation to others, to contract with one or more of their own number in matters relating to such trust. So a contract between a school board and one of its members for the building of a school house, is voidable in equity by the district, and the fact that a majority of the board may act in letting such contract does not alter the rule, nor the fact that the contractor did not act with the board nor seek to influence its action.⁷⁶

Equity deals with the directors of a private manufacturing corporation as trustees of the corporation. Where a contract of sale of real property of their *cestui que trust* to a stranger remains executory, trustees cannot purchase of such stranger. Where the nature of the agency has given the agent control of the principal's property, and peculiar opportunity of knowing its condition and value, a purchase by him will be voidable, unless he show affirmatively fair dealing and that he imparts to his principal his own knowledge.⁷⁷

Where a party conveys away lands purchased by him with funds held in trust for another, and which

Richardson v. Spencer, 18 B. Mon. (Ky.) 450; Smith v. Townsend, 27 Md. 368; Emerson v. Atwater, 7 Mich. 12; Jones v. Smith, 33 Miss. 215; Stone v. Wickson, 10 Mo. 75; Newcomb v. Brooks, 16 W. Va. 32.

⁴⁵ Crisfield v. Steele, 55 Md. 192.

⁴⁶ Un. Slate Co. v. Tilton, 69 Me. 244; See last citations.

⁴⁷ Oaks v. Barlow, 5 Redf. (N. Y.) 408.

⁴⁸ Williams v. First Presb. Soc. 1 Oh. St. 478; North Car. R. Co. v. Drew, 3 Woods C. Ct. 691; Connolly v. Hammond, 51 Tex. 635.

⁴⁹ Mortman v. Skinner, 12 N. J. Eq. 358; Jackson v. Brooks, 8 Wend. 426; DeBevoise v. Sanford, 1 Hoffm. 192; Birdwell v. Cain, 1 Coldw. 301.

⁵⁰ Creveling v. Fritts, 24 N. J. Eq. 134.

⁵¹ May v. May, 7 Fla. 207.

⁵² Becket v. Tyler, 3 MacArthur, 319.

⁵³ 1 Storey Eq. Jur. § 321, note 4; See Brannon v. Oliver 9 Stewart, 47; Julian v. Reynolds, 8 Ala. 680; Stallings v. Freeman, 2 Hill Ch. 401; Pratt v. Thornton, 33 Me. 335; But see McCartney v. Calhoun, 17 Ala. 301; Marshall v. Stevens, 8 Humph. 159; Beeson v. Beeson, 9 Barr. 279; McKinley v. Irvine, 13 Ala. 681.

⁵⁴ Frazer's Ex. v. Lee, 42 Ala. 25.

⁵⁵ Munn v. Berger, *supra*; Bush v. Sherman, *supra*; Star Fire Ins. Co. v. Palmer, 41 N. J. Sup. 267; Spencer's App. *supra*; Tatum v. McLellan, 50 Miss. 1; Un. Slate Co. v. Tilton, *supra*; James v. James, *supra*; Higgins v. Curtiss, 83 Ill. 28; Ferguson v. Lowry, *supra*.

⁵⁶ Schwartz v. Wendell, Walk. (Mich.) 267; Kennedy v. Kennedy, 2 Ala. 571; Staats v. Bergen, 17 N. J. Eq. 654; Coffee v. Ruffin, 4 Cold. (Tenn.) 487; Puzey v. Senier, *supra*.

⁵⁷ Baldwin v. Allison, 4 Minn. 25; McKinley v. Irvine, 13 Ala. 681; Woelper's App. 2 Pa. St. 71; Pointer v. Henderson, 7 Pa. St. 48; McNish v. Pope, 8 Rich. (S. C.) Eq. 112; Kemp v. Chalfant, 7 Minn. 497; See Jackson v. Walsh, 14 Johns. 407.

⁵⁸ Campbell v. McLain, 51 Pa. St. 200.

⁵⁹ Robbins v. Butler, 24 Ill. 387; See James v. Cowing, 17 Hun. 356.

⁶⁰ Clark v. Trust Co. 100 U. S. 149.

⁶² Detroit Savings Bank v. Truesdell, 38 Mich. 430.

⁶³ Wardens, etc. v. Rector, etc. 45 Barb. 356.

⁶⁴ Ringgold v. Ringgold, 1 Har. & G. Md. 11.

⁶⁵ Beeson v. Beeson, 9 Pa. St. 279.

⁶⁶ Slade v. Van Vechten, 11 Paige, 21; Van Epps v. Van Epps, 9 Paige, 237; Jewett v. Miller, 10 N. Y. 402.

⁶⁷ Williams v. Van Tuya, 2 O. St. 336.

⁶⁸ Williams v. Van Tuya, *supra*.

⁶⁹ Abbott v. Am. etc. Co. 33 Barb. 578; Smith v. Isaacs, 12 Mo. 106.

⁷⁰ Wortman v. Skinner, 12 N. J. Eq. 358.

⁷¹ Murray v. Vanderbilt, 39 Barb. 140.

⁷² MacGregor v. Gardner, 14 Ia. 326; Morris v. Joseph, 1 W. Va. 256.

⁷³ Anstin v. Willson, 21 Ind. 253.

⁷⁴ McKnight v. Wilson, 2 Jones, (N. C.) Eq. 491.

⁷⁵ Harnley v. Oramer, 4 Cow. 717; Gould v. Gould, 36 Barb. 270.

⁷⁶ Pickett v. Sch. D. No. 1, 25 Wis. 551; Cumberland Coal Co. v. Sherman, 30 Barb. 563; Whitecote v. Lawrence, 3 Vesey, 470; Story on Agency, § 210, et seq.; People v. Town Board of Overysel, 11 Mich. 233.

⁷⁷ Crook v. Berlin, etc. Co. 43 Wis. 433; Cook v. Sherman, 4 McCrary C. Ct. 20.

he has failed to pay, and thus procures the purchase of said land from his grantee by a third party with means of his own, and the conveyance of the same to his wife, the trust springs upon the land.⁷⁸

An administrator cannot become the purchaser of outstanding securities or claims against the estates, and then enforce them against the estate, but they became extinguished in his hands, and he can only be allowed what he actually paid for them.⁷⁹

A trustee cannot award his own compensation.⁸⁰

A wrongful purchase by a trustee of the trust property is not served by intermediate transfers.⁸¹

A trustee purchaser must show affirmatively the *bona fides* of the transactions; all presumptions are against it.⁸²

Where a majority of trustees of a religious society executed a judgment note in the corporate name to persons who had a claim against the society, constituting a lien on the church building, and included in such note the amount of certain claims in favor of such trustees personally against the society, it was held a violation of their duty as trustees.⁸³ A trustee cannot pay his own claim due from the *cestui que trust* who disputes it, out of trust funds.⁸⁴ But sales by a trustee to himself may be ordered by a court having competent jurisdiction, protecting the interests of all parties.⁸⁵ Equity has jurisdiction to decree a sale of trust property from its inherent nature.⁸⁶ In such a case the trustee will be protected.⁸⁷ But where an investment was made by a trustee with the approval of the court in a State loan the interest on which was payable in August and February, and the bonds therefor being deposited in a bank, the latter's cashier drew the interest, and the State repaid the loan soon after the investment, of which the trustee had no notice till long after, he was held not liable for the interest which had ceased.⁸⁸ But the fact that securities taken by a trustee in an investment of the trust money have been set apart for the beneficiary upon a decree of the surrogate, the beneficiary consenting, will not necessarily relieve the trustee of liability for a negligent investment.⁸⁹

Where, by the terms of a will, an executor also became a trustee or a donee of a trust power, powers being conferred and duties imposed on him, not as incidents of his office as executor, but as belonging to that of trustee, the trust and executorship are distinguishable and separate, and a separation commission may be allowed; but such separation may be determined without the aid of a judicial proceeding.⁹⁰

F. C. HADDOCK,

Oshkosh, Wis.

⁷⁸ Gunn v. Blair, 9 Wis. 352.

⁷⁹ Gillett v. Gillett, 9 Wis. 185; Everston v. Tappen, 5 John Ch. 497; Stanley v. Mancina, 7 Id. 179; Baugh v. Walker, 77 Va. 99.

⁸⁰ Gasse v. Beall, 3 Wis. 368.

⁸¹ Ely v. Wilcox, 26 Wis. 91; O'Dell v. Rogers, 44 Wis. 136.

⁸² Lathrop v. Pollard, 6 Col. 424.

⁸³ The U. B. Ch. New London v. Vandusen, 37 Wis. 54.

⁸⁴ Terry v. Bale, 1 Dem. (N. Y.) 452.

⁸⁵ Ansley v. Pace, 68 Ga. 402.

⁸⁶ Walker v. Singer, 80 Ky. 620.

⁸⁷ Faucett v. Faucett, 1 Bush (Ky.) 511; Oumberland, etc. Co. v. Sherman, 20 Md. 117; Ames v. Port Huron, etc. Co. 11 Mich. 139.

⁸⁸ Witmer's App. 87 Pa. St. 120.

⁸⁹ Roosevelt v. Roosevelt, 6 Abb.N. Cas. 447.

⁹⁰ Hurlburt v. Durant, 88 N. Y. 131.

BANKING — COMMERCIAL LAW — CERTIFIED CHECK—NEGLIGENCE OF COLLECTING BANK.

DROVERS ETC. BANK v. ANGLO-AMERICAN ETC. COMPANY.

Supreme Court of Illinois, May 15, 1886.

In the case of a certified check, the bank certifying the check is primarily liable for its payment, and it is negligent in a bank or agent for collection of such check to send it to the certifying bank itself for payment.

STATEMENT OF THE CASE.—The Anglo-American etc. Co., placed in the hands of the Drovers' etc. Bank, a check drawn and certified by Rice & Messmore, bankers of Cadillac, Michigan. The Drovers' Bank forwarded the check for collection to Rice & Messmore themselves. The check was not paid, and the Anglo-American Company brought suit for its amount against the Drovers' Bank and recovered judgment. The bank appealed.

Sleepers & Whiton, for appellant; *Page & Booth*, for appellee.

SCHOFIELD, J., delivered the opinion of the court.

Assuming, first, that appellant is not chargeable with knowledge of the existence of any other bank than that of Wright & Messmore, at Cadillac, Michigan; and second, that all the information it had, or could reasonably obtain at the time in respect to the financial standing of Rice & Messmore, was that they were solvent—were Rice & Messmore suitable agents to whom to transmit the certified check for collection after it was placed by appellee in appellant's possession? We do not think it is of much consequence whether appellant took the check as payment on account, or for the purpose merely of connection; for in either view it is entitled to show that the check, if it has discharged its duty by an effort to collect it, has availed nothing. Nor do we regard the evidence that certain banks in Chicago were in the habit of transmitting checks drawn on other banks, to those banks for collection, as affecting the present question. That evidence hardly comes up to the requirement of this court in regard to proof of a common-law custom, as laid down in *Turner v. Dawson*, 50 Ill. 85, and subsequent decisions of like import; but if it did, that custom does not include cases in which certified checks are sent for collection to the banks by which they are certified. In the case to which the evidence relates there is no primary liability on the part of the bank to which the check is sent; but in the case of a certified check the bank is primarily liable for its payment. So far as affects the present question, its position is precisely what it is where it makes its promissory note, bond, or other evidence of original indebtedness. *Bickford v. First Nat. Bank*, 42 Ill. 242, *et seq.*

The same person cannot be both debtor and creditor at the same time, and in respect of the same debt. How then can he, who is debtor, be at the same time, and in respect of the same debt, the disinterested agent of the creditor? Can it be said to be reasonable care, in selecting an agent, to select one known to be interested against the principal—to place the principal entirely in the hands of his adversary? The interest of the creditor, when his debtor is failing, is that steps be taken promptly, and prosecuted with vigor, to collect his debt. But at such a time the inclination of the creditor quite often, and it may be, sometimes his interest too, is to procrastinate. The debtor may often be interested in bringing about a compromise with his creditors whereby his debts may be discharged for less than their face. But the creditor, whose debt can all be collected by legal proceedings can never be interested in producing that result. Surely it could not be held reasonable care and diligence in an agent holding for collection the promissory note given by one individual to another individual, to send the promissory note to the maker, trusting to him to make payment, delay it, or destroy the evidences of indebtedness, and repudiate the transaction, as his conscience might permit. If this would not be held to be reasonable care and diligence, why should the same conduct be held to be reasonable care and diligence when applied to a bank?

It is to be borne in mind appellant was not compelled to accept this check for collection. It assumed the burden voluntary, and it ought to have known that the certified check was not delivered to it merely to have it exchanged for the draft of Rice & Messmore on some other bank; for if this had been desired, it ought to have known that appellee would have obtained such a draft instead of the certified check. If appellant had no correspondent or agent at Cadillac, through whom to make collection, it should have so informed appellee, and then acted on the directions of appellee. This would have imposed no hardship, and would have protected all. It is true that when appellee placed the check in the hands of appellant, it was to be presumed that it was intended that appellant should collect by the ordinary and usual mode of collecting in such cases; but neither from facts proved, nor as a matter of law, was it to be inferred that the check was to be surrendered to Rice & Messmore to use their pleasure as to the time and manner of payment and the disposition of the check. If appellant was willing to take the step without special stipulations, appellee was authorized to assume therefrom that it was able to collect, and that it had a proper agent through whom to do it promptly.

Indig v. City Bank, 80 N. Y. 106, cited by counsel for appellant, is entirely different in its material facts from that in the present case, as we conceive. There the bank owed no primary duty to pay. The note was sent to it for collection, not from itself, but from the maker of the

note. Its liability was solely that of an agent for collection.

In the recent case of *Merchant's Nat. Bank v. Goodman*, 2 Atl. Rep. 687, the Supreme Court of Pennsylvania however lay down the rule directly the opposite of that laid down by the New York Court of Appeals in *Indig v. City Bank*. The suit there involved the question whether the bank on which the check was drawn was a suitable agent to which to transmit the check for collection. And the court held that it was not. The court among other things said: "We think the principle may be stated as a true one, as the plaintiff's counsel have presented it, that no firm, bank, corporation, or individual can be deemed a suitable agent in contemplation of law, to enforce in behalf of another a claim against itself. The only safe rule is to hold that an agent with whom a check or bill is deposited for collection must transmit it to a suitable agent, to demand payment in such manner that no loss can happen to any party; whether he is depositor and indorser, or the indorsee and holder. * * * We interpret the cases to which we have referred as establishing the rule of transmission to a suitable correspondent or agent, to mean that such suitable agent must, from the nature of the case, be some one other than the party who is to make the payment. By no other rule can the rights of indorsers be protected, if it is the interest of the party who is to make payment to hinder, postpone or defeat payment. This imposes no hardship on the institution undertaking to transmit for collection, which can always protect itself by stipulating that special instructions by the depositor shall be given, which will save the collecting bank from all risk or peril."

It is unnecessary to say that we concur in these views any further than they are applicable to the facts before us.

We find no cause to disturb the judgment below and it is therefore affirmed.

NOTE.—To confide the collection of a money obligation to its payor would seem to be *quasi agnum committere lupo*, but it seems that an Illinois bank has come to grief by this precise form of misplaced confidence.

A certified check is an accepted 'bill of exchange, and all the legal attributes of the latter attach equally to the former.¹ The liability of the drawer of the check is precisely that of the drawer of a bill of exchange accruing only upon the protest for non-payment.² Certifying a check to be "good," is nothing more nor less than a promise by the bank to pay it when presented.³ It follows of course that by certifying a check, the bank becomes the principal debtor, its obligation to pay being absolute, while that of the drawer is subsidiary and contingent.

¹ *Harker v. Anderson*, 31 Wend. 373; *Conger v. Armstrong*, 8 Johns. Cas. 5.

² *Smith v. Jones*, 20 Wend. 192; *Merchanis' Bank v. Spioer*, 6 Wend. 445; *Murray v. Judah*, 6 Cow. 484; *Conroy v. Warren*, 8 Johns. Cas. 259; *Glenn v. Noble*, 1 Blackf. 104.

³ *Beckford v. First, etc. Bank*, 42 Ill. 242.

All this is familiar law; the only questions raised by the principal case are whether it is negligence in the collecting bank to entrust the collection of the check to the bank by which it has been certified and is to be paid, and whether there is such a custom established as would defeat the charge of negligence.

It is the duty of the bank receiving for collection commercial paper payable at a distant point to transmit it speedily to a suitable agent at that place for collection, and when that is done, its liability is at an end.⁴ The question is, who in case of the collection of a check is a suitable sub-agent. The Supreme Court of Pennsylvania says⁵ that the bank upon which the check is drawn is not, because its interest is plainly to "delay instead of speeding payment." *A fortiori*, is that the case, when by certifying the check it had become the principal debtor.

As to custom, the well established rule on that subject is that a custom to be binding must be uniform, long established, and generally acquiesced in, and so well known that parties contracted with reference to it, when nothing is said to the contrary.⁶

It is often said that extremes meet, and it is a little curious to find that the managers of the defendant bank in this case, acute, wide awake men of business, *au fait* in all financial matters, as they no doubt are, have committed the precise blunder, for which, in a well-worn joke, the newspapers have laughed at two unsophisticated Dutch farmers. They were neighbors, friends, both ready money men who had never in their lives given or received a promissory note, but it so happened that one had occasion to borrow a small sum of money from the other. He suggested that "in case of death," he should give his note for the amount, and the note was drawn, inartistically perhaps, but probably it had the root of the matter in it. The question then arose; who was to keep the note? There was no precedent in the experience of either. The lender, however, solved the problem, shrewdly saying; "You keeps it Hans, for then you will know when the time comes for you to pay it."—[ED. C. L. J.]

⁴ Merchants Bank v. Goodman, 2 Atl. R. 687, 690; Bank of Washington v. Triplett, 1 Pet. (U. S.) 25; Fahens v. Mercantile Bank, 23 Pick. 330; Dorchester Bank v. New Eng. Bank, 1 Cush. 182; East Haddam v. Scoville, 12 Conn. 308; Aetna Ins. Co. v. Alton Bank, 25 Ill. 247.

⁵ Merchants' Bank v. Goodman, *supra*.

⁶ Turner v. Dawson, 50 Ill. 85.

WILL—CONSTRUCTION OF — LEGATEE— EXECUTOR—LIABILITY OF — DEVISE— REVOCATION.

ESTHER ALICE LONGSTROTH v. JOHN FRED- ERICK GOLDING, EXECUTOR.

*New Jersey Court of Chancery.**

1. Under the following clause in a will: "Having \$2,000 out at interest at seven per cent., it is my will that the said sum shall be kept invested by my executor till my granddaughter, E. M. J. shall arrive at the age of twenty-five years, when I direct that the said sum of \$2,000 shall be equally divided between her and my husband. * * * In the event of my husband's death before my granddaughter arrives at the age of twenty-five years, his share of said \$1,000 to go

to his legal representatives or such person or persons, in such share or shares, as he may by will direct."—*Held*, that the gift of the \$2,000 was a general legacy, the testatrix's reference to its being "invested" in a particular way not being an important part of the description, and the \$2,000 being only a part of her whole investment, which was \$2,400; and *held, also*, that testatrix's husband having died before her, intestate, and the \$2,400 having all been paid in to testatrix during her lifetime, his share thereof (\$1,000), went to his legal representatives.

2. Under a devise of a house and lot, subject to a mortgage of \$8,000 thereon—*Held*, that the devisee was entitled to the benefit of a payment of \$1,000 made by the testatrix on account of the principal, after she had executed her will.

3. A general direction to two executors to pay testatrix's debts, and a devise to one of them, which he has accepted, neither renders him personally liable therefor nor the lands devised to him. Her debts are chargeable first on the residue, and the balance, if any, on the specific legacies and specific devises, ratably.

4. A share of the residue lapsed by the death of the legatee in the lifetime of the testatrix. *Held*, that she died intestate thereof; *held, also*, that, under the circumstances, that share was first liable for the payment of the debts and equally liable with the rest of the residue for the payment of the legacies. All the personal estate was bequeathed specifically, and the residue given in one mass after the gifts of the legacies, general and specific.

Bill for construction of will. On final hearing on pleadings and proofs.

Mr. W. H. Davis, for complainant; *Messrs. Parmly, Olendorf & Fisher*, for the executor; *Mr. John Griffing*, for the Andersons.

THE CHANCELLOR.

The bill is filed for a construction of the will of Esther M. Golding, deceased, late of Jersey City, who died May 27, 1879. The will is dated April 8, 1879. By the first clause, the testatrix directed her executors to pay her debts and funeral and testamentary expenses. By the second, she gave to the complainant, her granddaughter, by the name of Esther Maria Johnson, her jewelry and personal ornaments. By the third, she devised in fee to her son, John Frederick Golding, her house and lot, No. 242 East Fifth street, New York, where she then resided, subject to the mortgage of \$6,000 and accrued interest thereon, and subject to the right of his father, her husband, John Frederick Golding, to occupy one of the rooms in the house, and she, also, in that clause, gave to her son John all the furniture, carpets, etc., and other articles in the house belonging to her, and not specifically bequeathed to the complainant. By the fourth, she gave the use of the before mentioned room to her husband. The fifth clause is as follows:

"Having \$2,000 out at interest at seven per cent. it is my will that the said sum shall be kept invested by my executor till my granddaughter, Esther Maria Johnson, shall arrive at the age of twenty-five years, when I direct that the said sum

*Advance Sheets.

of \$2,000 shall be equally divided between her and my husband, John Frederick Golding. It is my will that so long as my son, husband, and granddaughter can agree, they shall occupy the house I now reside in; my husband to have the room hereinbefore referred to, and my granddaughter to have a comfortable room, comfortably furnished, and the accrued interest on said sum of \$2,000, to be used and applied toward the interest on the mortgage upon the said house devised to my said son. Whenever my son, granddaughter and husband find it disagreeable to occupy the said house together, as above stated, and my granddaughter shall desire to leave the same, then it is my will that from, and after that time the interest accruing on her share of said \$2,000 be paid to her for her own use and benefit. In the event of my husband's death before my granddaughter arrives at the age of twenty-five years, his share of said \$1,000 to go to his legal representatives or such person or persons, in such share or shares, as he may by will direct. In the event of my granddaughter, Esther Maria, dying before reaching the age of twenty-five years, leaving children, then the said \$1,000 to go to her said children, share and share alike; and if she die without leaving children or any child, then said sum of \$1,000 to be divided between my legal representatives, as though I had died intestate."

By the sixth clause she gave, devised, and bequeathed all the rest, residue and remainder of her estate, real and personal, to her son, John F. Golding, her granddaughter, the complainant, and her (the testatrix's) husband, John F. Golding. She appointed Rev. William McAllister, and her son, John F. Golding, executors and guardians of the person and estate of her granddaughter, the complainant. The will was proved June 9, 1885, by her son alone, Mr. McAllister having died. The testatrix's husband predeceased her. He died intestate. She left the following children, viz.: John Frederick Golding, Lucinda C. Andrew and Mahala Roden. Also the following children of her deceased daughters, viz.: Jeannie and William S. Anderson, children of her deceased daughter Esther, Charles A. King, son of her deceased daughter Cornella, and Esther M. Johnson (the complainant), daughter of her deceased daughter, Elizabeth. After the making of the will (it was, as before stated, made April 8, 1879), and on the 1st of March, 1880, the testatrix bought a house in Jersey City for \$2,500, of which sum she paid \$1,800 in cash, and for the balance, \$700, gave a mortgage upon the property. On the 23d of May following she, having paid off the \$700 mortgage, caused it to be canceled of record. On the 25th of May following she gave a mortgage for \$1,000 upon the property, which is still an encumbrance thereon. Between the time of the date of the will and her death she paid \$1,000 on account of the mortgage on the New York property, and she received the \$2,000 mentioned in the fifth clause of the will. At the time of her

death her entire property consisted of the house and lot in New York, which at that time was subject to a mortgage originally for \$6,000 (but upon which \$1,000 of the principal had been paid since she made the will), with interest payable at five per centum per annum; the house and lot in Jersey City, which was subject to a mortgage for \$1,000; and the personal property specifically given to the complainant, appraised at \$113.97, and that specifically given to the testatrix's son, which was appraised at \$576.02. Her debts and funeral expenses will, it is supposed, amount to \$500. The following are the questions presented: first, whether the gift of \$2,000 in the fifth clause of the will is a specific or a general legacy; second, whether the share therein given to the testatrix's husband lapsed by his death in the lifetime of the testatrix, and if not, whether it goes to his next of kin; third, if the \$2,000 legacy is general, from whence is it to be paid? And further, from what are the debts and funeral expenses to be paid?

The gift of the \$2,000 is a general legacy. Whether the gift of a sum of money "invested" in a particular way is specific or not, depends upon the question whether the testator meant the legatee to have the sum, however invested, or whether the actual investment is the important part of the description. *Theob. on Wills*, 31. In this case the investment is not an important part of the description; for the testatrix contemplated that it might be changed. She provided for such change. The money is to be kept invested until the complainant shall arrive at the age of twenty-five years. The fact that the testator contemplated such change has frequently been held to be evidence that the investment was not material.

Again, the gift was of an entire sum invested, but only of part of larger sum. The fund was \$2,400. The reference to the fact that the money was invested was due to the consideration that it was well invested, at a high legal rate of interest, on property in New York, and she desired that it should be kept well invested until the complainant had attained the age of twenty-five years. In *Gillaume v. Adderley*, 15 Ves. 384, the gift of a sum £5,000, or fifty thousand current rupees, afterwards described as "now vested in the [East India] company's bonds," was held to be not a specific but a general legacy. In *Le Grice v. Finch*, 3 Meriv. 50, a bequest of £500, which the testatrix and her mother then had out upon mortgage, was held to be a general and not a specific legacy. In *Sparrow v. Josselyn*, 16 Beav. 135, a gift of £10,000 sterling, being the testator's share of the capital then engaged in a certain banking business, was held to be a general legacy. In *Mytton v. Mytton*, L. R. (19 Eq.) 30, a legacy of the sum of "£3,000 invested in Indian security," was held to be a general and not specific. See, also, *Bevan v. Attorney-General*, 4 Giff. 361.

The legacy of \$1,000 (half of the sum of \$2,000 bequeathed by the fifth clause of the will) given to the testatrix's husband on the complainant's

attaining to the age of twenty-five years, with provision that in case he should die before that time it should go to his legal representatives, lapsed as to him by his death in the testatrix's lifetime, but not as to his legal representatives. *Willing v. Baine*, 3 P. Wms. 113; *Hawk. Wills* 244. He died intestate. The \$2,400 were all paid in before the testatrix's death, as before stated.

The pecuniary legacies (those given by the fifth clause) are charged upon the residue. *Corwine v. Corwine*, 9 C. E. Gr. 579. If that prove insufficient, the legatees will have no right of recourse to the property given in specific legacies. 1 *Rop. on Leg.* 356.

The persons, other than John F. Golding the son, who claim the legacy of \$2,000, insist that he is chargeable with their shares of that legacy, because he is executor of the will and real estate is thereby devised to him, which he has accepted. The proposition cannot be maintained. The case cited, *Brown v. Knapp*, 79 N. Y. 136, does not support it. It applies the rule that when a legacy is given and the will directs that it be paid by a person to whom real estate is thereby devised, and such person accepts the devise, the devisee personally and the land devised are charged with the payment of the legacy. In that case, the devisee was the executor. But in the case in hand there is no direction in the will that the son pay the legacy.

Nor is the son chargeable with the \$1,000 paid upon the mortgage of the New York property after the making of the will. That property was devised to him, "subject to the mortgage of \$6,000." The devise is not a devise subject to a charge in favor of the estate, but a gift of the property subject to the encumbrance thereon, and the devisee is entitled to the benefit of the reduction of the mortgage by the testatrix.

The residuary clause gives to the three persons therein named—the complainant, the testatrix's son and the testatrix's husband—all the rest, residue and remainder of the estate, real and personal. As before stated, the husband predeceased the testatrix. The devisees, under the terms of the clause, were tenants in common. *Rev. p. 167 § 78.*

The testatrix must be held to have died intestate as to the share of her husband which lapsed. *Hand v. Marcy*, 1 *Stew. Eq.* 59.

All the personal estate (it was appraised at \$689.99) was given specifically by the will to the complainant and the testatrix's son, John F. Golding. The amount of the debt is estimated at about \$500. John F. Golding is not, nor is the land specifically devised to him, chargeable with the debts. Though he has accepted that land under the will, and the will directs that the debts and funeral expenses be paid by the executors, the direction is merely formal. There were two executors, and property was given by the will to only one of them. *Warren v. Davis*, 2 *Myl. & K.* 49; *Theob. Wills* 469. The residue is first liable for

the payment of the debts and general legacies, and then the lands specifically devised and the specific legacies are together liable to pay ratably any deficiency. *Long v. Short*, 1 P. Wms. 403; *Shreve v. Shreve*, 2 C. E. Gr. 487; *Thomas v. Thomas*, Id. 356. The testatrix, by giving the whole of the residue of her estate, real and personal, in one mass, after giving the legacies, specific and general, evinced the intention to charge the legacies on the residuary estate, and though the gift as to one-third of the residue has lapsed, that third is equally liable with the rest to the payment of the general legacies. But in payment of the debts the share of the residue devised to the husband, and of which the testatrix died intestate, is first liable.

NOTE.—The testator's giving a mortgage to a devisee on the lands previously devised to him is not a revocation of such devise;¹ or giving a stranger a lease of the premises for years, to commence after testator's death;² or a lease to the devisee for testator's life and that of his wife, if she should survive him.³

Where a testator directs his executors to pay his debts and legacies and then devises land to one of them, the land so devised is not chargeable therewith;⁴ and so, if the lands are devised to the executors in unequal proportions.⁵

¹ *Stubbs v. Houston*, 23 Ala. 555; *McTaggart v. Thompson*, 14 Pa. St. 149; See *Hall v. Dench*, 2 Ch. Rep. 54; *Perkins v. Walker*, 1 Vern. 97; *McLenahan v. McLenahan*, 3 C. E. Gr. 101; *Thomas v. Thomas*, 2 C. E. Gr. 356; *Wetmore v. Peck*, 66 How. P. 54; *Bates v. Underhill*, 3 Redf. 365.

² *Hodgkinson v. Wood*, Cro. Car. 23; *Lamb v. Parker*, 2 Vern. 495.

³ *Zimmerman v. Zimmerman*, 23 Pa. St. 375; See, further, *Wiggin v. Swett*, 6 Metc. 194; *Lanning v. Cole*, 2 Hal. Ch. 102; *Hall v. Bray*, Coxe, 212.

⁴ *Braithwaite v. Britain*, 1 Keen, 206; *Laurens v. Reed*, 14 Rich. Eq. 245, 263; *Gaw v. Huffman*, 12 Gratt. 638, 664; See *Dowling v. Hudson*, 17 Beav. 248; *Bailey v. Bailey*, L. R. (12 Ch. Div.) 268; *Read v. Cather*, 18 W. Va. 263.

⁵ *Wasse v. Heslington*, 3 *Myl. & K.* 495; *Harris v. Watkins*, Kay. 438.

WEEKLY DIGEST OF RECENT CASES.

ALABAMA,	3, 8, 14, 17, 21, 25
ARKANSAS,	11, 16, 22, 24
FLORIDA,	30
ILLINOIS,	5, 19, 31
INDIANA,	27
KANSAS,	12
KENTUCKY,	9, 10, 18
MICHIGAN,	1, 2, 6, 23
MINNESOTA,	26
NEW YORK,	7, 13, 15
OHIO,	4
PENNSYLVANIA,	26
UNITED STATES,	29
VERMONT,	20

1. ASSIGNMENT FOR CREDITORS' BENEFIT.—*Preferences—Mortgage—Validity—Chattel Mortgage—Failure to Record—Effect on Creditors.*—An honest mortgage is not affected by its proximity to

a general assignment. Under the Michigan statutes any creditor may avoid an unrecorded mortgage who, during its absence from the record, has done anything on the basis of its non-existence,—such as giving a new credit, or extending an old one. *Root v. Harl*, S. C. Mich. July 15, 1886. 29 N. W. 29.

2. **BANKS AND BANKING.**—*Embezzlement of Funds of National Bank—Federal Jurisdiction—Section 711, Rev. St. U. S.*—The embezzlement of the funds of a national bank being an offense over which the federal courts have jurisdiction, any prosecution thereof by the State courts is in violation of section 711, Rev. St. U. S. *People v. Fonda*, S. C. Mich. July 15, 1886; 29 N. W. R. 28.

3. **CONSTITUTION LAW.**—*Effect of Variance between Enrolled Bill and Engrossed Bill, as shown by Legislative Journals.*—The statute relating to the drawing of grand and petit jurors approved February 17th, 1886, excepting from its provisions certain named counties, is valid and operative in Colbert County, notwithstanding a variance between the enrolled bill, as signed by the presiding officers and approved by the Governor, and the bill shown by the legislative journals to have been passed by the two houses, by insertion of Clay among the excepted counties. The original enrolled bill, which was signed by the presiding officers, and approved by the Governor, is shown by inspection to be the same as the act passed by the two houses, except that in the enrolled bill Clay county is named among the excepted counties. The constitutionality of a statute, where there was a similar difference between the act as passed and as enrolled and approved, was considered in *Stein v. Leper*, at the Dec. Term 1885 of this court; and on the authority of that case, we hold that the statute in question is constitutional and operative in Colbert County. *Abernathy v. The State of Ala.*, S. C. Ala. December Term, 1886.

4. ———. *Essentials to Validity of Statute.*—Where the journal of each house of the General Assembly shows that a law received the concurrence of the number of members required by the Constitution for its adoption, and that it was publicly signed in the presence of each house by its presiding officer as required by section 17, article 2 of the Constitution, its authenticity cannot be impeached by parol evidence that one or more of the members of either house, recorded as concurring in its adoption, had, prior thereto, been seated, upon the determination of a contested election, by less than a constitutional quorum, although the concurrence of such member or members was necessary to the number of votes required by the Constitution for the passage of the law. The members so seated are at least *de facto* members of the house to which they belong, and the validity of the title by which they occupy their seats cannot be inquired into by the courts, for the purpose of affecting the validity of laws enacted by the Legislature in which they hold seats. The Act of the General Assembly, passed May 17, 1886, entitled "An Act to Establish an Efficient Board of Public Affairs in Cities of the First Grade of the First Class" (83 Ohio L. 173), is within the legislative power conferred on the General Assembly by section 1, article 1, and the requirement of section 6, article 8, of the Constitution; and does not by its provisions vesting the appointment of the board in the governor of the State, impair any of the undelegated powers which by section 20, article 1, are declared to "remain

with the people." Whether laws so enacted for the government of cities and villages are wise or unwise is left, by the Constitution, to the wisdom of the Legislature, and the courts have no power to hold them invalid, although they may differ with the Legislature as to the policy of such laws. *State ex rel v. Smith*, S. C. Ohio; June 29, 1886; 4 West Rep. 101.

5. ———. *Mining Coal—Act Compelling Measurement of Coal by Weight as Basis of Wages, Unconstitutional—Record of Weight for Public Information—Compelling Keeping of, a Taking for Public Use—Coal Mining not a Public Employment.*—The act of June 29, 1885, amendatory of the act of June 14, 1883, to provide for the weighing of coal at the mines, requiring the owners and operators of mines to provide scales, and weigh all coal taken out, and making such weight the basis of wages, is unconstitutional. It is depriving such owners and operators, who made contracts for wages on the basis of a certain rate per box, of their property without due process of law. See Bill of Rights, § 2; Const. 1870, art. 2 § 2, (1 Starr & C. St. 99.) Such act is indefensible on the ground that it requires the keeping of a public record for the information of the public. The requirement that such a record be kept is a taking for public use, and, unless compensation be provided, the act so taking is void. Const. 1870, art. 2, § 13, (1 Starr & C. St. 105.) Such act cannot be sustained on the ground that the mining of coal is public employment, and subject to necessary regulations for the public good. The mining of coal was not at common law affected with a public use, and is not, like the business of warehousing grain, or of common carriers, a business, upon the followers of which the public are compelled to call. The references to coal mining in the constitution, for the protection of miners, (Const. 1870, art. 4, § 29; 1 Starr & C. St. 122,) and for the laying of railway switches to mines, (Const. 1870, art. 18, § 6; 1 Starr & C. 165,) impose no such character on the mining. *Millet v. People*, S. C. Ill. June 12, 1889. 7 N. E. Rep. 631.

6. **CONTEMPT.**—*Divorce—Alimony—Judicial Discretion.*—On an appeal from an order of commitment for contempt, in not paying temporary alimony to complainant in an action for divorce by the defendant, *held*, that, on the facts shown, the judge of the circuit court acted within his discretion. *Rossman v. Rossman*, S. C. Mich. July 15, 1886. 29 N. W. Rep. 23.

7. **CONTRACT—Public Policy—Compounding Felony.**—Where a person has given his promissory note to compound a crime, and has been compelled to pay the same to a *bona fide* holder for value, to whom it was transferred before maturity, he cannot maintain an action against the one to whom the note was given, to recover back the money so paid by him. Although the plaintiff was influenced to give the note by the duress, undue influence or threats of defendant, yet if, at the same time, both parties intended, by giving the note, to compound a felony, they were in *pari delicto*. If the compounding of a felony entered into and formed a part of the consideration of the note, or if the motive of the plaintiff in giving the note was in part for the purpose of compounding a felony, the plaintiff cannot recover. *Haynes v. Rudd*, N. Y. Ct. of App. June 1, 1888. 3 Cent. R. 449.

8. **CORPORATION—Ultra Vires—Contract beyond Corporate Powers Void.** Where the charter of a corpor-

ate body shows that it was organized for the purpose of "manufacturing and repairing machinery," and was expressly forbidden from contracting and debt without the written consent of the board of directors, the doctrine of *ultra vires* may be invoked in an action against them as endorers on a note for the purchase price of machinery sold as agents. In rendering the opinion of the court, Somerville, J., said: "The power to manufacture and repair machinery, coupled with a prohibition against the creation of debts, except in a mode particularly specified, does not confer by implication the power to act as agent in making sales of machinery manufactured by others, and of taking and endorsing notes executed for the purchase money. The act was clearly *ultra vires*, and being such, under the uniform rulings of this court, the contract was void, and the doctrine of estoppel cannot be invoked by the plaintiff to debar the interposition of this defense. To permit this, would practically be giving the sanction of the court to the doctrine, that a corporation, can become omnipotent by arrogating to itself power forbidden by its charter, which is the vital source and origin of all corporate power. *Chambers v. Falkner*, 65 Ala. 449; *Marion Savings Bank v. Dunklin*, 34 Ala. 471; *Grand Lodge of Alabama v. Waddill*, 36 Ala. 313; *Waddill v. Ala. & Tenn. R. R. Co.*, 35 Ala. 323; *City Council v. Montgomery* 31 Ala. 76; *Wood's Field on Corp.* (2nd Ed.) § 243. "*The Westinghouse Machine Co. v. The Montgomery Iron Works*, S. C. Ala. Dec. Term, 1885-86.

9. CRIMINAL LAW—*Embezzlement—Money in Hand before Fiduciary Capacity Began—Evidence—Time Money was Spent—Jury.*—Embezzlement cannot be charged with reference to funds acquired and spent before the party assumed the fiduciary capacity. In a case where a party is upon trial for embezzlement, his report that he had, meaning that he owed the corporation, a certain sum of money at the time of his election as treasurer, should have been submitted to the jury, for their determination whether it was before or after such election that the money was spent by him. *Lee v. Commonwealth*, Ky. Ct. of App. June 15, 1886. 1 S. W. R. 4.

10. —. *Criminal Practice—Witness—Contradicting Commonwealth's Witness in Criminal Case. Continuance—Murder Trial—Enticing Away Witness.*—Where one of the Commonwealth's witnesses has been recalled by the defense, and foundation laid for contradicting him, it is error for the trial court to refuse to allow a witness for the defense to give evidence contradicting the first witness, and showing that the evidence which he gave, important and prejudicial to the defendant, was false. Where a witness for the defense was induced to leave the court before testifying, by a person who was aiding the prosecution, and the defendant made an affidavit that the witness' attendance could not afterwards be procured, and that her evidence would show that the accused took the life of the deceased in necessary self-defense, held, that it was error to overrule defendant's motion to discharge the jury and to continue the case. *Joseph v. Commonwealth*, Kentucky Ct. of App. June 15, 1886. 1 S. W. R. 4.

11. EJECTMENT—*Title—Evidence—Executors and Administrators—Sale—Conveyance by Adminis-*

trator.—The plaintiff in ejectment must recover, if at all, on the strength of his own title, rather than on the weakness of the title asserted his adversary, and the burden of proof is on him throughout, the actuality of defendant's possession being itself *prima facie*. An administrator's deed conveys no title, unless executed pursuant to the decree or order of a court of competent jurisdiction. *Dawson v. Parham*, S. C. Ark. June 19, 1886. 1 S. W. Rep. 72.

12. EMBEZZLEMENT—*Waiver of Tort—Set-off—Pleading—Findings.*—Where the agent or clerk of a principal is guilty of embezzlement of his principal's goods, the principal may waive the tort if he chooses, and treat his cause of action against his agent or clerk as one arising upon an implied contract; and if the agent or clerk is the owner of a note the executed by the principal, in an action thereon the principal may plead as a set-off to the note the value of his goods embezzled and converted to his own use by his agent or clerk. An action was brought by the wife of W., upon a promissory note payable to her order. The defendant alleged in his answer that the wife was not the real party in interest, but that the husband furnished the consideration of the note, and was the owner thereof, and also alleged a set-off existing in favor of the defendant against the husband for a sum exceeding the amount of the note. Upon motion of the wife the set-off was stricken out. The other allegations in the answer were permitted to stand. The case was tried by the court without a jury; and the court found that the plaintiff was the real party in interest, and thereupon rendered judgment against the defendant. Held, that although the district court committed error in striking out the set-off, the error, under the findings, cannot be said to be material, as it did not affect or prejudice in any way the substantial rights of the defendant. *Challiss v. Wylie*, S. C. Kans., July 9, 1886. 3 Kans. L. Jour. 357.

13. EQUITY—*Cloud upon Title—Equity Jurisdiction.*—Relief purely equitable in character, granted in a cause needs for its support the proof of some facts giving the court jurisdiction of such a cause of action. In an action to obtain the cancellation of a deed as a cloud upon plaintiff's title, his claim for relief rests upon his ownership of the premises and where this is totally unproved, he is not entitled to judgment. A deed purporting to have been executed by a referee in a partition action, without proof that any of the parties in the action or their grantors ever had title to or possession of the premises or any part thereof, is not sufficient to show title in the grantee as against a defendant, a stranger to the partition action, who was in possession of the premises before, at, and since the execution of the deed, under a duly executed tax deed thereof. Where the findings of fact do not establish a legal right on the part of the successful party to the relief granted, and there is nothing in the evidence to show such right, an exception to the legal conclusion of the court, directing judgment raises the question whether, upon all of the facts found, the party succeeding is entitled to the judgment directed. Where equitable relief is demanded on the grounds of the want of an adequate remedy at law, and the facts show the existence of such a remedy and the falsity of the averment, the complaint is insufficient. The owner, out of possession,

cannot sustain an equitable action to remove a cloud upon title, nor to establish a legal title or cover possession, unless other circumstances give equitable jurisdiction. Where the invalidity of the disputed title appears upon the face of the conveyance or in any proof which the claimant is required to produce in order to maintain an action to establish it, no suit whatever can be maintained in equity to set it aside. *Moores v. Townshend*, N. Y. Ct. App., June 1, 1886. 8 Cent Rep. 442.

14. EQUITY.—*Practice—When Injunction will not lie Against Unlawful Detainer Suit.*—Where a bill is filed for the purpose of correcting the numbers in a deed to certain lands, made by M. to B., and for the purpose of enjoining an unlawful detainer suit in favor of M. and against B. for the lands embraced or intended to be embraced in the deed sought to be reformed, as title is not the subject of inquiry in said suit, the bill sets forth no equitable right to an injunction against the recovery complained of, or against its enforcement. If, instead of unlawful detainer, M. had brought ejectment, or the statutory real action, then a reformation of the deed would have been necessary to B's defense, for title would have been the issue in the cause. * * * The bill avers that the suit and recovery were in unlawful detainer, and the injunction prayed for and obtained was against the enforcement of that judgment. In such suit title can not be inquired into. A tenancy, or authorized possession, and its termination or forfeiture, are the conditions of its maintenance. *Murphree v. Bishop*, S. C. Alabama, December Term, 1885-86.

15. ESTOPPEL.—*Judgment—Second Appeal—Wrong Decision.*—where, in a former action, the appointment of plaintiff as general receiver was alleged in the complaint, and denied in the answer, and the same issue was framed and tried as in this, the legality of the appointment is *res adjudicata*, and cannot be the subject of review upon this appeal. Even if the decision was wrong, it does not impair the effect of the former judgment as a bar to the right to raise the same question. Nor does it change the effect of the judgment because the amount recovered was not sufficient to entitle the plaintiff to appeal, as a matter of right, from the general term to this court. *Griffin v. Long Island etc. Co.*, N. Y. Ct. of App.; June 1, 1886, 7 N. East R. 735.

16. EVIDENCE.—*Confession—Corpus Delicti—Admissibility of Confession—Finding Stolen Property.*—In a criminal prosecution, the *corpus delicti* cannot be shown by the prisoner's confessions, unless they appear to the court to have been absolutely involuntary, and free from compulsion or fear. The discovery of stolen property through information furnished by the accused does not warrant the admission of his confession that it was stolen by him. *Yates v. States*, S. C. Ark. June 5, 1886, 1 S. W. Rep. 65.

17. FENCES.—*Trespass—Common of Pasture.*—In this State, except where the rule is changed by local statutes, uninclosed lands are regarded as common of pasture, over which cattle or stock may be suffered to run at large; and if the owner of the lands desires to protect himself from damage, he must erect and maintain a lawful fence around them. The owner of lands not inclosed by a lawful fence, whose rights are only defensive, may have the trespassing animals estrayed, and may use all proper means to drive them out of his in-

closure, taking care to employ no unnecessary force; but, for any injury which is the natural and proximate consequence of a wrongful act on his part, outside of these defensive measures, he is liable to the statutory penalty (Code § 1587) of five times the amount of the injury. The plaintiff's horse having been taught by the defendant while trespassing in his field not inclosed by a lawful fence, tied with a rope to a tree, and here left for twenty-four hours, when he was found dead; the liability of the defendant does not depend on the question of negligence, but on the question whether the injury was the natural and proximate consequence of his unlawful act; though he would not be liable for the death of the animal, if it resulted from other causes.—*Wilhite v. Spearman*, S. C. Ala.

18. FRAUD.—*Mortgage of Homestead—Homestead—Mortgage—Acknowledgment—Wife's Separate Estate—Waiver of Dower.*—Evidence and circumstances considered, and held not to sustain a charge of fraud in omitting to except from a mortgage the homestead of plaintiffs. When a married woman executes a mortgage on real estate, including the homestead, the title to which stands in her name, an acknowledgment made by her and her husband to the effect that the same was their act and deed, for the purposes therein mentioned, and that the wife relinquishes all her right to dower and homestead, is sufficient. *Kimmell v. Carnthers*, Ky. Ct. of App. June 5, 1886, 1 S. W. Rep. 2.

19. HABEAS CORPUS.—*Contempt—Fine—Order of Imprisonment for Non-Payment—Such Order not Reviewable by Habeas Corpus.*—Where a witness is properly brought before the court, and, for failure to answer question propounded, he is fined for contempt, and an order is entered that he stand committed until the same and all costs are paid, such order is in the nature of a final process or means of enforcing the judgment, and not a judgment in itself. A *habeas corpus* will not lie in such case, as it does not come within any of the statutory grounds for a *habeas corpus* for a prisoner under process. 1 Starr & C. St. c. 65, par. 22. A writ of error with an order for a *supersedeas* is the proper remedy. *In Re Smith*, S. C. Ill. May 24, 1886, 7 N. East. Rep. 683.

20. INSURANCE.—*Fire Insurance Inventory.*—Where an application for insurance against loss by fire was obtained by one not an agent of the defendant, but a broker doing the business under an arrangement with defendant's duly authorized agent, by whom it was sent to defendant, and the defendant returned it for additional information as to the ownership and occupation of the property to be insured, and the agent gave the application to the broker with instructions to obtain the answers from the applicant, and the broker took the application away and returned it with the answers written in his own handwriting and not in accordance with the facts, although the broker at the time had full information as to the facts; Held, That the act of the broker under these circumstances was the act of the agent, and the knowledge of the broker, no matter when obtained, if before the answers were given, was the knowledge of the defendant, and it was estopped from setting up such false answers in defense. It was the duty of the assured to supply the defendant with an honest inventory of the property damaged, and although he could properly employ his wife to make the inventory of household goods destroyed, if he makes

oath to one thus made by his wife containing false statements and fraudulent claims, without knowing of its false claim and without scrutiny, he thereby adopts and makes the fraud his own and cannot recover. *Mullen v. Vermont etc. Co.*, June 26, 1886, 15 Ins. L. Jour. 561.

21. LIMITATIONS.—*Statute of Adverse Possession.—Rule in Shelley's Case.*—Uninterrupted possession by defendant and his vendor, for twenty eight years before suit brought, under written claim of title, accompanied by the usual acts of ownership, "perfects a title against all the world, unless there be a claimant armed with a paramount title, yet so circumstanced that he could not assert his title until the occurrence of an event which has happened within less than ten years before the commencement of the suit." The "Rule in Shelley's case," as at common law, prevailed, in this State until the 17th January, 1838, when the Code of 1852 became operative; and deeds and wills which took effect before that date, are governed by it. A deed, executed in 1841, by which lands were conveyed to a trustee, "for the purpose of providing a permanent domicile and home for the said Jane C. M., a married woman, "and such family as she may have, for their use and benefit during her natural life, and at her death descend to and be equally divided among and between her heirs," under the operation of the rule in Shelley's case, rested the entire estate in Mrs. M.; and if her children took any present interest, as members of her "family," their right to sue for it was not postponed until her death. Reversed and remanded. *McQueen v. Logan*, S. C. Ala.

22. STATUTE OF LIMITATIONS.—*Begins to Run, When—Absconding Debtor.*—Whenever a cause of action accrues, the statute of limitations begins to run directly against it, and the continuous operation of the statute cannot be suspended by any subsequent act of the debtor. Where a debtor, against whom a cause of action exists, absconds, but subsequently returns, the entire period of his absence is to be computed as a part of the time prescribed by the statute. *Richardson v. Cogswell*, S. C. Ark. June 6, 1886, 1 S. W. Rep. 51.

23. MASTER AND SERVANT.—*Injuries to Servant by Negligence—Breaking of Scaffolding—Fellow-Servants.*—Where an employer furnishes suitable materials, and employs competent carpenters, to construct scaffolding, to be used by them in putting the cornice upon a building, and the same scaffold is subsequently used by painters hired to paint the cornice, *heid*, that the carpenters who constructed the scaffolding and the painters are fellow-servants, and that the employer is not liable for injuries caused to one of the painters by the breaking of the scaffolding. *Hoar v. Merritt*, S. C. Mich., July 15, 1886. 29 N. W. R. 15.

24. MORTGAGES.—*Rights of Mortgagee—Advances—Crops—Rents and Profits.*—A mortgagee of growing crops may advance sufficient to preserve them from waste and destruction, and the advances thus made add to his mortgage debt, and are chargeable against the mortgagor in an equitable accounting. A mortgagee in actual possession must devote the entire rents and profits to the payment of the mortgage, and can divert no part thereof towards the satisfaction of other and unsecured claims due him from the mortgagor, without the express assent of the latter. *Caldwell v. Hale*, S. C. Ark., June 19, 1886. 1 S. W. R. 62.

25. ——. *Deed Absolute in Form—Conditional Sale.*—Where the controversy is whether a conveyance, absolute in form, was intended as an unconditional sale or as a mortgage, the evidence must be clear and convincing to overcome the terms of the writing; but, where the controversy is whether it was intended as a conditional sale, with a reservation of the right to re-purchase, or as a mortgage, a court of equity leans to the latter construction. The concurring intention of both parties must be shown, before the transaction can be established and treated as a mortgage; and if it appear that the defendant considered and intended it as a conditional sale, though the complainant intended it as a mortgage, this does not make a "doubtful case," nor require the court to adopt the complainant's construction. The fact that the parties originated in an application for a loan of money, is regarded as one of the principal *indicia* of a mortgage; but, when it is shown that the application for a loan was repeatedly declined, and, after the negotiations were broken off, the defendant's proposal of a conditional sale was accepted, the weight of that circumstance is destroyed. Great disparity between the price paid and the value of the property, is also one of the *indicia* of a mortgage; but, when it is shown that the property was not in demand at the time, its value being prospective and speculative, a subsequent advance in its value, arising from unforeseen and adventitious circumstances, cannot be considered in this connection. If the bill alleges that the transaction was a mortgage, the complainant can obtain no relief founded on a conditional sale. *Douglas v. Moody*, S. C. Ala.

26. NEGLIGENCE.—A child riding upon the platform of a railroad car without payment of fare is a trespasser; but this fact will not exempt the company from payment of damages if its driver ejects him in a manner which endangers life or limb; as here, by compelling him to jump backward from the platform while the car was in motion. *Biddle v. Hestonville etc. Co.*, S. C. Penn., May 3, 1886. 3 Cent. R. 404.

27. OFFICERS.—*Constitutional Limit—Successor Elected but Dying before Qualifying.*—Though a public officer, who is empowered to hold office for a certain term and until his successor is elected or appointed and qualifies, will hold over, after the election of a successor who dies before qualification; but if he has held the office for the full term allowed by the constitution which visqualifies him to hold longer, the office is vacant though his successor has not qualified after election or appointment. *Gosman v. State*, S. C. Ind. April 16, 1886. 22 Rep. 107.

28. PARTNERSHIP.—*Deed or Mortgage in Firm Name—Rights of Partners—Mortgage—Release—Quit-claim Deed.*—A conveyance or mortgage of real estate, in which a partnership, by its firm name, is named as grantee or mortgagee, operates, in law, only in favor of a partner whose name is in the firm name, and not in favor of a partner whose name is not contained in the firm name. A quit-claim deed by a mortgagee of real estate to one having an estate in the land operates as a release of the mortgage in favor of such person. *Gille v. Hunt*, S. C. Minn., July 7, 1886; 29 N. W. Rep. 2.

29. ——. *Surviving Partner—Insolvency—General Assignment—Assignment for the Benefit of Cred-*

Store—By Surviving Partner—Retention of Goods by Him.—The surviving partner of an insolvent firm may make a general assignment. A general assignment by a surviving partner is a valid instrument, though he retains a part of the firm property. *Emerson v. Senter*, S. C. U. S., April 12, 1886; 22 Rep. 120.

30. PLEADING—Contract—Acceptance of Contract.

—A demurrer to a plea reaches any substantial defect in the declaration, or the count thereof to which the plea has been tendered; but not a defect of mere form. The appellant, upon whom an order was drawn in favor of the appellee by H. & J., for five hundred and seventy dollars "balance due on the house we are building for you," accepted it is as follows: "I accept the above when the house is finished according to contract and delivered. To pay said sum by the first of January, 1885, interest to commence when said building is delivered." *Held*, To be a conditional acceptance, and that no recovery could be had against the acceptor upon the instrument until the house has been finished according to the contract, whatever it might be and delivered. The declaration upon a conditional acceptance must allege a performance of the condition. An allegation of a delivery of a house and that the acceptor has been in possession, is not a sufficient allegation of performance of the conditions that the house has been "finished according to contract and delivered," upon which a draft is payable. The allegation that the plaintiff, the payee, gave the acceptor notice that he held himself ready to complete the house according to contract or to pay her a reasonable sum for his failure if she point out to him the deficiencies or omissions, and that she refused to do so, and that she refused to permit him to enter the house for, the purpose of completing it according to contract, is not a sufficient averment of performance of the conditions named in the acceptance, whether considered alone or in connection with above allegation of delivery to, and possession by the acceptor. If, in any case of a non-performance by a drawer of the conditions named by the acceptor in the acceptance, the payee has a right of action against the acceptor who refuses to permit him to perform the conditions, which the drawer was under contract to perform, such right of action is not upon the acceptance, but is one of special action on the case for damages occasioned by the acceptor's refusal and prevention of performance by the payee. Where there is both a demurrer and a replication to a plea, it is a matter of discretion with the Circuit Court as to which issue shall be first disposed of. Assuming that such discretion can ever be controlled, it cannot be done when there is no showing of an abuse of the discretion. Where an exception has been taken upon the trial to the refusal of the Circuit Judge to give certain instructions to the jury, and the instructions so refused have been then and there written out and endorsed as refused, and the exception noted and signed by the judge, and the paper filed, it constitutes of itself a special bill of exceptions as to such instructions, and when it has been incorporated in this shape into the general bill of exceptions, and such general bill has been subsequently struck from the record by an order of the appellate court, because it was not settled in the time allowed, the special bill is not affected by such order and will be considered as if such order had not been made. Where there is no bill of exceptions showing that any exception was ta-

ken to an instruction given to the jury or to the exclusion or admission of evidence, the ruling of the court upon such instructions or testimony cannot be reviewed on appeal. Where there has been a refusal to give certain instructions to the jury, and the testimony upon which they were based is not incorporated in the bill of exceptions, it will be assumed that there was no error in refusing to give them, and they will not be considered on appeal. Where there is one good count in a declaration and a plea thereto and issue joined thereon, and there is no bill of exceptions showing the evidence adduced on the trial, the appellate court will presume that the evidence was sufficient to sustain the verdict rendered in favor of the plaintiff. *Myrick v. Merritt*, S. C. Fla., June Term, 1886.

31. TAXATION — *Exemption of Church Property—Title must be in Church Society—Dedication of Property by Religious Services, Immaterial to Question of Exemption.*—In order to make property exempt from taxation as church property under the provisions of the constitution and revenue act, the title to the property must be in a religious corporation or church society as a body. A church edifice, and the lot upon which it stands, owned by a citizen individually, and regularly used for religious services, is not exempt from taxation. The fact that such property has been dedicated to religious uses, by the holding of religious services of a dedicatory character therein, is immaterial to the legal question concerning its exemption from taxation. *People ex rel v. Anderson*, S. C. Ill. May 14, 1886. 7 N. East. R. 625.

QUERIES AND ANSWERS.*

[Correspondents are requested to draw up their answers in the form in which we print them, and not in the form of letters to the editor. They are also admonished to make their answers as brief as may be.—Ed.]

QUERIES.

18. Has an Indiana Turnpike Company the right to prohibit the passage upon its roads of a steam traction engine used for threshing purposes? The conductor of the engine offering to pay all reasonable toll. 2. If it has, and no such prohibition is made, and the engine is injured while passing over the road, by reason of a defect in the bridge not known to the conductor of the engine; is the Turnpike Company liable for the damages to the engine? E. B. S.

Cite authorities, if any.

QUERIES ANSWERED.

Query No. 11. [23 Cent. L. J. 94.] A. B. & C. sign a petition for dramshop license; § 4 of Dramshops, session Acts, 1883, of Mo. C. afterwards reconsiders his action and in writing, petitions the county court to cause his name to be erased from or held for naught on dramshop petition. His plea being filed before the 4th day of July, and before action had on dramshop petition, should the court grant his prayer? J.

Answer. Yes; party who having signed petition, afterwards signs a remonstrance, must be regarded not as a petitioner, but a remonstrant. 26 N. W. Red. 25. (Iowa Case.) W. J. H.

RECENT PUBLICATIONS.

THE AMERICAN REPORTS, Containing all Decisions of General Interest Decided in the Courts of Last Resort in the Several States, With Notes and References by Irving Browne. Vol. LIII, Containing all Cases of General Authority in the following Reports: 72 Georgia; 111 Illinois; 103 Indiana; 33 Minnesota; 83 Missouri; 18 Nebraska; 40 New Jersey Equity; 100 New York; 92 North Carolina; 93 North Carolina; 12 Oregon; 21 South Carolina; 22 South Carolina; 19 Texas Court of Appeals; 64 Texas; 26 West Virginia; 63 Wisconsin. Albany: John D. Parsons, Jr., Publisher. 1886.

The volume before us brings this excellent series of reports nearly down to date, so far at least as concerns the States from which the cases are derived. There are no decisions rendered earlier than in 1883, some in 1884, but the most of them bear date of 1885. The volume is in arrangement, and, indeed, in all respects fully up to the standard of its predecessors. The *syllabi* of the cases are prepared with the care which their critical nature requires, and the notes which the reporter has appended to many of the cases are learned and judicious, and add much to the value of the book. We cannot do for it less, or more, than to commend it heartily to the favorable regards of the profession.

THE LAW OF NEGLIGENCE, by James H. Deering of the San Francisco Bar. San Francisco: Sumner, Whitney & Co., 1886.

This is another issue of the small volumes, practitioners or pony series, so much affected on the Pacific coast. It is a small volume, treating on a very large subject, the development of which, within living memory, is one of the marvels of the science of the law. The growth of the "Law of Negligence" reminds one of the classic poet's description of "Rumor" which, from small beginnings, swells until it pervades all space.

It is not because people of these days are more careless than their ancestors, but because they are held to a stricter account, that litigation of this character has increased to its present enormous proportions, that every day new liabilities are declared, new distinctions drawn, and new principles evolved by the ratification of the bench.

The author of the work before us has boldly tackled this great subject in this single volume of less than seven hundred pages (24mo.), and we must say with a success that we hardly expected when we first took up the work. There is no knowing, however, how much a man can say within a limited space, if he gives his mind to it, and while saying all he ought to say, says nothing that he ought not to say, and as little as possible of things that he need not say. With a rigid adherence to this rule, and a religious abstinence from padding, the sin that doth so easily beset the authors of legal works, a vast body of law can be gotten into an incredibly small space.

Mr. Deering seems to have appreciated fully all this, and his book is pretty fair evidence of its truth. It is concise, condensed, well arranged, and exhaustive. The work is divided into three parts, of which the first treats of the "General Principles of Negligence;" the second, of "Negligence in Particular Relations;" and the third of "Remedies for Negligence." There are forty-five chapters and four hundred and twenty-six sections, each with its appropriate heading, descriptive of its subject. The references in the index are by their numbers to the sections. All this is, as it should be, but what we particularly like is the arrangement, peculiar we believe to the publishers of this book, of

placing the notes to each section at the end of the section and not at the foot of the page.

Much thought, labor and research have manifestly been devoted to this work, and the modest and unpretentious little book, in which it is all embodied, is well worthy of a favorable reception by the profession.

JETSAM AND FLOTSAM.

GETTING ADMITTED.—A young man dropped into the office of a Dakota lawyer and said:

"What is a habeas corpus?"

"It is a kind of writ for—"

"That's all I want to know about it. Is a mandamus a writ, too?"

"Yes."

"Use pretty considerable of these writs in the law business I reckon?"

"Yes, there are a number of different kinds."

"What is the usual rate for making collections in the Territory?"

"We usually take about half."

"All right—thanks. You see I made up my mind this morning to become a lawyer and wanted to get a point or two. I'm going over to get admitted to the bar now before court adjourns—I'll hang out my shingle in the morning."

TART AND TESTY.—From the following item taken from the London *Law Times* it would appear that English judges have become singularly deficient in the *suaviter in modo*, which should especially characterize all gentlemen in high places.

The exhibition of temper by Mr. Justice Stephen, at Nottingham Assizes, is one of those incidents which everyone must deplore. Mr. Stevenson, a solicitor, appears to have had a dispute with the judge's clerk, as to a document which, being held by both, came in two. The conduct of the solicitor does not seem to have been very reprehensible, and, indeed, it went wholly unpunished. But, verbally lashed by the judge, he mildly said that the members of his branch of the profession had a good deal to bear, which is perfectly true. This expression precipitated the judge into a flood of personal abuse absolutely inexcusable, with the result that Mr. Stevenson must receive universal sympathy. Whether it is the distracting anxiety which Mr. Justice Hawkins says disturbs the judges, or the increased wear and tear of modern life, which is to be credited with the aggravated irritability which is to be found on the bench, we know not. But of this we are convinced that, if the judges are to retain the respect of the profession, they must not presume too much upon their position.

PEREMPTORY.—The *Times* says that on Wednesday Mr. Justice Field, after a jury had stopped a case in which the plaintiff claimed damages for personal injuries, expressing an opinion that the case ought never to have been brought, called the plaintiff's solicitor to the front of the court and, addressing him said: "Have the goodness, sir, at once to pay the jury their fees. I make an order to that effect, and if you do not pay these fees to-day, sir, I shall make an order for your attachment. I will not allow the jury to be treated like this; it is bad enough that they have to put up with their present low remuneration." [The statement is obviously imperfect; there must surely have been some demur on the part of the solicitor to the payment of the fees of the jury.] (*Solicitor's Journal* London.)

The Central Law Journal.*ST. LOUIS, AUGUST 27, 1886.***CURRENT EVENTS.**

COPYRIGHT.—We have not yet been able to see the full text of the International Copyright Act of 1886 (49 and 50 Vict. Ch. 33), but the *Irish Law Times* of Aug. 7, informs us that the new statute "makes some valuable improvements in that branch which is called international copyright, and which owes its existence to the very peculiar and anomalous views taken of copyright by lawyers, both English and foreign." That the English government is disposed to do justice to foreign authors in this respect, encourages the hope that Congress will emulate its good work; and that in the "good time coming" will be removed the reproach now resting upon the American people, that they take the fruits of the foreign author's labors without paying him anything, and at the same time discriminate *against*, and discourage native authorship.

CALIFORNIA JUDGES AGAIN.—We learn from a late California paper, that the legislature of that State has taken partial action upon the charges of physical and mental incapacity, brought by David S. Terry, against two of the Judges of the Supreme Court. In the House of Representatives the following resolution was adopted: "Resolved, that the charges heretofore presented against Hon. R. F. Morrison, Chief Justice, and Hon. John R. Sharpstein, Associate Justice of the Supreme Court of the State, be and they are hereby dismissed, being wholly unsupported by evidence."

THE LAW OF LIBEL.—At a recent meeting of the Press Association, of Texas, the law of libel was discussed at some length, and several amendments of it were suggested. It would seem, from the extraordinary activity of the press in these days, the morbid craving of the public for news of every descrip-

tion, and the wild struggles of every paper to "scoop" its rivals, that particular circumspection must be exercised to keep abreast with the times, and yet on the windy side of the law. It is suggested by a contemporary, in the interest of the press, that persons furnishing information upon which libellous articles are founded, should be primarily liable, and, we infer, that the publisher should go free if he shall give the name of his informant and testify against him. That such a rule would operate most injuriously to the public is obvious, for there could be no assurance that the informant could respond in damages for the mischief he had done. We think the existing law of libel is in no respect too stringent, and that the publishers of newspapers should be required, before they venture to publish matter (not privileged,) which is in its nature defamatory, to verify their information at their peril, and hold themselves in readiness to answer all comers, irrespective of the liability of their informant.

DAMAGES CAUSED BY FELONY.—It is not a little remarkable how the spirit of feudality still pervades the administration of law in England. In this country it has long been settled, both by judicial decisions and, in many States, by statute, that a party injured by a felonious act, may avail himself of either a criminal prosecution to punish the felon, or an action for damages to obtain a suitable recompense for his loss, or both, and it is immaterial which precedes the other.¹ In England the general rule was, that a party cannot bring a civil action for a felonious act, until after the (alleged) felon has been prosecuted, and convicted or acquitted of the felony. And this because, under the feudal system, a felony worked a forfeiture of the feudatory's grant, and the forfeiture extended to the whole property of the felon.²

It seems, that in England, the courts are still struggling with this question. In a late number of the *Irish Law Times*, is an article on the subject, in which it is said:

¹ Sedgwick on Damages 362 (471); Boardman v. Gore, 15 Mass. 331; Ocean etc. Co. v. Fields, 2 Story C. C. 59; Plummer v. Webb, 1 Ware D. C. (U. S.) 78.

² Sedgwick on Damages, *supra*.

"There seems to be nothing before our modern courts more full of difficulty than to determine how far one can sue for damages arising out of some felonious or criminal act, for it has long been said or assumed, that it is contrary to public policy that any such damage should be recovered until the criminal has first been prosecuted or brought to justice. In a series of important cases occurring now and then during the last quarter of a century, many leading opinions have been given on different phases of this question, and still there is always an underground of misgiving as to what is the right rule, if there be a rule."

Then follow a number of cases in which the non-existence of any well settled rule is made abundantly manifest. The nearest approximation to such a rule is the following:

"1. A felonious act may give rise to a maintainable action. 2. the cause of action arises from the commission of the offence. 3. Notwithstanding the existence of the cause of action, the policy of the law will not allow the person injured, to seek civil redress if he has failed in his duty of bringing or endeavoring to bring the felon to justice. 4. This rule has no application to cases in which the offender has been brought to justice, at the instance of some other person, or in which prosecution is impossible by reason of the death or escape of the felon."

One ground upon which the rule is justified is thus stated:

"In this country, there is nobody in strictness charged with any duty to prosecute a malefactor. All is left to chance or to the spirit of revenge which usually impels the party who is mainly injured, to resort to an indictment or other criminal remedy."

Hence, it may be inferred, it is regarded as against public policy to permit one injured by a felonious act, to bring a civil action and recover damages, because he will be satisfied with the judgment and abstain from prosecuting the offender.

As we have already said, on this side of the water we have changed all that, and released ourselves from this relic of feudalism.

of the most brilliant "forenoon" lawyers I have ever known is delving in the silver mines near Leadville. Hundreds of young attorneys, who begin practice in large cities, never come to the surface for a dozen years, while a great many more quit the business or move far away in the country, and we know very little of their first or last cases. The world is so large, and the lawyers so many, a thousand to one to what they were when Webster told of room in the upper story, that to-day even the upper stories are crowded, and the immortal Daniel would need to revise his useful saying that has lured so many into believing they would reach his high standard in good season. All are not Websters in build, dignity, learning and development; most are quite the opposite, and have need to seek honor of a different kind, and fame from another platform. To conform to the new conditions and study the newer methods is wiser than stopping to lament that we were not born earlier, before the great rush to the legal profession. The Websters of the future are the Justice Court boys in practice of to-day, and those who are doing their duty as they reach it, without any other reward than the high sense of work well done, as they reach it. From a long list of eminent advocates that have attained their high positions through the slow and gradual steps, that began in little courts, and grew higher, scarcely a man, that tried his first cases well in a blacksmithshop or a bar-room, has failed to try them well in Washington; and the motto of all mottoes to-day, that will most tend to make young lawyers into maturer Websters, is to try their first cases with care, interest and energy, and take them to court with as much strength and stability as the granite corner stones on which great public buildings must rest and remain forever.

The early cases are the foundation in practice, and it will not do, as a rich young lawyer lately told me he had planned, to hire all the help needed before the argument, and rely upon that alone to win a law suit. The drill, the courage, the tact, the experience, and even the eloquence of cases, will rest with the one who masters the whole practice and relies upon himself in early cases.

J. W. DONOVAN.

FIRST CASES.—A lawyer's first case may afford a small clue to his later success. One

NOTES OF RECENT DECISIONS.

CARRIER—DELAY BY STRIKERS—NON-DELIVERY OF GOODS.—The New York Court of Appeals have recently decided a question that some months ago would have been of even more interest than it is now.¹ The facts were that the plaintiff shipped a number of cattle and hogs on the trains of the defendant company and part of the journey had been accomplished, when by reason of a strike of the employees of the defendant, a stop was put to further progress, and the cattle and hogs were delayed for a considerable, but unspecified time. The strikers not only refused to work themselves, but also to permit any other persons to fill their places, until their demands should be complied with. They were numerous and were supported by many outside sympathizers, and all together constituted a force that the defendant company could not resist or overcome. When the company finally succeeded in moving its freight, and delivered plaintiff's cattle and hogs at Buffalo, the animals were much deteriorated in value by the delay, and for this damage the shipper brought suit.

In the trial court he obtained a judgment under the ruling that if the persons who delayed the trains by their unlawful conduct, were chiefly or altogether the servants of the defendant company, it was responsible for them, and "their acts were the acts of the corporation."

Upon appeal the judgment was reversed. The appellate court states the law controlling this subject in the following forcible terms:

"A railroad carrier stands upon the same footing as other carriers, and may excuse delay in the delivery of goods by accident or misfortune, not inevitable or produced by the act of God. All that can be required of it in any emergency, is that it shall exercise due care and diligence to guard against delay, and to forward the goods to their destination; and so it has been uniformly decided."²

In the absence of special contract there is no absolute duty resting upon a railroad carrier to deliver the goods intrusted to it within

what, under ordinary circumstances, would be a reasonable time. Not only storms and floods and other natural causes may excuse delay, but the conduct of men may also do so. An incendiary may burn down a bridge, a mob may tear up the tracks or disable the rolling stock or interpose irresistible force or overpowering intimidation, and the only duty resting upon the carrier, not otherwise in fault, is to use reasonable efforts and due diligence to overcome the obstacles thus interposed, and to forward the goods to their destination.

While the court below conceded this to be the general rule, it did not give the defendant the benefit of it, because it held that the men engaged in the violent and riotous resistance to the defendant were its employees, for whose conduct it was responsible, and in that holding was the fundamental error committed by it. It is true that these men had been in the employment of the defendant. But they left and abandoned that employment. They ceased to be in its service, or in any sense its agents for whose conduct it was responsible. They not only refused to obey its orders or to render it any service, but they willfully arrayed themselves in positive hostility against it, and intimidated and defeated the efforts of employees who were willing to serve it. They became a mob of vicious law breakers, to be dealt with by the government whose duty it was, by the use of adequate force, to restore order, enforce proper respect for private property and private rights, and obedience to law. If they had burned down bridges, torn up tracks, or gone into passenger cars and assaulted passengers, upon what principle could it be held that as to such acts they were the employees of the defendant for whom it was responsible? If they had sued the defendant for wages for the eleven days when they were thus engaged in blocking its business, no one will claim that they could have recovered.

It matters not if it be true that the strike was conceived and organized while the strikers were in the employment of the defendant. In doing that, they were not in its service or seeking to promote its interest or to discharge any duty they owed it; but they were engaged in a matter entirely outside of their employment, and seeking their own ends and not the interests of the defendant. The

¹ *Gelsamer v. Lake Shore etc. R. R. Co.*, N. Y. Ct. App. June 22, 1886; 6 East. Rep. 166.

² *Wibert v. New York & Erie R. R. Co.*, 12 N. Y. 245; *Blackstock v. New York & Erie R. Co.*, 20 Id. 48.

mischievous did not come from the strike, from the refusal of the employees to work, but from their violent and unlawful conduct after they had abandoned the service of the defendant.

Here upon the facts, which we must assume to be true, there was no default on the part of the defendant. It had employees who were ready and willing to manage its train and carry forward its stock, and thus perform its contract and discharge its duty, but they were prevented by mob violence which the defendant could not by reasonable efforts overcome. That under such circumstances, the delay was excused had been held in several cases quite analogous to this, which are entitled to much respect as authorities.³

The cases of *Weed v. Panama*⁴ and *Blackstock v. N. Y. & Erie R. R. Co.*,⁵ do not sustain the plaintiff's contention here. If in this case the employees of the defendant had simply refused to discharge their duties, or to work, or had suddenly abandoned its service, offering no violence and causing no forcible obstruction to its business, those authorities could have been cited for the maintenance of an action upon principles stated in the opinions in those cases.

We are, therefore, of opinion that this judgment should be reversed and a new trial granted, costs to abide event."

WAGERING CONTRACTS—LEX LOCI CONTRACTUS—BROKERS.—In the Maryland Court of Appeals was recently decided⁶ a case of some interest, to persons engaged or concerned in speculative traffic. The facts were, in brief, that defendant was a lawyer worth about \$3500, that he engaged plaintiffs who were brokers to buy and sell stocks, grain, and other commodities for him, upon margins, that they carried on a large business in that way, the aggregate of the transactions amounting to \$800,000, that in all those

transactions there was only one instance of actual delivery, that the actual amount of margins put up by defendant in all these transactions was only \$1700. The *locus* of all these transactions was in the State of Pennsylvania. The traffic came to an end, and the plaintiffs sued for money advanced, commissions etc., and the defendant pleaded that the whole business was a series of wagers, wholly illegal in Pennsylvania, and that he owed the plaintiffs nothing. Judgment however was rendered against him and he appealed.

The court held that as both parties resided in Pennsylvania, and the principal employed the plaintiffs (brokers) to make purchases and sales in other States, but it being agreed that deliveries were to be made in Pennsylvania, the law of that State governed. That the law of that State is, that when a person enters into gambling stock transactions through a broker, he will be deemed to be dealing with that broker as a principal, not as an agent;⁷ that selling stocks which the seller does not possess at the time of the sale is a gambling contract, contrary to the policy of the law, and void.⁸ This being the law of Pennsylvania and the contract having been made in that State in which plaintiffs and defendant resided, the Court of Maryland administering that law held that the parties dealt with each other as principals, and the transactions between them being against public policy, when and where they were made, were illegal and created no right of action.

⁷ *Kuchezky v. DeHaven*, 97 Penn. St. 202.

⁸ *Dickson v. Thomas*, 97 Penn. St. 278; See also, *Farcira v. Gabell*, 89 Penn. St. 98; *North v. Phillips*, 89 Penn. St. 250; *Brue's Appeal*, 55 Penn. St. 294.

³ *Pittsburgh & C. R. R. Co. v. Hazen*, 84 Ill. 36; S. C., 25 Am. Rep. 422; *Pittsburgh C. W. L. Ry. Co. v. Hollowell*, 65 Ind. 188; S. C., 32 Am. Rep. 63; *Bennett v. L. S. & M. S. R. R. Co.*, 6 Am. & Eng. Cas. 391; *I. & W. L. R. R. Co. v. Juntgen*, 10 Bradw. 295.

⁴ 17 N. Y. 262.

⁵ 1 Bosw. 77; affirmed, 20 N. Y. 48.

⁶ *Stewart v. Schulle*, Sd. Ct. App. May 14, 1886, 3 Cent. R. 509.

THE AMERICAN ABROAD.

As there has been a great deal said about the failure of the United States Government to protect the rights of its citizens in foreign countries, it may be worth while to enquire briefly what those rights are; and, in order thereto, to consider some of the anomalies of American citizenship, and how its privileges are acquired and lost. I shall not, therefore, here employ the term "citizen" in its etymo-

logical sense, nor yet in the sense indicating one to whom necessarily belongs the right of participation in the affairs of government; but in the sense in which it is used in the United States exclusively, namely, as indicating a person of either sex and of any age, native born or naturalized, who owes allegiance to our government, and is entitled to its protection in the exercise and enjoyment of all the so-called private rights. Thus, for example, we, in the United States, have always had, and we still have, two classes of citizens—one which has, and one which has not, the rights of suffrage; but the individuals of both are equal before the law, and are equally entitled to protection by the government in the exercise of all the fundamental rights incident to citizenship.

By the old English common law (the basis of our American jurisprudence) a native-born subject owed an allegiance which was intrinsic and indelible. It could not be divested by any act of his own, nor was it in the power of a foreign State, by employing or naturalizing him, to dissolve the bond of allegiance between him and the crown. And although this doctrine was practically abandoned by Great Britain in 1814, when the prisoners, taken in the service of the United States, were unconditionally exchanged, it was never explicitly renounced until 1870, when it was declared by statute that a British subject ceases to be such, upon becoming duly naturalized in a foreign State.

The first attempt at a constitutional definition of American citizenship occurs in Article XIV., adopted July 28, 1868. It is therein declared that, "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside." Previous to that time, it had been held, that a person could not be a citizen of the national government, except as he was a citizen of one of the States. Such was the well-known opinion of Mr. Calhoun, and of the political party of which he was the chief ornament and exponent. Thus, for instance, that persons born and residing in the District of Columbia or other Territory of the Union, though within the United States, and subject to its jurisdiction, were not citizens of the United States.

Absurd as this proposition now seems, it had never been judicially controverted. On the contrary, the decision in the celebrated Dred Scott case virtually sustained it. And since that decision was never reversed or overruled, a negro, though born of free parents and within our allegiance and jurisdiction, could never become a citizen of the United States by anything short of an amendment to the Constitution.

But persons of the African race are not the only beneficiaries of this amendment. It reaches far beyond the incidents and consequences of slavery. It eradicates from our federal system a most pernicious doctrine that had distracted the country for more than half a century, and which had culminated in unequal legislation and in practical insecurity to life and property. It makes American citizenship a sure guarantee of safety by putting forever at rest, the question as to whether a person may be a citizen of the United States other than as he is such incidentally, by reason of his citizenship of some of the States. It goes even beyond this, and makes a marked distinction between national and State citizenship. Thus, a person may not only be a citizen of the United States without being a citizen of a State, but an important condition is necessary to give him the character of the latter. He must "reside" within a State to make him a citizen of it, whereas, it is only necessary that he should be born or naturalized within our Federal jurisdiction, in order to be a citizen of the United States.

It has been rather loosely asserted that this constitutional provision fastens upon us the doctrine, derived from the English common law, that all persons born within our territory are, with few exceptions and to all intents and purposes, citizens of the United States. It, however, makes personal subjection to our jurisdiction a necessary element of citizenship, and this has been held to exclude Indians. The native-born African is subject to our jurisdiction, and is therefore a citizen. But the native-born Indian is adjudged to be beyond our jurisdiction (at least for certain purposes) and is not, therefore, deemed a citizen. Our government makes treaties with him, and thus nominally awards him the status of national independ-

ence; and yet, strangely inconsistent with this, it holds that he is a "domestic subject" and hopelessly beyond the reach of its naturalization laws. [See Opinion U. S. Attorney-General, 7,746.] So that, a descendant of the original lords of the soil, can be admitted to citizenship only by a special act of Congress, or by treaty. The Pueblo Indians of New Mexico constitute no exception, because, as citizens of the Mexican Republic, they became citizens of the United States by the Treaty of Guadeloupe-Hidalgo.

Another test of nationality is the nationality of the father. "By the law of nature alone," says Vattel, "children follow the condition of their fathers, and enter into all their rights. The place of birth cannot, therefore, in itself, produce any change in this particular, nor furnish any valid reason for taking from a child what nature has given him." Our government formally adopted this doctrine by the act of Congress of February 10, 1855, with, however, a qualification that the rights of citizenship shall not descend to persons whose fathers never resided in the United States. And even in cases where, by the laws of a foreign country, all children born therein are citizens thereof, notwithstanding the nationality of the father, our government has never recognized their citizenship as against that country, though it is obligated to recognize their citizenship as against all other countries. The practice of the English government is the same. But it is manifest that the adoption of this test of nationality, even with the modifications referred to, logically requires the abandonment of that by place of birth, at least to a corresponding extent, so that our so-called "Civil Rights Bill," (of April 9, 1866,) avoids possible conflict by only declaring to be citizens, persons "born in the United States and not subject to any foreign power."

Thus, our government has adopted neither of these tests of nationality—that by the place of birth nor that by the nationality of the father—without important qualifications. The law in both England and France is substantially the same. That of England, like our own, lays chief stress on the place of birth, while in France the father's nationality usually determines, though not absolutely, that of the child.

How or under what circumstances a citizen may be deemed to have changed his allegiance, and to have obliterated all obligations resulting from his previous allegiance, has been among the vexed questions connected with our administration of foreign affairs. It has been only about fifteen years since the old feudal doctrine of indelible allegiance was explicitly abandoned in some parts of Europe, and previous to that time, even after the treaty of 1814, there was always more or less conflict between our theories of naturalization and European theories of expatriation. There is some friction still, though it has been diminished by a series of special treaties. Thus, for instance, there still remain two opposing doctrines of expatriation, namely: First, the American, as proclaimed in our law of July 27, 1868, whereby expatriation is declared to be "a natural and inherent right of all people;" and, second, the continental, as embodied in the Code Napoleon, whereby an emigrant incurs the loss of civil rights in his native country, and (should he return thereto) certain penal consequences, if the emigration took place without permission of the government.

There are also as many as four main systems of naturalization, namely: First, by residence for a stated period, renunciation of native allegiance and oath of allegiance to adopted country, as in the United States; second, by employment in the public service, a residence in the country for a stated period, by oath of allegiance and a certificate granted at the discretion of the government, as in England; third, by either employment in the public service or certificate from the government, as in Prussia, and, fourth, by residence for a stated period and certificate from the government without oath, as in France. And in addition to these there are often exceptional provisions for the naturalization of aliens, as in the United States, by service in the army with one year's residence, or three years' service in the merchant marine, or, as in England, by two years' naval service during actual war.

It has never been difficult for a foreigner (if "a free white person 21 years of age") to become a citizen of the United States. Under our existing laws, he must have resided in our midst not less than five years;

must have made his preliminary declaration of intention two years beforehand; must take an oath to abjure all former allegiance and to support the Constitution of the United States; must renounce any title of nobility which he may have; must prove, by two citizens, that his residence has been continuous for, at least, five years, and that he has resided one year at least within the State where the court is held; must satisfy the judge that he has, during that time, behaved as "a man of good moral character," that he is attached to the principles of our constitution and is "well disposed to the good order of the government." Finally, the country of his former allegiance must, at the time of his admission, be at peace with the United States, because, by the law of nations, the subject or citizen of a belligerent cannot transfer his allegiance. When thus duly naturalized, he is thenceforth entitled to the full measure of all the privileges and immunities of American citizenship, political as well as civil, except that he must wait two years longer before he is eligible to a seat in Congress, and that he can never be eligible to the office of President. If, however, he should visit the country of his former allegiance, the protection to be given him therein by our government must be considered in connection with other questions of natural rights and duties, because he is not necessarily discharged from obligations or penalties which he may have actually incurred before emigration. But of this, we shall have occasion to speak further on.

Any "free white woman" married to an alien, becomes naturalized by the naturalization of her husband; and any woman who is eligible to citizenship by our laws, becomes a citizen by marrying a citizen. The minor children of an alien, if living in the United States at the time of his naturalization, are deemed citizens, and if he should die after making his preliminary declaration of intention to become a citizen, and before his actual admission, his widow and children are deemed citizens.

The law itself would not be objectionable, if it could be honestly administered; and at the time of its enactment, more than three quarters of a century ago, its honest administration was possible. But since that time,

indeed within the last fifty years, nearly all the States have, by constitutional amendments, stripped the local judiciary of its ancient independence and prestige. They have, with hardly an exception, either made the judges elective for short terms by universal suffrage, or else virtually placed all judicial tenures at the caprice of some ward politician. The result is, that as these local, or State courts still have jurisdiction in this vitally important matter, naturalization frauds have become the rule rather than the exception. Any one ought to be able to see that the judge, in such cases, should be independent; least of all, should he be the mere tool of some local political "boss." Besides, since the power of naturalization is, by our constitution, vested in the national legislature exclusively, the power to grant certificates of naturalization should be as exclusively in the national courts. This is of infinitely more practical importance than any probationary term of residence, because it is of no consequence whether that term be long or short, so long as its provisions are habitually disregarded by the tribunal having the power to admit to citizenship.

The nationality of married women has been the source of much controversy, and although questions closely connected therewith are constantly arising, our Congress has never defined the status of American women married to aliens. The common law rule in such cases is, that marriage produces no dissolution of her native allegiance, and there can be no doubt that this was the rule in the United States, previous to the act of Congress of February 10, 1855. The question then is, did that act change the law? It confers citizenship upon an alien woman who marries a citizen, but it does not say that an American woman forfeits her nationality by marrying a foreigner. If the laws of her husband's country confer citizenship of that country upon her, there seems no good reason why she may not enjoy the privileges without effecting her rights in her native country. Her marriage to an alien domiciled in the United States, does not denationalize her; and if she goes to her husband's country, the objection to double allegiance would not necessarily preclude her enjoyment of rights and immunities incident to her American citizenship.

If, on the contrary, it be held that by accepting the privileges conferred by her husband's country, she forfeits her American citizenship, her own right of inheritance, as well as that of her children, may be seriously affected. Therefore, until some legislative act, or some decision of our Supreme Court, shall place this vexed question beyond dispute, it would seem the safer plan for the Executive branch of our Government to adhere to the old common law rule.

The attitude of our Government on the subject of expatriation, has never been particularly remarkable for consistency. Until quite recently, we had no statute authorizing the exercise of the right of expatriation by our own citizens; and our Courts had decided in the meantime, that, in the absence of such a statute, an American citizen could not expatriate himself. And yet, in apparent forgetfulness of this fact, we had been naturalizing the subjects and citizens of other countries, on condition of their renunciation of their previous allegiance. We had even gone so far as to ask other countries to place their legislation in harmony with our naturalization laws, quite overlooking the fact of our failure to so harmonize our own.

The Declaration of July 27, 1868, known as the "Expatriation Act," was intended to correct this defect. It declares "the right of expatriation" to be "a natural and inherent one of all people," and that "any declaration, instruction, opinion, order or decision of any officer of the United States which denies, restricts, impairs or questions this right, is inconsistent with the fundamental principles of this government."

This language savors of the hustings; and, in addition to its questionable taste, is both gratuitous and indefinite. It says too much, in that it assumes to speak in behalf of "all people;" and it says too little in that it fails to declare how, or under what circumstances this "right of all people may be exercised by American citizen. It fails to define "expatriation," or to say what is essential to its full attainment, or what shall be the evidence of its accomplishment. The power of Congress to make such laws as it pleases in regard to the denationalization of its own citizens, no one questions. That is an attribute of sovereignty, incident to every independent

State. And it may enforce, within its own jurisdiction, such laws as it pleases to make touching the naturalization of foreigners. Inasmuch, therefore, as these are rights of a municipal or domestic character, this declaration, as to the "natural and inherent right of all people," is law as respects our own citizens, but nothing more than an expression of opinion as to what is the law of nations. Consequently, it is not binding on other nations further than they may assent to it by treaty, or that it may, in reality, accord with the law of nations.

Again, the language of the act is ill chosen when it declares that "all naturalized citizens of the United States while in foreign countries, are entitled to, and shall receive from this government, the same protection of person and property which is accorded to native citizens." Such sweeping assertions of unqualified rights of naturalized citizens in foreign countries, may sound very well at the hustings; and, though always of very questionable taste, may be thought by some to be justifiable as a contrivance to catch the so-called "foreign vote." But sensible people know that Congress cannot alter the law of nations; and that any declaration contrary thereto, is not binding upon the President, who is charged by the constitution with the administration of our foreign affairs. A free State may legislate on the subject of expatriation and naturalization, without enquiry as to the laws of other countries; because the assent of the emigrant's native country to his change of residence, is no longer considered necessary in the country which naturalizes him. And after his naturalization, the emigrant is, with one exception, entitled to all the protection which is usually accorded to native born citizens. But the exception here noted, is an important one; and it arises whenever the emigrant returns to his native country. The question of his protection then becomes complicated with other questions of natural rights and duties, which no government can afford to ignore. He cannot, in such case, justly claim exemption from obligations or penalties incurred before emigration; unless, indeed, they may have been discharged or satisfied by lapse of time or other intrinsic causes. Thus, for example, if he deserted the army or navy, or had be-

trayed some public trust, or, after having been conscripted, he emigrated in order to escape duty, his change of citizenship does not extinguish the obligation in the one case, nor satisfy the penalty in the other; though it does discharge him from the liability to any service that had not been actually required of him before emigration. These principles are so generally conceded in all our treaties with foreign powers, and so generally recognized even in the absence of treaty stipulations, that they are no longer matters of dispute.

We usually hear a great deal, once in about every four years, of the failure of our government to protect the rights of its naturalized citizens in foreign countries; and it is but natural that our demagogues, as well in Congress as out of it, should improve the occasion to distinguish themselves by "buncombe" speeches. But intelligent men, familiar with the administration of our foreign affairs, need not be told that where the rights of one naturalized citizen have been neglected by our government, it has espoused the cause of hundreds who have little or no claim upon it. In other words, every well informed man knows, and every candid man must admit, that the abuses of American citizenship in foreign countries have become frequent and shameful. It is a very common thing for natives of other countries to maintain a residence in our midst barely long enough to procure (by purchase or otherwise) certificates of naturalization. They then return to their native country—or take up their abode in some other—with no intention of ever making of the United States their permanent residence. In this way, they enjoy exemption from the duties and burdens of citizenship in both countries; from those in the country of their residence by reason of their naturalization papers, and from those in the country of their adopted allegiance by reason of their continuous absence. And every American Minister and Consul will testify, that it is precisely this class of persons who give our government most annoyance and trouble. They are usually the most importunate in their demands for protection, and generally the first to complain, if their demands are not readily complied with. And it sometimes happens that, by misrepresentation and falsehood,

they either embroil our government in difficulty, or place it in a wrong position.

But, it is said, that, in all cases where, by the laws of their native country, these persons were never expatriated by being naturalized in ours, and where they assume duties or perform acts compatible with their original allegiance and incompatible with their acquired citizenship, they must be held to have absolved our government from all obligation to protect them. Very true. But this seldom happens, and for obvious reasons. By our treaties with most European countries, and by the laws of nearly all the Latin-American States, expatriation is accomplished whenever naturalization takes place; and since the primary object of these persons is to avoid the duties of citizenship in both countries, they are very careful not to assume duties or perform acts that would imply a purpose to resume their former allegiance. And thus, while living beyond the reach of the authority of our government—without ever having identified themselves with it, and without ever having contributed anything to its support—they successfully invoke its power to shield them from the ordinary burdens of citizenship in the country of their residence.

An effective remedy for such abuses is not possible, except by some well digested scheme of Congressional legislation. There should be some explicit declaration by Congress of the conditions under which citizens of the United States shall be deemed to have expatriated themselves; and when a man, in a foreign country, demands protection as an American citizen, he should be required to produce some better evidence of his nationality than that afforded by the certificate of a petty municipal magistrate who, although he may have common law jurisdiction, and "a seal and clerk," usually obtains his office as a reward for some supposed political service at the primaries, and holds it by the extremely uncertain tenure of the popular will.

WILLIAM L. SCRUGGS.

NEGLIGENCE — FELLOW-SERVANT OR VICE-PRINCIPAL.

HOKE v. THE ST. LOUIS, KEOKUK AND NORTH-WESTERN RAILWAY CO.

Supreme Court of Missouri, March 18, 1886.

NEGLIGENCE—Fellow-Servants—Road Master and Common Laborer are not.—Where a road-master of a railroad company has superintendence of the road department, and jurisdiction over all wrecking trains, and through his negligence in giving a wrong signal to an engineer of a wrecking train, engaged in removing a wreck, one of the laborers is injured in performing a duty imposed upon him by the "boss" of the gauge, such road-master, in giving the signal, was not acting as fellow-servant of such laborer, but was acting as vice-principal or "*alter ego*" of the railroad company.

The facts appear in the opinion.

RAY, J., delivered the opinion of the court.

This was an action for damages for an injury alleged to have been done to plaintiff by defendant and its employees, while engaged in loading a wrecked car upon a wrecking train of defendant.

This action was commenced in the Lincoln County Circuit Court, and afterwards transferred to that of St. Charles, where there was a verdict and judgment for plaintiff for \$10,000, from which the defendant appealed to the St. Louis Court of Appeals, where the judgment of the Circuit Court was reversed, and the case remanded, from which the plaintiff appealed to this court.

The case is reported in the 11 Missouri Appeal Reports, 574, where the general facts of the case appear; except that the record shows the extent and nature of the powers, duties of jurisdiction of Tracy, as road-master of defendant, more fully than appears by the opinion.

The controlling question in the case, and upon which it was made to turn in the Court of Appeals, is, whether the plaintiff and said Tracy were fellow-servants in the transaction in which the injury was received; or whether said Tracy, in said transaction, acted as vice-principal, or "*alter ego*" of the defendant company.

The Court of Appeals, in effect, held that plaintiff and said Tracy were fellow-servants, and that it did not appear that the injury complained of arose from any negligence of Tracy's in the matter of employing hands, or in any matter, in which he replaced the master, or in any of the business, in which, he was vice-principal, or "*alter ego*" of the master, and that plaintiff could not, therefore, recover, and for that reason reversed the judgment of the trial court, and remanded the cause, and the propriety of this ruling is the question now before us.

The record shows, not only that said Tracy was road-master of defendant road, with power to employ and discharge hands, but, also, that as such road-master, he had jurisdiction over the road-

bed and tracks of defendant throughout its entire line; that his duties were to keep road-bed, tracks, cattle guards and fencing in repair; that he had authority to employ and discharge section foremen, foremen of construction and wrecking trains, bridge watchmen, and also all men and laborers in his department; that his authority and jurisdiction extended alike, to laborers, section foremen, foremen of construction and wrecking trains engaged in the work of clearing away, or removing a wreck from the road-bed or track; or any special foreman engaged in the special work of clearing away such a wreck, etc.

The record, also, shows that in August, 1879, a supply train of defendant's cars, consisting of 3 box and 3 flat cars, had been wrecked on defendant's road, near Foley station, and the evidence on the part of the plaintiff tended to show that the plaintiff, at the time of the injury complained of, was working in defendant's employ as a laborer, under Michael Fitzgerald, an agent and servant of defendant, who was superintending or bossing the body of laborers, of whom plaintiff was one; that plaintiff was acting as a laborer under the direct supervision, direction and control of John Tracy, who was defendant's road-master, and as such had control of the road-bed and track of defendant's entire line, with the powers, duties and jurisdiction heretofore stated, in that behalf; that said Fitzgerald was section and construction foreman of defendant, and was assisting said Tracy in superintending plaintiff and other laborers in removing the wreck and loading a flat car, whose wheels and trucks had been broken off, upon a wrecking train, both of which were owned by defendant, and being controlled by defendant's agents.

The wrecking train was composed of an engine and flat cars, and had been cut in two, some of the cars attached to the engine being south of the wrecked flat car, and other cars standing still north of the wrecked car. The flat or wrecked car had been lifted upon the track of defendant road, when the train was cut in two, and the north end of the wrecked flat car had been lifted up and placed on the first car in the wrecking train, north of the wrecked car, and the other laborers and plaintiff, under the control and supervision of Tracy and Fitzgerald, were attempting to place the south end of the wrecked car on the first car of the wrecking train, immediately south of the wrecked car, so that the first car of the south might be pushed under the wrecked car. This wrecked car was held up above the level of the first flat car south, by levers resting on the floor of the first flat car south, the north ends of which levers extending a few inches under the south end of the wrecked car; and while the wrecked car was held up by the levers, plaintiff was ordered by Fitzgerald and Tracy to go under the wrecked car, and push out one of the levers. The plaintiff obeyed the order and whilst pushing at the lever, Tracy, intending to signal the engi-

neer to move the engine north, and thus force the flat car, on which the levers were resting, under the wrecked car, by carelessness and mistake, signaled the engineer to move south, in consequence of which, the engine was moved south, and thereby drew the flat car and levers from under the wrecked car, and caused the same to fall on plaintiff, crushing and crippling him for life.

The testimony on the part of the defendant, on the contrary, tended to show that Tracy gave the right signal, but that the engineer, by mistake and carelessness moved the engine south, instead of north, thus causing the accident. On this point, the testimony is conflicting as to what signal Tracy gave, but all agree, that if he gave the signal the plaintiff's witnesses say he gave, he gave the wrong signal, caused the cars to move the wrong way, and thus occasioned the accident and injury in question, and so the jury found.

The material instructions given and refused in the cause, are set out in the opinion of the Court of Appeals and are as follows: Those given for the plaintiff are two in number, as follows:

1. If the jury find from the evidence that one John Tracy was the road-master of defendant's railroad, and as such road-master was the superintendent for the defendant of the work of removing and loading up the wreck in question, and had entire control and charge thereof, with power to employ the section foreman and section hands, and that the plaintiff was subject to his orders and directions, then the jury are instructed that said Tracy was not a fellow-servant with the plaintiff, and that said Tracy's acts and conduct, in connection with said work, were and are the acts and conduct of the defendant, so far as this case is concerned.

2. If the jury believe from the evidence that the plaintiff, while employed by defendant as a section hand, on or about the 15th day of August, 1879, in the discharge of his duty as such section hand, was ordered by his superior to step under the wrecked car and push out a certain lever, and that in discharge of said duty, and in obedience of said order, plaintiff stepped under said car, and while engaged in attempting to carry out said order, the defendant, through negligence or mistake, and without warning to the plaintiff, gave to the person in charge of the engine a signal to move said engine and the cars attached to it southward, when the proper signal would have been to move the engine and cars attached northward, and that in obedience to said signal, the person in charge of the engine moved said engine and cars attached to it southward, and that, in consequence thereof, said wrecked car fell upon and injured plaintiff, the verdict must be for the plaintiff.

Three were given for the defendant, as follows:

1. If the jury believe, from the evidence, that at the time plaintiff was injured, he was an employe of the defendant, and engaged with a number of other men in loading a wrecked train on a

flat-car attached to an engine on defendant's track, and that John Tracy, defendant's road-master, gave a signal to the engineer in charge of the engine to move his engine northwardly, and that the engineer instead of moving his engine northwardly, moved southwardly, and that the plaintiff's injury was caused by the southward movement of the engine and the car thereto attached, the plaintiff cannot recover, and they must find for the defendant.

2. Even though the jury may believe, from the evidence, that plaintiff's injury was caused by the southward movement of the train, by the engineer in charge, in obedience to an order of John Tracy, the defendant's road-master, so to do; yet, if they also believe from the evidence that the said engineer had reasonable grounds to believe that this was a wrong signal, and that obedience to this signal would cause damage or injury, the plaintiff cannot recover, and the finding must be for the defendant.

3. If the jury believe, from the evidence, that prior to the happening of the accident which caused the injury to plaintiff, defendant's road master, John Tracy, gave the men employed in loading the wrecked car on another flat-car warning that they must get out of the way, that he was going to move the train, or words to that effect, and that said warning was given in sufficient time before the moving of said train for said men to get out of the way, and loud enough for the men to hear said warning; and shall further believe that plaintiff, in the exercise of reasonable care, could have heard said warning, and failed to get out of the way, then the defendant is not liable in this action and the verdict must be for defendant, unless the jury further find, that said Tracy saw that plaintiff was in danger in time to have prevented the injury, and failed to make proper precaution to prevent said injury.

The court gave the following instruction, upon its own motion: 9. The court instructs the jury that a servant of a corporation, who is injured by the negligence or misconduct of his fellow servant, can maintain no action against the master for such injury, and that this rule applies in all cases, without regard to the degree of subordination in which the different servants or agents may be placed with reference to each other, and if the jury find from the evidence that plaintiff, Tracy and Fitzgerald were, at the time of the injury complained of, all employes of defendant, in the service of the defendant, then the verdict of the jury must be for defendant, unless the jury should also find and believe from the evidence that the road-master, Tracy, had sole charge and control of the work, as superintendent thereof, with power to employ the hands employed, and that the plaintiff was at the time subject to his order, and that the injury complained of was caused by his (the said Tracy's) negligence.

Defendants asked the court to instruct the jury, "that if plaintiff and Tracy were fellow servants of

defendant, all engaged at a common employment at the time of the accident, and the injury was caused by Tracy's negligence in giving a wrong signal, defendant is not liable; and also that if Tracy was road-master of defendant, with authority to employ and discharge hands, yet, unless plaintiff was injured by some negligence of Tracy in the employment of unfit men, or the providing of unsafe appliances, the verdict must be for defendant." These declarations of law were refused.

The court of appeals held that instruction number 2, given for plaintiff was erroneous and unwarranted by any evidence in the case; and that the instructions asked, by the defendant and set out in the course of its opinion as refused, should have been given.

The case at bar, in all its essential features and principles, is identical with that of *Moore v. The Wabash St. Louis & Pacific Ry. Co.*, recently decided by this court and not reported. In that case this court, per Henry, C. J., had occasion to consider and review this whole question of fellow servants in an elaborate opinion and the ruling in that case must be accepted as decisive of this. That was an action to recover damages for an injury sustained by the plaintiff therein while in the employ of that defendant as a car repairer.

The defendant in that case, it seems, kept a local car shop at Stansbury (its general car shops being elsewhere and under a general superintendent thereof named Buck) and had in its employ a foreman of car repairs, named Kestler, who had sole charge and control of hands employed to repair cars.

At that shop, the plaintiff was employed as a car repairer and was ordered by said foreman to repair the draw-head of one of the freight cars of defendant standing on a side track, under a promise from said foreman that he would protect him from danger and injury while so employed in making said repairs, and prevent any train or engine from coming on said side track, while so employed; but that, through the negligence and carelessness of said foreman, an engine of defendant was permitted to come in upon said track, and drive with great force against said car, under which said plaintiff was so at work, whereby plaintiff's right arm was caught and crushed between said cars, etc.

In treating of that case, the court use this language: "If we may venture a general proposition on the subject, it is, that all are fellow servants, who are engaged in the prosecution of the same common work, under the direction and management of the master himself; or of some servant placed by the master over them."

"If a person employs another to perform a duty, which he would have to discharge, if another were not employed to do it for him, such person, as to that service, stands in the master's stead with relation to other persons." * *

"The person who had control of the work and

the men engaged in it, directing how, when and where it should be done, represents in those matters the company itself. It was the duty, a contractual obligation, of the company to provide for the safety of the men at work in repairing the cars. The company devolved that duty upon the person, who represented it, in conducting, ordering and managing the work and men engaged in it." * *

"The foreman, in what he had to do for the company, did not represent himself; except as the agent of the company, he had no interest in the repairs ordered. He did none of the manual labor in repairing the car, but, for the company, gave such orders and directions to the car repairers, as he thought proper. That the foreman was an inferior servant to Buck (who had a general control and management of car repairs, anywhere along the line of the road,) does not determine that the foreman was a fellow servant of plaintiff."

* * Buck, the general superintendent of car repairs, was not a fellow servant of plaintiff, and could not have been so regarded, if he, instead of Kestler had been present, and given the order, and made the alleged promise to protect plaintiff in obeying that order; and if by authority of the company, Kestler was placed there to do what fell within the line of Buck's duty, did he not, in respect to that matter, stand in the same relation to the company, as Buck himself, and if Buck had personally done what it is alleged Kestler did, could the company have successfully defended the action, on the ground that Buck and plaintiff were fellow servants?

"We recognize the principle that one may act in the dual character of a representative of a master and as a fellow servant. If it had been the duty of the foreman, in this case, to assist when necessary in the manual work of repairing the cars, in addition of the other duties of superintending, controlling and directing such work, and he had gone under the car with plaintiff, to assist in repairing the car; and by some negligent or unskillful act, while so engaged, injured the plaintiff, the latter could not have recovered, without proof of facts, which entitle one to recover when injured, in consequence of the negligence or unskillfulness of a fellow servant. Under the circumstances proved in this case, we think that plaintiff and Kestler were not fellow servants."

In this case at bar, as has been seen, Tracy, whose negligence and carelessness in giving signals to the engineer, occasioned the injury in question, was not at the time engaged or assisting in the manual work of removing said wreck from the road-bed and track of defendant; or in loading said wrecked car upon said wrecking train; nor does it appear to have been his duty, as road-master, so to do; but was engaged as such in superintending, directing, and controlling said laborers, including plaintiff, in said work; and in that particular, was in the line of his duty, as road

master of the defendant; and under the authority of said case of *Moore v. Wabash St. L. & Pacific Ry. Co.*, *supra*, said plaintiff and Tracy were not fellow servants; but, that Tracy, in the transaction in which the injury in question was received, represented the master, and in that behalf was acting as vice principal or "*alter ego*," and that his negligence in that particular was the negligence of defendant, for which it is liable.

Various other questions were raised in the progress of the trial and suggested and argued by briefs of counsel, which we have not overlooked, but we have not deemed them material to the proper disposition of the case and they will not be further noticed.

The question we have considered was raised at every stage of the proceeding, first, by way of objection to the reception of any evidence at the trial; second, by way of demurrer to plaintiff's evidence, and third, by way of instructions and confessedly was and is the principal and controlling question in the case.

For these reasons, the Court of Appeals erred in its said ruling, and its said judgment for that cause is reversed and the cause remanded to that court, with directions to enter up its judgment affirming that of the circuit court. All concur.

NOTE.—The first case reported, passing on the liability of an employer for injuries to an employe, occasioned by a co-employe, is the English case of *Priestley v. Fowler*,¹ in 1837. This was followed in 1841 by *Murray v. So. Car. R. R.*,² and in 1842 by the Massachusetts case of *Farwell v. Boston & W. R. R.*,³ and then in 1850 by the English case of *Hutchinson v. York N. & B. R. Co.*⁴ These cases decided, that when an employer had provided proper appliances, he was not responsible for an injury sustained by one of his employes caused by the carelessness or negligence of a co-employe. These decisions were almost universally adopted as the correct exposition of the law throughout this country. But it was soon perceived that such rulings often produced injustice—that operators turned over the whole immediate care and supervision of their business to subordinates, and escaped all liability for injuries caused by such subordinates. The courts then proceeded, without reversing the rule, to qualify and differentiate it, till in some courts it is torn almost to shreds, and a coach and four can be driven through it. Without attempting to decide where the weight of authority is, we will call attention to the various modifications of the rule, which have been adopted by the different courts:

1. When a servant is injured by the fault of another servant working in an essentially different department of the business, the master is responsible therefor.⁵ The two servants are not considered to be fellow-servants, unless they were actually co-operating at the time of the injury in the particular business in hand, or their usual duties brought them into habitual con-

sociation, so that proper caution would be likely to result.⁶

2. The master is required to provide proper and safe machinery and appliances for his laborers, and he is not allowed to delegate this duty to any agent or servant so as to relieve himself from responsibility.⁷

3. After the master has provided proper appliances, he must see that everything is kept in a safe condition, and if he intrusts that duty to a servant, he will still be liable for any injury to any servant caused by the appliances being out of order.⁸

4. The cases go further than the matter of proper machinery and appliances. The master must provide proper assistance in the work and the proper watchfulness, that no injury may be caused by other employees. The principal case treats of the latter liability. He is liable to a brakeman for an injury caused by his failure to place enough brakemen on the train.⁹ Where a servant was engaged in repairing a car, it was the business of his principal to keep trains of cars from running against his car, and the principal was held liable for the neglect of the boss car repairer in that respect.¹⁰

5. Two servants of the same master are not fellow-servants when one acts in a superior capacity to the other, and the master is liable for injuries to the subordinate caused by the carelessness or negligence of the superior. At first it was held, that to hold the master responsible, he must have intrusted this superior servant with the actual control of all his business—made him his *alter ego*.¹¹ Then it was held, that this superior servant must have the power to employ and discharge the inferior servant. But now it is considered sufficient that the inferior servant is under the control and subject to the orders of the superior servant.¹² Ohio and Kentucky from the first adopted this modification of the rule.¹³ It will be noticed, as in the principal case, that the employer is exempted from responsibility for the negligence of the superior servant, when, at the moment of the accident, the superior is working with and assisting the inferior, and is not engaged in directing and supervising.

6. The master is also responsible for injuries sustained by a servant in executing work different from that for which he contracted, and which he was ordered to execute by his employer or by a superior servant.¹⁴

⁶ *Chicago & N. W. R. R. v. Miranda*, 93 Ill. 302.

⁷ *Schultz v. Chicago, M. & St. P. R. R.* 48 Wis. 375; *Gilmore v. N. P. R. R.* 9 Sawy. 558; *Hough v. Railway Co.*, 100 U. S. 213; *Indiana Car Co. v. Parker*, 100 Ind. 181; *Copper v. Louisville, etc. R. R.*, 2 N. E. Rep. 749; *Pantzar v. Tilly Foster M. Co.*, 99 N. Y. 369; *Hannibal & St. J. R. R. v. Fox*, 31 Kans. 586.

⁸ *Atchison, T. & S. F. R. R. v. Moore*, 31 Kans. 197; *Lewis v. St. Louis & I. M. R. R.* 59 Mo. 495; *Tierney v. Minne. & St. L. R. R.* 33 Minn. 311; *Cunningham v. U. P. Ry.*, 7 Pac. Rep. 795; *Schultz v. C. M. & St. P. R. R.*, 48 Wis. 375; *Brabbite v. C. & N. W. R. R.* 38 Wis. 289; *Holden v. Fitchburg R. R.* 129 Mass. 268; *Ford v. Fitchburg R. R.*, 110 Mass. 240; *Mullan v. Phila. & S. M. Co.*, 78 Penn. St. 25; *King v. Ohio, etc. R. R.* 14 Fed. Rep. 277.

⁹ *Booth v. Boston & A. R. R.*, 73 N. Y. 38; *Flike v. Boston & A. R. R.* 53 N. Y. 519.]

¹⁰ *Hannibal & St. J. R. R. v. Fox*, 31 Kans. 586.

¹¹ *Brothers v. Carter*, 52 Mo. 372; *Malone v. Hathaway*, 64 N. Y. 5; *Willis v. Oregon R. & N. Co.*, 11 Oreg. 257.

¹² *Cowles v. Richmond & D. R. R.*, 84 N. C. 309; *Lalor v. Chicago, B. & Q. R. R.* 52 Ill. 401; *Thompson v. Chicago, etc. R. R.* 4 McCrary, 629; *Chicago, etc. R. R. v. Lundstrom*, 16 Neb. 254; *Chicago, M. & St. P. R. R. v. Ross*, 112 U. S. 377; *Gravelle v. Minn. & St. L. R. R.*, 3 McCrary, 352.

¹³ *Berea Stone Co. v. Kraft*, 31 Ohio St., 287; *Louisville & N. R. R. v. Collins*, 2 Duvall, 114.

¹⁴ *Lalor v. Chicago, B. & Q. R. R.* *supra*.

¹ Mee. & W. 1.

² McMullan, 385.

³ Metc. 49.

⁴ Exch. 343.

⁵ *King v. Ohio, etc. R. Co.*, 14 Fed. Rep. 277; *Chicago, M. & St. P. R. R. v. Ross*, 112 U. S. 377; *Garraby v. K. O., St. Joe & C. B. R. R.*, 25 Fed. Rep. 258; *Nash & C. R. R. v. Carroll*, 6 Helsk. 347.

It may be said, that the only case where the old rule has not been impugned, is where the servants are so far working together as to be practically co-operating, and to have opportunity to control or influence the conduct of each other, and have no superiority, one over the other. Since the rule grew up as judicial legislation, the courts are acting properly in retiring from a position where injustice may be done.

S. S. MERRILL.

EQUITY—MISTAKE—REFORMATION OF INSTRUMENT—OVERWHELMING PROOF—PAROL EVIDENCE.

JAMES A. C. BOND V. FANNIE V. E. DORSEY.

Maryland Court of Appeals, May 27, 1886.

1. Equity has jurisdiction to entertain a suit to reform an instrument (here a release of a mortgage) which has been dated, drafted, recorded, etc., erroneously by mistake. But the evidence of mistake must be "clear and overwhelming," or at least "satisfactory."

2. What is meant by "overwhelming," "satisfactory," "clear," etc., explained with reference to decisions of various States.

3. Parol evidence of mistake is admissible in support of a suit to reform a mistake in an instrument. Record evidence is not always required.

4. Parol evidence may be received to show mistake in according release of a mortgage, against subsequent mortgagees, although not against *bona fide* purchasers for value.

Appeal from the Circuit Court for Carroll county, in equity. Reversed.

The facts are stated in the opinion.

Argued before Alvey, Ch. J., and Robinson, Ritchie, Irving, Miller and Yellott, JJ.

James A. C. Bond, appellant, *pro se*; *Messrs. Charles B. Roberts, James McSherry and W. A. McKelip*, for appellees.

YELLOTT, J., delivered the opinion of the court.

This is an appeal from a decree of the Circuit Court for Carroll county sitting in equity. The bill of complaint was filed by the administrator of Henry Bussard; and it is alleged in said bill and shown by the proof in the cause that William H. B. Dorsey, being indebted to the Central National Bank of Frederick City on two promissory notes, with the said Henry Bussard as one of his indorsers, did on the second day of October, 1876, execute a mortgage to said bank as security for the liquidation of said indebtedness.

The land described in said mortgage consists of a tract of about forty acres; of which said tract eight acres and a fraction are situate in Frederick county, and the remaining portion in Carroll county. This land belonged to the appellee, Fannie V. E. Dorsey, who was the wife of the said William H. B. Dorsey, and who joined with her husband in the execution of the mortgage.

Subsequently, but on the same day, the said Dorsey and wife executed another mortgage of the same property to Lewis F. Detrick of Baltimore City, in which is a recital mentioning the existence of the first mortgage, and thus recognizing its priority. On the 9th day of November, 1876, Dorsey and wife executed a mortgage of the same property to the Maryland Fertilizing & Manufacturing Company. On the 14th day of May, 1878, the first mentioned mortgage was assigned by the Central National Bank to the said Henry Bussard, he having paid the notes for which this mortgage was intended as security. The said Henry Bussard held another mortgage executed by John J. Molesworth of Frederick county, and recorded in the clerk's office of said county. As shown by the testimony of Molesworth, the money secured by this mortgage was paid on or about the 17th of May, 1878, to the mortgagee at his house in Carroll county, at which time he promised to enter a release on the record in Frederick county. On the 21st of May, Henry Bussard went to Frederick City; and it is contended by the plaintiff's solicitor that he went for the purpose of releasing the mortgage executed by Molesworth. The mortgage assigned to him by the bank having been recorded in Frederick county, on the 27th of May, 1878, soon after his return from Frederick, he sent the same mortgage, with the assignment thereon, to the clerk of the Circuit Court for Carroll county, to be there recorded. It was subsequently discovered that while on his visit to Frederick City he had not released the mortgage from Molesworth, but had released the mortgage executed by Dorsey and wife to the bank, and assigned to him, which mortgage had not then been and has never since been paid. It is contended by the appellant, that this release was made by mistake; and this question must now be determined by the proof in the cause.

The evidence adduced on the part of the plaintiff seems to be strong enough to remove all reasonable doubt with reference to the occurrence of a mistake in making the entry of a release on the record. It is not to be presumed that Mr. Bussard intended to release a mortgage which had never been paid. And it is difficult to suppose that, after executing a release in Frederick county, he would subsequently send the same mortgage to Carroll county to be there recorded. But it is easy to believe that he intended to release the mortgage from Molesworth, which had been paid, and which was afterwards released by his administrator.

Such surmises would, of course, avail nothing unless supported by proof. But the testimony of witnesses, who are not contradicted, is so strong as to show clearly that Mr. Bussard did not intend to release the mortgage assigned to him by the bank. One of the witnesses says that in March, 1880, the appellee, Fannie V. E. Dorsey, said to Henry Bussard in her presence, that it was a mistake, and offered to take him to Frederick in her

carriage and have the mistake rectified. Another witness says, that she heard Mr. Bussard tell Mr. Ross, his attorney, that he had intended to release the mortgage from Molesworth, and had executed the release of the other mortgage by mistake.

These two witnesses are the daughters of Henry Bussard, and may be interested in his estate; but they are of high respectability; and their testimony, so far from being contradicted, is corroborated by that of other persons who have no interest in the matters in controversy. The mother of William H. B. Dorsey, says that she heard the appellee offer to take Mr. Bussard in her carriage to Frederick, and he said he was too infirm to go, and expressed his apprehension that he would never be able to correct the release. Mr. Bussard died very soon afterwards at the age of eighty-two years. This testimony is strongly corroborated by that of Charles W. Ross, who says that "Mr. Busard claimed that the release made by him of the Central Bank mortgage, which had been assigned to him, was an error; that he intended to release a mortgage given him by a man of the name of Molesworth." Mrs. Dorsey, the appellee, was present at this conversation.

The only testimony offered by the defendant was that of Thomas Gorsuch, formerly the clerk of the Circuit Court for Frederick county. He says he has no recollection of the transaction, but does not think that such a mistake could have occurred, as it was an assigned mortgage.

But when we see by the evidence that the mortgage was assigned by the bank on the 14th of May, 1878, and was first recorded in Frederick County; that on the 21st of May, 1878, Mr. Bussard went to Frederick and on the 27th of the same month sent the mortgage to Carroll County to be recorded, the conclusions is obvious that he must have spoken to the clerk about the mortgage; and during this conversation the mistake may, as the result of age and infirmity, have occurred. But Mr. Gorsuch's memory has retained nothing in relation to the transaction, and therefore nothing is established by his testimony.

When it has been proven that a mistake of this nature has occurred, equity will intervene and grant relief. But it has been said in some of the cases that the proof must be clear and overwhelming. *Beard v. Hubble*, 9 Gill, 430; *Groff v. Rohrer*, 35 Md. 327; *Mendenhall v. Steckel*, 47 Md. 454.

What is intended to be understood by the very strong expression "overwhelming proof" is explained by other authorities. It cannot be disputed that proof sufficient to remove every doubt from the mind is, in effect, overwhelming, because it establishes the part sought to be proved; and no proof can usefully accomplish more than this result. In some of the States, the expressions used by the courts are not so strong; and it is held that "the evidence of the mistake must be clear and satisfactory, leaving but little, if any, doubt of the

mistake," *Miner v. Hess*, 47 Ill. 170; *Heavenridge v. Mondy*, 49 Ind. 484; *Burgin v. Geberson*, 26 N. J. Eq. 72.

And in other courts "satisfactory evidence" of the mistake is sufficient, as indeed it must be sufficient in all cases where a material fact is sought to be established by proof; for if it were otherwise, the evidence would not be satisfactory. As Chief Justice Shaw said, in a case nearly resembling the one now under consideration.—

"The discharge of a mortgage on the margin of the record of the mortgage deed is strictly an act *in pais* of which the register is the witness, and is declared by the statute to have the force and effect of a release duly acknowledged and recorded. But a release acknowledged and recorded would not be conclusive, even if delivered, if no money was paid, and other facts proved showing that it was delivered by accident or mistake. I am of opinion it is such a case of accident and mistake in the course of conveyancing, as would be relieved against in a court of equity upon satisfactory proof of such mistake or accident." *Bruce v. Bonney*, 12 Gray, 111.

It has been contended on the part of the appellee that, "as against the subsequent mortgagees, parol evidence of an alleged mistake is inadmissible, and no decree could be passed thereon affecting their rights."

The case cited as authorities do not support this proposition. Those were cases in which the legal existence of the mortgages was not disputed, but an attempt was made to vary the apparent meaning of the instruments of writing and give them a different effect from that warranted by the language therein contained. But here the very existence of a valid release is disputed.

It is contended that the release, having been made by mistake, is a nullity. In relation to this question the authorities tend strongly in one direction. The doctrine thus established is that "a subsequent mortgagee, whose rights existed at the time of the release, cannot object to the prior mortgagee being restored to his rights. Of course the mortgage cannot be restored as against one who has in good faith purchased the property after the cancellation, or has advanced money upon it upon the faith of a clear record title." 2 *Jones, Mortgages*, § 967; *Trenton Banking Co. v. Woodruff*, 1 *Green's Ch. (N. J.)* 117; *Fassett v. Smith*, 23 *N. Y.* 252.

The authorities remove all doubt in regard to the admissibility of parol evidence to prove a mistake in regard to the execution of an instrument of writing. *Busby v. Littlefield*, 31 *N. H.* 193; *Canedy v. Marcy*, 13 *Gray*, 373; *McKay v. Shipson*, 6 *Ired. (N. C.)* 452.

The evidence in this record is such as to leave no reasonable doubt on the mind of anyone who carefully examines, in that Henry Busard did not intend to release the mortgage which had never been paid; and that the release was the result of a mistake. Such fact being established, it follows

that the plaintiff was entitled to the relief asked for in the bill of complaint; and the court below erred in refusing to grant such relief. The order dismissing the bill should therefore be reversed and the cause remanded, so that a decree may be passed in conformity with what has been said in this opinion.

Order reversed and cause remanded, with costs to the appellant.

NOTE.—Mistake is one of the original subjects of equity jurisdiction. In case of mistakes affecting the recording or registration of legal instruments, it has been exercised under a great variety of circumstances. It is well settled that if in the recording of a deed, such a mistake occurs as prevents the recording or registration of the instrument operating as constructive notice of the transfer and all its material incidents, the record is unavailing against subsequent purchasers or mortgagees. Thus the registry of a mortgage which does not state the name of the mortgagee is not constructive notice to subsequent purchasers.¹ And where a mortgage to secure a debt of \$3,000 was registered as for a debt of \$300, it was available against a subsequent purchaser only to the amount of the latter sum.² It is incumbent upon the parties to the instrument to see that no mistake is made, *they* must in such case bear the consequences, not the subsequent purchaser, who is required to do no more than examine the record, and is authorized to take as correct what he finds there.³ And if a record shows the name of a person as grantor, who is not the grantor, the record is not notice. The rule is that a record is constructive notice of that of which its perusal would be actual notice.⁴ And it is said that if part of the deed, or defeasance accompanying it, is omitted, and the instrument appears on the record as an absolute deed, it will be held to be good for nothing as such, because it is in fact no conveyance, and it is equally worthless as a mortgage, because it does not appear on the record to be a mortgage.⁵ *quere.*

This last *dictum* may well be questioned. The deed thus recorded, without its defeasance, would be good for nothing in favor of the grantee and against its grantor, for both had full actual notice of the defeasance and its terms, but it would surely be good in favor of a *bona fide* purchaser from the grantee, without notice, actual or constructive, of the infirmity of the grantee's title thus standing fair upon the record.⁶

It is abundantly manifest therefore, that when the rights of third persons have supervened in consequence of the recording or registration of a deed, and such third persons are innocent *bona fide* purchasers without notice actual or constructive, and for a valuable consideration, the mischief caused by a mistake is irremediable in law or equity.

Unless this is the case, and provided no such privileged persons as *bona fide* subsequent purchasers with-

out notice are concerned, the powers of courts of equity to remedy all the mischievous consequences of a mistake are plenary and sufficient.⁷ The proof however must be plain and entirely satisfactory, because the rule is that the written paper is presumed to contain the meaning of the parties, and the *onus* is, therefore laid with much emphasis upon him who seeks to overturn it. It must stand until the contrary is established beyond all reasonable controversy.⁸ We take it that what is said in the principal case, and the cases therein cited about "overwhelming proof" means no more than this; that the preponderance must be very decided, and that one mistake having already been made, the court must take very good care that it shall not be followed by another. In a Vermont case the court says, that the proof shall be strong and of a conclusive character,⁹ in Missouri the rule is stated to be, that when the mind of a judge is entirely convinced upon any question of fact or law he is bound to act upon his conviction.¹⁰ The Supreme Court of Illinois says that a court of chancery "will not reform a written instrument except upon clear and satisfactory proof."¹¹ In Pennsylvania it is said that relief will not be granted, unless there is a plain mistake made out by satisfactory proofs, and that the evidence must not be loose, equivocal, or contradictory; open to doubt or to opposing presumptions.¹² In Georgia the court says, that this power of courts of equity should be exercised sparingly, with great caution and only upon the clearest proof of the intention of the parties.¹³ And it all amounts to this; that the instrument shows distinctly what appears to be intention of the parties, the party seeking to overthrow it, has before him a double labor; and must accomplish it by proportionate proof. He must show, not only that the parties did not mean what they said, but also, and with much precision, what they did mean.

And this may, and generally must, do by parol evidence.¹⁴ And in no event can he be permitted to overthrow an existing contract unless he can show either fraud or mistake, mere misunderstanding of the facts will not do,¹⁵ nor can he accomplish his object if it appears that the mistake was the result of his own negligence.¹⁶ [Ed. C. L. J.]

⁷ *Hearne v. Marine, etc.* Co. 20 Wall. 490; *Iverson v. Hutton*, 98 U. S. 79.

⁸ 1 Story Eq. Jur. (9th ed.) § 153; *Gillespie v. Moon*, 2 Johns. Ch. 535; *Rhode Island v. Massachusetts*, 15 Pet. 271; *Daniel v. Mitchell*, 1 Story O. C. 173; *Tucker v. Madden*, 44 Me. 206.

⁹ *Preston v. Whitcomb*, 17 Vt. 183.

¹⁰ *Leitensdorfer v. Delphy*, 15 Mo. 160.

¹¹ *Cleary v. Babcock*, 41 Ill. 271.

¹² *Edmonds' Appeal*, 59 Penn. St. 220; See also, *Beard v. Hubble*, 9 Gill. 420.

¹³ *Reese v. Wyman*, 9 Ga. 430.

¹⁴ *Hunt v. Rousmanier*, 8 Wheat. 174; 1 Story Eq. Jur. (9th ed.) § 156; 3 Greenl. Ev. (8 ed.) § 330. See also, *Elcott v. Sackett*, 108 U. S. 132; *Popplein v. Foley*, 61 Md. 381; *Jones v. Sweet*, 77 Ind. 187; *Morris v. Stern*, 80 Ind. 227.

¹⁵ *Story v. Conger*, 86 N. Y. 673.

¹⁶ *Iverson v. Wilburn*, 65 Ga. 103.

¹ *Peck v. Mallam*, 10 N. Y. 509.

² *Beekman v. Frost*, 18 Johns. 544.

³ *Terrell v. Andrew County*, 44 Mo. 309.

⁴ *Jennings v. Wood*, 20 Ohio, 261.

⁵ *Brown v. Dean*, 3 Wend. 208; *James v. Morey*, 2 Cowen, 246; *Dey v. Dunham*, 2 Johns. Ch. 183; *Friedley v. Hamilton*, 17 Serg. & R. 70; *Jaques v. Weeks*, 7 Watts, 261, 287; *Edwards v. Turnbull*, 50 Penn. St. 509; *Hendrickson's Appeal*, 24 Penn. St. 363.

⁶ *Cogan v. Cook*, 22 Minn. 137; See also, *Fletcher v. Butten*, 4 N. Y. 398; *Schreck v. Pierce*, 3 Iowa, 350; *Conway v. Case*, 22 Ill. 127; *Wilson v. Getty*, 57 Penn. St. 266.

AGENCY—AGENT TRANSCENDING HIS AUTHORITY—SALE BELOW PRESCRIBED RATES—NOTICE TO PURCHASER—BILL RENDERED—LIABILITY OF PURCHASER—WAIVER OF TORT—EFFECT.

ROGERS v. HOLDEN.

Supreme Judicial Court of Massachusetts, July 1, 1886.

1. A contract between a purchaser of goods and the agent of the seller, by which such agent agrees to let the buyer have the goods below the price to which he is limited by his agency, the buyer being apprised of the limit, is not binding upon the agent's principal.

2. When a bill for goods sold is rendered to the buyer, and he makes no seasonable protest against the prices charged, he is bound by those prices.

3. When a plaintiff has an option of suing in tort, or upon contract, waiving the tort, by taking the latter course he does not ratify the acts of his agent done in excess of his authority, and known to the defendant to be in excess of such authority.

STATEMENT OF THE CASE.—The facts were, that the plaintiff's agent sold to defendant certain goods at rates below the prices at which he was authorized to sell, agreeing with the defendant that he himself would make good the deficit. He was paid the reduced price, but did not make good the deficit, for which the sellers, after having sent a bill of the goods, sued the buyer. Further facts appear in the opinion of the court.

GARDNER, J., delivered the opinion of the court:

The defendants contend that, upon the report of the auditor, the plaintiffs cannot recover in contract; that there were two courses open to them, one to ratify and adopt the contract of their agent and the prices he had made, the other to repudiate the contract and replevy the goods, or sue for their value in trover. The law is clear that, if the plaintiffs' property was sold by a person, assuming to act for them, but without authority, and the plaintiffs waive the tort and ratify the contract in an action against the purchaser, they must ratify it as the agent made it. *Brigham v. Palmer*, 3 Allen, 450.

The case finds that Norris was employed by the plaintiffs, as their traveling agent, to sell their goods at prices not less than the so-called "minimum prices," and that the several defendants, from the commencement of their dealings with Norris, not only knew that he was the plaintiffs' agent, but they "had notice at the time of the sales of the several bills of goods to them, and at the times of settlement therefor, of the limitations of the authority of Norris, the plaintiffs' agent, to sell at prices not less than the so-called minimum prices."

The transaction between the defendants and Norris and the plaintiffs were as follows: Norris, the agent, made a schedule or order of the goods

wanted by defendants, and the minimum prices were marked thereon; at the same time it was agreed between the defendant and Norris, that defendants should settle the bills at prices then agreed upon between them, and not according to the prices stated in the order; Norris sent the order to the plaintiffs at Boston, who shipped the goods ordered to the defendants, charged them in their books with the amount of goods shipped, at the prices stated in the order, and at the same time sent to the defendants, by mail, a bill of the goods sent, containing a description of the goods shipped, and prices corresponding to the description, and prices stated in the order by them received from Norris. After the defendants had received the goods, and the next time Norris went to the defendants' store, he settled the bill according to the prices agreed upon at the time the orders were given, and at less than the minimum prices, and receipted the bill in full sent by plaintiffs to defendants. He then informed the plaintiffs that he had collected of the defendants a certain sum of money, the sum so stated being equal to the full amount, when in fact he received a less sum. The plaintiffs thereupon credited the defendants with the amount paid, as stated by Norris, and charged Norris with the money which he reported he had received. There were more than one hundred of these orders, and the transaction was substantially the same in each. The plaintiffs had no knowledge of the private agreement between the defendants and Norris.

There is sufficient evidence in these transactions to show that Norris and the defendants combined together to deceive the plaintiffs, and that this was done by means of a pretended contract. The defendants ordered goods of the plaintiffs at a certain price, which they did not intend to pay, and permitted the plaintiffs to charge them with the goods, and send them bills for the same at prices which they had agreed with Norris should not be paid. The plaintiffs now have the right to insist upon the execution of the contract which the defendants have by implication made. They ordered the goods at the minimum prices; when the goods arrived and the bills with them, charging the defendants with the goods at the prices at which they were ordered, they did not refuse to receive the goods, nor did they notify the plaintiffs of any mistake in the price. By remaining silent, while the numerous bills were sent to them, they have impliedly ratified the sale of the goods, by the plaintiffs at the prices named in the bills. *Bearce v. Bowker*, 115 Mass. 129. The defendants say, we did not make this contract, although we knew that Norris ordered the goods for us at the minimum prices. and although we received the bills of the goods at the same prices at which they were ordered, and we have remained silent ever since, yet we made an agreement with Norris, which he knew he was not authorized to make, to buy the goods at a less price. We think that the defendants cannot set up this agreement for the

purpose of denying the contract which the law says exists between them. They will not be permitted to take advantage of their own wrong for their own benefit. *Hill v. Perrott*, 3 Taunt. 274; *Walker v. Davis*, 1 Gray, 506.

The cases at bar are not to be confounded with *Jones v. Hoar*, 5 Pick. 285; *Brigham v. Palmer*, *ubi supra*; *Berkshire Glass Co. v. Wolcott*, 2 Allen 227, and other cases of that class, cited by the defendants for the purpose of showing that the plaintiffs cannot waive the tort and sue in contract, unless they bring their action upon the contract made by the agent Norris with the defendants. The cases at bar have in them an element which is wanting in all the above-cited cases. It is this, that the defendants knew that the agent Norris had no authority to make the contract which he attempted to make with them; that the agreement between them was a transaction to obtain the goods from the plaintiffs at a less price than they were willing to sell them. It brings the plaintiffs' cases directly within that of *Hill v. Perrott*, *ubi supra*.

In the note to *Jones v. Hoar*, above cited, containing the opinion given in that case by Judge Strong, in the court of common pleas, a clear distinction is made between the case of *Hill v. Perrott* and those sustaining the doctrine contended for by the plaintiffs. In that case, *Perrott* had procured the delivery of the goods upon a pretended sale to one *Dacosta*, under the impression that the defendant was to be his surety, but the whole was a "swindling transaction" to enable the defendant to get possession of the goods. The court held that the law would imply a contract to pay for the goods on the part of the defendant, and that he could not be permitted to control this implication by setting up the sale to *Dacosta*, which he had himself procured, because no man can take advantage of his own fraud. Judge Strong, in his opinion, which met with the approval of the court, says: "Although the plaintiff, on account of the fraud of the defendant, might perhaps consider him as a trespasser, yet as the transaction assumed the form of contract by the acts of the defendant himself, and the goods went from the possession of the plaintiff by his consent and through the form of a sale, if the plaintiff chose to consider it as a sale, I do not see how it would be competent to the defendant to dispute it. . . . It may be considered as belonging to a class of cases where the plaintiff may maintain *assumpsit* on account of some act of the defendant which varies it from the common cases of tort, and authorizes an action as upon a contract."

Upon the facts disclosed in the case at bar, we think the plaintiffs are entitled to maintain their actions in contract.

2. The defendants contend that the plaintiffs cannot recover in any form of action—clearly not in contract—because the account between the plaintiffs and defendants is balanced and closed, and the debt in suit stands charged upon the

plaintiffs' books to Norris. It appears that, when Norris received the money for the goods sold, he informed the plaintiffs, usually by mail, that he had collected of the defendants a certain amount. The facts, which have already been stated, the auditor found, cannot be regarded as payment for these bills in full, as the plaintiffs made these entries in their books in ignorance of the real facts, and they have never had a final settlement with Norris. These charges and credits were apparently a convenient way of keeping the account with Norris, and were never intended as a transaction in the nature of a novation. We think that the auditor was correct in his finding.

3. The defendants also deny that the plaintiffs can recover for boxes, barrels, crates, packing and carting. The auditor's report does not set out the evidence; it finds the facts only. He finds that these charges were on all the bills sent with the goods to the defendants, and also that they were made in accordance with the customs of Boston merchants. We see nothing inconsistent in this finding by the auditor as matter of law.

4. The defendants further contend that, the plaintiffs cannot recover upon the items that did not accrue within six years before suing out the plaintiffs' writ. The auditor has allowed all the items, and he has found no fact in conflict with his conclusion. He has not reported the evidence, and his conclusion is, therefore, final.

This disposes of all the exceptions argued by the defendants.

Judgment on the verdict.

WEEKLY DIGEST OF RECENT CASES.

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1. AGENCY—Principal and Agent—Cotton Factor—When Liable for Conversion—Accounting.—The bailee and consignee who violates the contract of bailment by exercising an unauthorized control over, and making an unauthorized disposition of, the property consigned to him, thereby becomes liable in trover for the conversion of such property. It is no defense to such an action, that the wrong-doer accounted for the value of the prop-

erty at the time when, and market where, such account was rendered. *Galbreath v. Epperson* S. C. Tenn., June 10, 1886. 1 S. W. Rep. 157.

2. **CARRIER—Of Goods—Connecting Lines—Liability beyond Terminus—Through Contract—Bill of Lading—Contract for Through Carriage—Offer.**—When a carrier receives goods marked to a place beyond the terminus of his own line, without more, or without any further or special contract, he is only liable to carry safely to the end of his own route, and deliver to the next carrier on the usual route. Bill of lading, with condition on the back, limiting liability to defendant's own road, if goods are deliverable to a point beyond, upon notice to next carrier of readiness to deliver to them, is not evidence of a through contract. An offer by a common carrier to take car-load lots of peas from N. to P. at 25 cents per 100 pounds is not an offer to carry from N. to P., but only to take the goods for carriage to the end of the defendant's own route, and then deliver them to the next carrier to forward. *Harris v. Grand Trunk etc. Co.* S. C. Rh. Is. July 17, 1886. 5 Atl. Rep. 306.

3. —. **Of Goods—Express Company—Loss—Act of God—Notice of Loss—Must be Given When.**—An express company, as a common carrier of money and valuables, is not liable for losses resulting from the "act of God, the public enemy, mobs, riots," etc., unless it expressly insures against such losses in the contract of consignment. Under such circumstances, an express company, not being liable, is entitled to no notice whatever of the loss. In all cases of loss other than such as result from the "act of God," etc., the carrier, being liable therefor, is entitled to actual notice of loss within 30 days after receiving the consignment, in order that he may be seasonably enabled to trace the missing property. *Southern Express Co. v. Glenn*, S. C. Tenn., June 5, 1886. 1 S. W. Rep. 102.

4. **CORPORATION.—Garnishment—Debt due by, to employee, beyond State, not Subject to Garnishment.**—A debt due by a foreign corporation to one of its employees at the place of its domicile, not being within the jurisdiction of our courts, can not be reached and subjected by a creditor here, by process of garnishment against the corporation. In rendering the opinion of the court, stone, C.J. said: "Garnishment, like attachment, is a species of proceeding *in rem*. It acquires jurisdiction of the person *pro hac vice*, by seizing his property, goods, or choses in action. If it cannot acquire jurisdiction or control of the *res*, it needs must fail to acquire, through such *res*, jurisdiction of the person: for jurisdiction of the person is acquired only through the *res*, or thing. The debt in this case was contracted in Kentucky, for a corporation and by a laborer, each resident in the State of Kentucky. The *status* of a debt, in the absence of stipulation to the contrary, is the domicile of the creditor. A court in Alabama cannot obtain legal control of the *res*, or make any binding disposition of it; for process of attachment under our statute can not change rights of property situated without the State. . . . We hold that situated as these parties were, the debt sought to be condemned by process of garnishment could not be subjected, first, because it should not be brought under the legal control of the court, and second, because the statute has made no provision for serving process on a foreign corporation, to reach a debt such as this was and is. *Tingley v. Bateman*, 10 Mass. 848; *Danforth v. Penny*, 8

Pick. 564; *Gold v. Housatonic R. R. Co.*, 1 Gray, 424; *Lawrence v. Smith*, 45 N. H. 533; *Western R. R. Co. v. Thornton*, 60 Ga. 300; *Sutherland v. Second National Bank*, 78 Ky. 250; *Bates v. Railway Co.* 60 Wis. 296; *Wheat v. Railroad Co.* 4 Kans. 370; *Waples on Attachment*, 226-227." *Louisville & Nashville R. R. Co. v. Dooley*, S. C. Ala. Dec. Term, 1885-86.

5. —. **Witness—Evidence.**—A corporation, being a collection of individuals, acting through its officers and agents, who are admitted to testify in cases where the corporation is a party, cannot be said to be under legal disability, and the opposing party in a suit can be examined as a witness. A written statement made by the conductor of a car, in the line of his duty, giving details of the accident, immediately after it happened, is not admissible in evidence, but the facts must be proved by the conductor or others who witnessed the occurrence. If the conductor be sworn, he may use the written statement to refresh his memory. *North Hudson etc. Co. v. May*, S. C. New J., July 19, 1886. 6 East. Rep. 176.

6. **CRIMINAL LAW — Rescue Aiding to Escape—Indictment—Evidence.**—Under an indictment for aiding a prisoner to escape (Code, § 4130) a conviction may be had, whether an escape was effected or attempted or not; but it is not necessary that there shall be a specific intent to liberate any particular prisoner, although there must be the intent to liberate, and it must be found by the jury; nor is the consent of the prisoner a necessary ingredient of the offense. In an indictment under this statute, it is necessary to aver that the act was done "with the intent to facilitate the escape;" and that the disguise, instrument, etc., describing it, was useful for that purpose. *Hurst v. State*, S. C. Ala. Dec. Term. 1885-6.

7. **DAMAGES—Measure of Rule as to where Stock has been Damaged by Railroad Company.**—The measure of damages, in a case where stock has been negligently killed by a railway company, is the difference in value between the cattle when live, and the carcass of the animal, when dead. Ill. Cent. R. R. Co. v. Finnegan, 21 Ill. 646. "The dead animal unquestionably belongs to the plaintiff, and not to the railroad company, by whose negligence it was killed. The tort committed does not operate to divest the title of the property so as to transfer it to the wrongdoer. If the carcass, being of any pecuniary value, should be converted to the use of the railroad, an action of trover would lie for it in favor of the owner. The carcass, it may be, is most frequently worth nothing to the owner, and the facts must be peculiar which would overcome this presumption. It is often bruised and mangled, and unfit for any use. Its small value and distance from any available point may render its utilization profitless. There may be no ready market for it, even if possessing some value. In such and like cases, we apprehend, the owner may abandon the carcass and claim the reasonable value of the animal before it was killed, as the proper measure of his compensation. *Thompson on Neg. p. 539, § 31; Rockford etc. R. R. Co. v. Lynch*, 67 Ill. 149; *Wood's Railway Law*, p. 1549. § 423." *Gr. Pacific Ry. Co. v. Fullerton*, S. C. Ala. Dec. Term, 1885-6.

8. **DEED—Delivery—Intention of Grantor.**—The delivery of a deed is essential to give it effect, and

although, when the grantee has possession of the deed, and nothing to the contrary be shown, delivery will be presumed, yet, when disputed, the question is whether the possession was obtained with the intention of the grantor, that the grantee should receive it as an executed deed, and this question is one to be determined by the trier. *Dwinnell v. Bliss*, S. C. Vt. July 31, 1886. 5 Atl. Rep. 317.

9. EVIDENCE—*Account Books—Trial—Objections to Evidence, how Made.*—A witness may be shown an account book of original entries to refresh his recollection, and the book itself is admissible in evidence. An objection made on trial should be accompanied with a statement of the grounds of objection, in order that the trial judge may fairly understand the precise question upon which he is to rule. *Brown v. Weightman*, S. C. Mich. July 21, 1886. 29 N. W. Rep. 98.

10. FRAUDS—*Statute of Frauds—Memorandum—Correspondence between principal and agent, showing only instructions to the agent, without including authority to contract, is not a sufficient memorandum within the statute of frauds to establish an agreement to take a lease, although the same may have been disclosed to the plaintiff.* *Hastings v. Weber*, S. Jud. Ct. Mass., July 2, 1886; 6 East. Rep. 210.

11. INSURANCE—*Fire Insurance—Policy—Increasing Risk—Construction of Policy.*—A policy of insurance, issued upon a dwelling-house owned by plaintiff, contained the following condition: "If the risk shall be increased by the erection or use of any building contiguous thereto, without the consent of this company indorsed thereon, this policy shall be null and void." Held, that a building erected at a distance of 25 feet is not to be construed as contiguous, within the meaning of the condition, and the policy was not avoided thereby. It is a well-settled rule of construction that the language of a condition in a policy, being that of the insurance company, and selected by it, must be clear and unambiguous, and any doubt as to its meaning must be resolved in favor of the policy-holder. *Olson v. St. Paul, etc. Co.*, S. C. Minn., July 14, 1886; 29 N. W. 125.

12. JUSTICE OF THE PEACE—*Appeal—Trial de Novo.*—On appeal from a judgment rendered by a justice of the peace, the case stands for trial *de novo* on the process and pleadings; the judgment of the justice is vacated, and a new judgment rendered on its merits. When a garnishee answers, before a justice of the peace, denying any indebtedness, and his answer is contested, a formal issue in writing is not necessary: but, on appeal to the Circuit Court, the amount in controversy being more than twenty dollars, a formal issue in writing must be tendered by the plaintiff; and this not being done, the garnishee is not required to take any step, nor can a judgment by default be rendered against him. *Lehman v. Hudman*, S. C. Ala. Dec. Term, 1885-86.

13. MECHANICS' LIEN.—The statutes of this State upon the subject of mechanics' liens, being remedial in their nature, are to be liberally construed in order to carry out the purpose of the legislature in their enactment. Where a mechanic, who, under the employment of a contractor, and with the knowledge of the owner, has performed labor upon the construction of a building, and the account

not being paid, takes all necessary steps, as provided by §§ 3193, 3195, 3201 and 3202, of the Revised Statutes, to fix the liability of the owner and to obtain a lien upon the premises, and brings his action against the owner to recover the amount due and have the same declared a lien, such account being less than the balance unpaid on the contract, such owner cannot be allowed to set off a claim against the contractor, not growing out the contract, acquired by him after the labor was performed, although such claim was acquired before notice that the mechanic's demand had not been paid. *Bullock v. Horn*, S. C. Ohio, June 29, 1886; 16 Ohio L. Jour. 124.

14. MORTGAGE—*Assignment—Sale of Notes—Satisfaction—Entry of Satisfaction After Sale of Notes—Right of Grantee of Equity.*—The sale and delivery, before maturity, of mortgage notes, carries with it an assignment of the real-estate security, which, in equity, is a mere incident of the debt secured. A satisfaction entered on the record by the creditor, after he has sold and delivered the notes, is a mere nullity, and can neither weaken the security of the party to whom he has sold the notes, nor strengthen the title of the party who afterwards buys the land in good faith from him. The party buying mortgaged premises must, at his peril, ascertain who then owns the notes accompanying the mortgage, and whether the same have been actually paid. *Lee v. Clark*, S. C. Mo., June 7, 1886; 1 S. W. Rep. 141.

15. MORTGAGE—*Notes Secured by—Description—Removal of Cause.*—Three notes all alike except in the amount, read: "Five years after date for value received, I promise to pay —, or order, — dollars, with interest annually at six per cent." In an action to foreclose a mortgage given to secure the payment of the notes, held, that the failure to state when the interest was payable was a mere omission and not a false description. In an action to foreclose a mortgage, one of the defendants was a non-resident of the State. Held, that the cause was not removable to the Federal courts. *Winchell v. Coney*, S. C. Conn., April 10, 1886; 6 East. Rep. 214.

16. —. *Rights of Mortgagee—Advances—Crops Rents and Profits.*—A mortgagee of growing crops may advance sufficient to preserve them from waste and destruction, and the advances thus made add to his mortgage debt, and are chargeable against the mortgagor in an equitable accounting. A mortgagee in actual possession must devote the entire rents and profits to the payment of the mortgage, and can divert no part thereof towards the satisfaction of other and unsecured claims due him from the mortgagor, without the express assent of the latter. *Caldwell v. Hull*, S. C. Ark., June 19, 1886; 1 S. W. Rep. 62.

17. MUNICIPAL CORPORATION—*Charter—Construction in Case of Doubt—Prohibition of Sale of Liquor—When May be Absolute.*—The charter of a municipal corporation is strictly construed, though not so strictly as to thwart the legislative intent, fairly and reasonably appearing; only such powers as are clearly granted, necessarily implied, or incidental to the purposes and objects of the corporation, will be regarded as conferred; and a reasonable doubt as to the grant of a particular power, especially if it is in abridgment of natural or common rights, will be resolved against the

corporation. A grant of power in a municipal charter, as in the charter of the Town of Florence (Sess. Acts, 1878-79, p. 418), "to license and regulate retailing spirituous, vinous, or malt liquors within the corporate limits, and provide for annulling and revoking such license, on good cause being shown; to close up retail establishments, for such time as they may deem necessary; to prevent the selling of spirituous, vinous, or malt liquors within the corporate limits, whenever they may deem it expedient," confers the power to prohibit absolutely the sale of such liquors within the corporate limits. In delivering the opinion of the court upon this point, Justice Clopton said: "The words prevent, license and regulate, annul and revoke, and close up, have each a particular and special meaning. By the classification and description of the different powers, a case is not created for the operation of the rule *ejusdem generis*. If the application of the maxim *nosctur a sociis* manifests any particular intention, it tends to show by the relation and association, that a higher, more effective, and different power was intended to be conferred by the grant to prevent the selling whenever deemed expedient, than the preceding powers. While it is true, that the different parts of a statute, relating to the same subject matter, often reflect light upon each other, and therefore should be construed together, that construction should be adopted which will avoid contradiction, inconsistency, or superfluity, and at the same time, leave a field of operation for each sentence or clause, and give effect to each substantive word. * * * The purpose was to confer powers, which would be sufficient to answer the requirements, not only of the existing condition, but also of the varying conditions that might occur in the history of the corporation. They are successive and independent grants of distinct powers, not included in the same class, or clause; but distinguished from each other plainly as the grants of other like police powers, except as collocated, and as they relate to the selling of spirituous, vinous, or malt liquors." *Ex parte, Mayor and Aldermen of Florence*, S. C. Ala. Dec. Term, 1886.

18. NEGLIGENCE—Pleading—Damages.—Contributory negligence is a defense, the burden of which rests on the defendant, although negatived by the averments of the complaint; and it must be affirmatively proved by the defendant, unless the plaintiff's own evidence establishes it. Improperly sustaining a demurrer to a special plea is error without injury, when the record affirmatively shows that the defendant had the benefit of the same defense under the general issue; but the principle does not apply to the erroneous overruling of a demurrer to a bad special plea, whereby the plaintiff is compelled to take issue on it. In an action by a railroad company, to recover damages for injuries caused by a collision of one of its trains with several empty cars left standing on a side-track by the defendants' servants; if the empty cars were left standing too near the main track, and a collision might have been avoided by the use of reasonable diligence on the part of the persons in charge of the passing train, the defense of contributory negligence would be made out; and in this connection, the speed of the train and the fact that it had a watchman so stationed as to see and give notice of obstructions, or the want of these precautions, would be material factors; but if the empty cars, though not placed too near the

main track, were insecurely scotched on the down grade of the side-track, and, being put in motion by the passing train, rolled down on it at the switch, the speed of the train would be immaterial, and contributory negligence could not be imputed to the plaintiff. If the empty cars were placed so near the main track as not to allow room for passing trains, the defendant cannot claim immunity from liability on the ground that this was the result of an "honest mistake" on the part of his servants. *Montgomery, etc. Co. v. Chambers*, S. C. Ala., June Term, 1886.

19. NEGLIGENCE.—Railroad Crossings.—Contributory Negligence.—Question for Jury.—The duties, obligations, and rights of railroads and of highway travelers at a point of intersection are mutual and reciprocal, and both must use such care as a prudent man would under like circumstances. The question of contributory negligence depends on the circumstances of each particular case, and is one of fact for the jury. *Baltimore, etc. Co. v. Owings*, Ct. App. Md., June 23, 1886; 5 Atl. Rep. 329.

20. ———.Firing Guns—Remedy for Injury Caused by—Damages—Defense—Near Highway—License.—The law furnishes every person a remedy, by civil action, to recover damages for injuries resulting to him from the negligence of another, even though such injury was accidental. To constitute a valid defense in such cases, the injury must be shown to have resulted from some controlling, superior agency, and without defendant's fault. The laws of Tennessee (Code, § 2275) prohibit the firing of guns within 200 yards of any public highway, and no directions or suggestions from one individual to another can be construed into a license justifying the latter in a violation of said laws. *Knott v. Wagner*, S. C. Tenn., June 5, 1886; 1 S. W. Rep. 155.

21. SALE.—Acceptance—Fire-Engine—Trial of Engine—Breach of Contract—Assumpsit.—Where the contract by which a village agrees to purchase a steam fire-engine and attachments provides for the payment of the first installment of the purchase money at the date of acceptance of the property, and, at the request of the vendee, the vendor sends one of its employees to assist at the trial of the engine, the nature of the machinery making a trial necessary to determine its fitness for the purposes required, *held*, that the acceptance was to be after trial, not when placed upon the cars at the place of manufacture. Where a vendee refuses to accept merchandise which, by written contract, he has agreed to purchase, the remedy of the vendor is not *assumpsit* for the purchase money, but an action for breach of contract, and refusal to accept on the part of defendant. *Mansfield Machine-Works v. Lowell*, S. C. Mich., July 21, 1886; 29 N. W. Rep. 105.

22. ———.Delivery—Rights of Vendor's Creditors—Notice.—To constitute a valid sale of chattels, as against the vendor's creditors and subsequent purchasers, there must be an actual, substantial, visible change and delivery of possession. Selecting out from a general stock the goods bargained away, packing them in unsealed, unmarked boxes, charging them to the party who has bargained for them, and rendering him an itemized bill of them, but without any transfer of actual possession, is of no avail against creditors and subsequent purchasers without notice. *Davis v. Meyer*, S. C. Ark. June 19, 1886; 1 S. W. Rep. 95.

23. — *Judicial Sale—Will—Title*.—One who buys at a judicial sale may demand a title free from any reasonable doubt, as condition precedent to the completion of his purchase. When the testator directed in substance that his residuary estate should remain in the hands of his executors, for the purpose of accumulation, inalienable for the period of ten years after his death, and the trust is not determinable within any two ascertained lives nor limited by life, such direction is void, under the statute. The title to the land and premises included in said residuary clause vested in the heirs at law of the testator, as though he had died intestate. *Rice v. Barrett*, N. Y. Ct. of App., April 13, 1886; 3 Cent. Rep. 440.

24. SHERIFF—*Liability—Attachment—Proof of Debt—Consideration—Note—Fraud—Evidence—Title*.—Where a sheriff justifies the taking of property from the possession of A. as being the property of the debtor in an attachment suit, it is material and necessary for him to establish the relation of debtor and creditor between the plaintiff and defendant in that suit. And where a defendant in such suit, upon his examination as a witness, denied that he owed the alleged claim (a promissory note) sued on, and his evidence tended to show that the same was fraudulent and invalid, held competent and material to inquire, on the part of the plaintiff, into the consideration of the note, and the circumstances under which it was given. Where a party testified that he had derived title to the property in controversy a short time before it was attached, claimed by plaintiff to have been fraudulently transferred by defendant, it is proper, on his cross-examination, to inquire fully into the nature of his title, and his knowledge of an alleged previous transfer, and also the amount of the consideration, and whether paid or not. *Homberger v. Brandenburg*, S. C. Minn., July 12, 1886. 20 N. W. Rep. 123.

25. TAXATION—*Redemption by One as Agent without Authority—Ratification Presumed—Reassignment to Tax Purchaser will not Defeat Redemption—Statute Liberally Construed to Support Redemption*.—The agent to pay taxes in this case was a general real-estate agent. He turned over his business to another, including that for the lands in question. At this time these lands had been sold for taxes. The agent and his successor both wrote to the owner for ratification. Pending reply, the successor tendered redemption to the tax purchaser, and obtained an assignment of the certificate to his own use. He then advertised that he would apply for a deed himself. Under threat of prosecution from the purchaser, he then re-assigned to the purchaser. Held, that the redemption was complete, a ratification must be presumed, and such redemption could not be undone by reassignment. Sec. 210 (last paragraph) and 215 of the revenue act (2 Starr & C. St. c. 120, pars. 212, 217) provide that any redemption shall inure to the benefit of the owner, and that a receipt of redemption money, or a return of the certificate for cancellation, shall constitute a redemption. While these do not authorize a stranger to redeem, yet the redemption of a stranger with color of authority will inure to the benefit of the owner. *Houston v. Buer*, S. C. Ill. June 13, 1886. 7 N. East. R. 646.

26. — *Sale of Tracts Separately Assessed as*

One Tract—Enjoining Execution of Deed—Redemption.—Where two lots of land were assessed in 1880 for taxation separately, and at different valuations, and were advertised in the same manner, but were not offered separately at the tax sale, but instead thereof were improperly sold as one tract only, and subsequently the owner of the lots brings an action to enjoin the issuance of a tax deed on account of the irregular sale, held that, before he is entitled to the injunction prayed for, he must pay or tender the full amount of taxes and charges, with interest thereon at the rate of 24 per cent. per annum. Sec. 127, c. 107, Comp. Laws 1879. Held, further, that the owner of the lots so sold for taxes cannot redeem his lots, or enjoin the issuance of a tax deed on the tax sale, by tendering the taxes and charges with only 10 per cent. interest thereon, even if he first calls the attention of the board of county commissioners of his county to the error or irregularity existing in the tax sale, and applies to the board for an order directing the county clerk not to convey the lots, if such application is refused by the board, and no order made concerning the return of the tax certificate, or the setting of the same aside. *Miller v. Madden*, S. C. Kan., July 9, 1886. 11 Pac. Rep. 449.

27. TRESPASS—*Telegraph and Telephone Company—Right of Way—Entry on Adjoining Land—Damages*.—Where a municipal corporation grants the right of way through its streets to a telephone company, the grant so made must not be construed into a license to enter upon adjoining lands owned by private individuals. Entering on private premises, under such circumstances, without leave from the owner, is a trespass for which the company must respond in damages. *Memphis Bell etc. Co. v. Hunt*, S. C. Tenn., June 5, 1886. 1 S. W. Rep. 159.

28. VENDOR AND VENDEE—*Vendor's Lien—Parties to Proceedings to Enforce—Foreclosure of Lien—Adverse Title*.—An action to enforce a vendor's lien on real estate is similar in principle to an equitable foreclosure, and the same rule, as to parties, applies to both proceedings. The only necessary or proper parties to the foreclosure of a mortgage or vendor's lien are the parties to the original contract, and those occupying the property, or claiming some interest therein subsequent to the original contract. No title adverse to the contract being enforced can be litigated, and the holder of such adverse title is an unnecessary and improper party. *Faubion v. Rogers*, S. C. Tex. June 22, 1886. 1 S. W. Rep. 166.

29. WILL—*Attempt to Create a Perpetuity—Public or Charitable Trust*.—A will contained the following provision: "I give to Samuel Leeds and Josiah Dunham, Jr., their heirs and assigns forever, and to the survivor of them and his heirs forever, in trust to sell, dispose of, invest and manage the same, and appropriate such part of the principal and interest, as they may deem best, for the aid and support of those of my children and their descendants who may be destitute, and, in the opinion of the trustees, need such aid." Held, invalid, as tending to create a perpetuity for the benefit of those who might not be living at the time of the testator's death. Held, also, that this provision of the will could not be sustained as a public or charitable trust. To constitute a public

or charitable trust there must be some benefit to be conferred upon or some duty to be performed toward, either the public at large, some part thereof, or an indefinite class of persons. *Kent v. Durham*, S. Jud. Ct. Mass., July 1, 1886; 6 East. Rep., 261.

30. — *Election—Party Claiming Under Will Must Abide by Will as Whole.* There is an implied condition that he who accepts a benefit under an instrument, *e. g.*, a will, shall adopt the whole, conforming to all its provisions, and renouncing every right inconsistent with it. This rule has no application where the testator has only a part interest in the property devised, and devises the property by general terms. In such case that interest only is devised. But in this case the testator intended to devise the whole, and the will must be taken or rejected as a whole. *Ditch v. Sennott*, S. C. Ill., June 12, 1886; 7 N. E. Rep. 636.

31. — *Rights of Widow—Parol Agreement—Promissory Notes—Liability of Deceased Partner Evidence—Executors and Administrators—With What Chargeable—Items Allowed—Attorney's Fees.*—Where a son, to whom, with other sons, a father, had given property, enters into a parol agreement with them and the father that he will, upon the father's giving him property in lieu of the same, surrender his interest in certain real estate to one of the sons, dies in possession of the property, without making a transfer of his interest to the son, and by his will devises the same to his widow, such parol agreement cannot be set up against the rights of the widow, and she will be entitled to the property so devised to her by the will. Where several persons, as partners, make a note in writing, and deliver the same, and the payee afterwards assigns the note, and delivers the possession of it to one of the partners, the presumption is that the note has been paid with partnership funds; and where an effort is made to set up the note as an evidence of debt against one of the partners who has died, the burden is on the holder to prove his claim against the deceased partner in some other way than by his own testimony and the production of the note. Where a person dies in the possession of a note or other security for debt, in the absence of any legal evidence showing that he has not parted with the title thereto, it becomes a part of the assets of his estate, with which his executor is chargeable. When, in a suit brought against an executor for the settlement of his accounts, as such, he employs an attorney for the protection of his own private interests, connected with others, he is liable personally for the fees for such services, and for services rendered the estate by an attorney, he is entitled to an allowance out of the same. *Robbins v. Robbins*, Ky. Ct. App., June 15, 1886; 1 S. W. Rep. 152.

32. *WITNESS—Privilege—Refusal of Witness to be Sworn—Contempt—Competency—Refusal of a person to be sworn as a witness, or to obey an order of court that he be so sworn, is a contempt of court, and may be punished as such; and it is no excuse that the person sets up as his reason for the refusal that his testimony would tend to subject him to punishment for a felony. A person called as a witness cannot refuse to be sworn on the ground that his testimony would tend to subject him to punishment for a felony, nor can he urge such pri-*

vilage until a question is put to him, after being sworn, the answer to which would have such tendency; and the court would then decide whether the answer would have such an effect. Under the California law the State is not prohibited from calling a party proceeded against in one information to testify against a defendant charged in another and different information: the former, when so called as a witness, however, retaining his right to object to answering a question put to him by reason of its tendency to criminate him. A refusal to be sworn as a witness on one day, and infliction of penalty and suffering of punishment for contempt in refusing to obey the order of the court to be sworn, will not prevent the court from again inflicting punishment for another and subsequent refusal to be sworn in the same case, on another day, this not being the case of double punishment for one offense; but each refusal being a separate offense, punishable separately. *Ex parte Stice*, S. C. Cal., June 24, 1886; 11 Pac. Rep. 459.

QUERIES AND ANSWERS.*

[Correspondents are requested to draw up their answers in the form in which we print them, and not in the form of letters to the editor. They are also admonished to make their answers as brief as may be.—Ed.]

QUERIES.

19. Under Code of Ga. §§ 2598, 2599, any person interested as distributee or legatee, may cite the administrator to appear before the ordinary for a settlement of his accounts; or, if the administrator chooses, he may cite all of the distributees to be present at the settlement. * * * Upon proof of such citation by a distributee, the ordinary may proceed to make an account, and settle finally between the distributee and administrator. * * * And enforce the same by execution or by attachment for contempt. Courts of Ordinary have general jurisdiction over testate and intestate estates. Under these provisions, on a citation by the executor, to one of the legatees, a non-resident of the county, has the Court of Ordinary jurisdiction to render judgment against said legatee for money overpaid him, by said executor, and enforce it either of the ways mentioned? G. W. A.

CORRESPONDENCE.

To the Editor of the Central Law Journal:

In Vol. 23, page 157, is a criticism of the opinion our Supreme Court in *Pierce v. Ry. Co.* 36 Wis., 283 (erroneously cited as page 388).

Is it certain this court was in error in holding that in the absence of proof, the presumption is that the statute law of Illinois is the same as the statute law of Wisconsin? We think not. On the contrary, we think the proposition is good law, with proper exceptions. *Rape v. Heaton*, 9 Wis. 301; *Welsh v. Dart*, 12 Wis. 635; *Draggo v. Graham*, 9 Ind. 212; *Annuasen v. Gilbert*, 24 Id. 298; *Pelton v. Platner*, 18 Ohio, 209; 2 Phillips on Ev. 10th Eng. Hill & Edwards, edition, page 427; *Sedgwick on Construction of Statutes*, etc. 138, note. *Rape v. Heaton* is re-affirmed in *Hull v. Augustine*, 23 Wis. 383, and the true distinction drawn

where the statute works a forfeiture, or imposes a fine etc.

2. The critic then says, "The case has been severely criticised as being on its face 'unmistakeable evidence of having been poorly considered and hastily written, and wholly unsupported by respectable authority,'" and refers to 2 Cent. L. J. 378.

We find no such language in the notice referred to, but waiving that, we submit:

1. Is this just, fair and courteous criticism?

2. Is it supporting testimony for you to cite a former statement, made by your journal, to support a present one. In other words, do you make it any stronger by stating it twice.

How does it strike you?

J. C. GREGORY.

Madison, Wis.

We beg to call the attention of our correspondent to the fact that, the comment to which he objects is that of a contributor who furnished us a note upon the case of *Missouri Pacific, etc. Co. v. Maltby*, published by us in full. The language he quotes, and which we have verified by reference to our files, is that of another contributor who, in our issue of June 11, 1876, furnished a note to the identical case in question, [*Pierce v. Chicago, etc. R. R. Co.*] then published in full in the JOURNAL. It strikes us that as these two gentlemen, having made a special study of the subject, arrived at the same conclusion, the latter quoting the former, it is hardly fair to say that the JOURNAL cites itself as authority.

ED. CENT. L. J.

RECENT PUBLICATIONS.

REPORTS OF THE DECISIONS of the Appellate Courts of the State of Illinois. By James B. Bradwell, Volume XVIII. Containing all the remaining opinions of the First District up to the 8th. day of June 1886, and all the remaining opinions of the Second District up to the 19th day of February 1886, and all the remaining opinions of the Third District up to the 5th day of January 1886, and all the remaining opinions of the Fourth District up to, and including a portion of those filed April 15, 1886. Chicago: Chicago Legal News Company. 1886.

On the subject of this Series of Reports we can add nothing to what we said in our notice of the preceding (17th) Vol. in our issue of the 18 June, Vol. 22 Central Law Journal p. 600. Like its predecessors, this volume is well printed and well bound, the arrangement of the matter, *syllabi* etc. is very good, and the work is in every respect as well worthy of the favor of the profession as the Reports of an intermediate court can be.

A DIGEST OF THE DECISIONS of the Supreme Court of Minnesota; embracing all reported cases from the 26th to the 33rd Volumes (inclusive) of Minnesota Reports—Second Edition—By T. T. Alexander, Member of the Ramsey County Bar. St. Paul: Hall Smyth Printing Company. 1886.

This is of course a local work, and that it has met the approbation of the profession in the region of its usefulness is abundantly apparent from the fact that this is a second edition. As a further evidence of its merits, we append the commendation it has received from the Judges of the Supreme Court of Minnesota, who say: "The second and enlarged edition of the Digest of Minnesota Reports, Vols. 26 to 33 inclusive, by Hon. T. T. Alexander, appears to be carefully and accurately

prepared. It has an excellent Index, and will be found very convenient and useful to every lawyer in practice." (Signed) C. E. Vanderburgh; John M. Berry; Wm. Mitchell; D. C. Dickinson.

JETSAM AND FLOTSAM.

"I hear," said somebody to Jeckyll, "that our friend Smith, the attorney, is dead, and leaves very few effects." "He could scarcely do otherwise," returned Jeckyll, "he had so very few causes." This is as old as the hills—old enough to be quite new to the junior class.

A gentleman who died recently in Paris left a legacy of six thousand dollars to his niece in Dubuque, Iowa, who, it appears, died about the same hour of the same day. The question, which died first, turns upon the relation of solar to true time, and must be determined by the difference of longitude. If the niece died at 4 a. m. and the uncle at 10 a. m., the instants of their death must have been identical. Assuming that to be the hour of the testator's death, if the niece died at any hour between four and ten, although the legacy would apparently revert to his estate, it would really vest in her and her heirs, since by solar time she would actually have survived her uncle.

The present Louisiana legislature has passed a Sunday law. For 170 years the people of New Orleans have devoted themselves to pleasure-seeking on Sunday. By the new law, all places of business will be closed on the Sabbath, except newspaper offices, book stores, public markets, drug stores, restaurants, theatres and other places of amusement where liquors are not sold, street cars and a few others of minor importance. Guests at hotels will, however, be allowed to purchase wine at the table. As it has been the custom to keep all bar-rooms, corner-groceries and small shops open throughout Sunday, the hotel men may well congratulate themselves. The Saturday evening and Sunday morning arrivals will fill up many pages of the hotel registers.

A knotty legal question has arisen in the State of North Carolina, which may have to be decided by the Superior (*Quære* Supreme) Court of that State. All of this because a colored man called a brother descendant of Ham a liar, and the offended party be-labored the head of the offending negro with the only available weapon, which chanced to be a ten pound mud turtle. The question to be decided is, whether or not a mud turtle is a lethal weapon. The court is fully competent to struggle with this problem, one of its learned judges having already decided that a bull-dog is a "deadly weapon."

(In North Carolina, "deadly weapon" is sometimes a jurisdictional question, the law being that Justices of the peace have no jurisdiction to try and determine affrays in which a deadly weapon is used.)—Ed. C. L. J.

FRIGHTFUL.—A very innocent word may suggest frightful possibilities to one not familiar with its meaning:

"Uncle Pete, what did dey do wid dat nigger, Tooth-pick Ben, in de p'lice c'ot dis mo'n'n?"

"De sentence was unexpected."

"What was it?"

"De jedge he sed he'd exonerate him dis time."

"Yes, but I spected dat; but far how many days did he exonerate him?"

The Central Law Journal.*ST. LOUIS, SEPTEMBER 3, 1886.***CURRENT EVENTS.**

AMERICAN BAR ASSOCIATION.—The attendance at the late meeting of this body was larger than usual. The principal subject under consideration, was "Codification," which was formulated into a resolution recommending that "the common law, so far as its substantive principles are settled, should be reduced to the form of a statute." This resolution, after a prolonged debate, was adopted by a vote of fifty-eight to forty-one. The marked division of opinion, among those who we may presume are representative men of the profession, does not presage a very early fruition of the hopes of the majority. Years will elapse before any definite, and general, and effective action will be taken, and in the meantime, the law, already too bulky and complex, will increase in volume, and volumes, and complication, and the law's delay will continue to be the shame and reproach of the profession. Time, however, is an essential element in all great reforms, everything comes at last to him who waits, and in due season will doubtless come the reform of the law, for which the Bar Association is laboring. Patience is, or ought to be, a professional virtue, and there is no better field for its exercise than in this matter of law reform.

MR. BUTLER'S ADDRESS.—We have read, with much pleasure, the address of William Allen Butler, Esq., delivered before the American Bar Association, of which he is the president. His address was framed in pursuance of the Eighth Article of the Constitution of the Association, which provides that the president shall communicate the most noteworthy changes in the statute law, on points of general interest, made in the several States, and by Congress, during the preceding year.

* The information which Mr. Butler has, in answer to this requisition, furnished the As-

sociation is admirably arranged, as well as most interesting and instructive. It shows that, although the legislatures of the several States have wasted a great deal of time, (and, of course, money,) in futile local and unimportant legislation, and in the consideration of bills which they rejected, there are, nevertheless, many grains of wheat in the vast mass of chaff. Much salutary legislation has taken place, tending to promote morality, good order, sobriety and education, to protect women and children from oppression, to regulate the domestic relations of the people, to secure public health, and to suppress gaming and intemperance.

The showing upon this line of legislation is, we think, particularly good, and we must confess, it is better than we expected. Upon the more material interests of the country, trade, the labor questions, corporations, etc., there has been much legislation, and Mr. Butler's description of it is equally complete and exhaustive.

MR. TILDEN'S WILL—CHARITABLE USES.—We learn, from the newspapers, that the validity of Mr. Tilden's bequests to charitable uses is questioned in certain legal circles. As we have not seen the full text of the will, we shall, of course, express no opinion on the subject. We learned, in our earliest professional life, that no lawyer can safely construe any instruments upon extracts, abstracts, or statements of its contents, nor upon anything less than a careful examination of the document itself. Nevertheless we submit, for the consideration of those of our reader who are curious upon the subject, the subjoined statement of the grounds upon which is founded the opinion that the language of Mr. Tilden's bequests is too uncertain and indefinite to support a trust for charitable uses.

"The fatal weakness of the will is the thirty-fifth clause. Mr. Tilden there requests his executors to use his money to establish 'a free library and to promote such scientific and educational objects as they may particularly specify.' He should have specified the object and the sum of money to be devoted to them, himself.

Again, Mr. Tilden donates money to an in-

stitution, provided, 'it shall be incorporated in a form and manner satisfactory to my executors.'

Further on, Mr. Tilden relegates to his executors the authority to 'organize the said corporation, designate the first trustees thereof, and convey to, or apply to the use of the same the rest, residue, and remainder of all my real and personal estate not specifically disposed of by this instrument, or as much thereof as they may deem expedient.'

Last of all, Mr. Tilden says: 'If, for any cause or reason, my said executors shall deem it expedient to convey said rest, residue and remainder, or any part thereof, or to apply the same, or any part thereof, to the said institution, I authorize my executors to apply the rest, residue and remainder of my property, real and personal, to such charitable, educational and scientific purposes as, in the judgment of my said executors, will render the rest, residue and remainder of my property most widely and substantially beneficial to interests of mankind.' The trouble is, that he must himself decide what is 'most widely and substantially beneficial,' and specify the sums set aside for it."

NOTES OF RECENT DECISIONS.

"THE GREAT RAT CASE"—DAMAGES CAUSED BY RATS AT SEA—CARRIER—UNDERWRITER—PERILS OF THE SEA.—At this season of the year, courts here have generally subsided into a condition of "innocuous desuetude," but in England they seem to be as lively as the proverbial black snake in August, and have lately been dealing with animals not less nimble. The *Solicitors' Journal* of August 14th. informs us that, "the decision of the Court of Appeals in the 'Great Rat Case' (Pandorf & Co. v. Hamilton Frazer & Co.) has been awaited with a good amount of interest in the mercantile world." The case briefly stated was this: "The action was brought by shippers of rice for damages done to it, in the course of carriage in the defendants' ship. The rice was shipped under bills of lading which contained an exception of 'dangers and accidents of the seas.' During the voyage, rats gnawed through a metal pipe con-

nected with the bath-room, and the seawater, escaping from the pipe, damaged the rice. The question was whether this damage was caused by a 'danger and accident of the sea.' Lord Justice Lopes, before whom the action was tried at Liverpool, held, on further consideration, that it was. He thought that 'a loss arising from some inevitable accident at sea whereby seawater enters and damages goods is a danger or accident of the seas within the exception. Where the effective cause is beyond human control, and in consequence, salt water enters which damages goods, it is an 'accident of the sea' within the meaning of the contract of affreightment, and the true intention of the parties. Here it is a sea damage occurring at sea, and nobody's fault.' The Court of Appeal have unanimously reversed this decision, though on different grounds. Lord Esher holds that 'perils of the sea' mean perils to which vessels are exposed by reason of their being on the sea. The damage done by the rats was not peculiar to the sea, or caused by the sea. True, the rats let in the sea, but such letting in was not cause, but effect. Lords Justices Bowen and Fry proceeded on the ground that a loss could not be due to 'perils of the seas' which a reasonable exercise of skill on the part of the ship-owner could have averted. In the present case, the ship-owner had not shown that the presence of rats was inevitable, and not due to any defect in the ship or his own carelessness."

The London Law Times of the same date commenting on this case says: "The witch in 'Macbeth' put to sea in a sieve 'like a rat without a tail,' and we have Shylock's authority that there are water-rats as well as land-rats; but, according to Pandorf v. Fraser, rats are not yet in the eye of the law sea-faring animals. Shylock explains that by water-rats he means pirates, and pirates by English law are among the perils of the sea; but rats, say the Court of Appeal, are not—not even when perversely turning up their noses at a cargo of rice they gnaw through a pipe and let in the salt water. It would be different, say the Court of Appeal, in a policy of assurance, because in that case the *causa proxima* may be looked at, but the case before them was a charter party. In other words, perils of the sea assured against by

an assurer include rats; perils of the sea not assured against by a ship-owner do not include rats. If a peril of the sea must be, as the Court consider, indigenous, why are pirates and collisions, perils of the sea? The law of England sadly wants a master-hand to crush these refinements." Besides having figured in song, and story, as in the legends of Whittington's Cat, and the "Pied piper of Hamelin," rats have a distinct and well marked judicial history. It was settled at an early date by the continental maritime law that, the common carrier by sea was liable for damage done to cargo by rats, but he was excused if he had been prudent enough to take a cat on board, (as a portion of the crew or as a dead-head passenger) to keep the rats in order and within proper bounds.¹ In England as appears from the case under consideration, the law concerning rats is quite unsettled, and has always been so. In 1815, a ship was detained in the West Indies and the rats ate holes in her bottom to such an extent that the cargo had to be sold, as the ship could not proceed on her voyage. Upon an action against the underwriters,² Lord Ellenborough held that, the damage by the rats was not a "peril of the seas" within the meaning of the policy of insurance. In a later case in 1852,³ the action was brought for damage done by rats to a quantity of cheese on voyage from Genoa to London. The court gave the defendant carrier the benefit of the usual exception of the "dangers of the seas," which however were *not* in the bill of lading, and then decided against him, because damages by the direct action of the rats were not among those dangers. It was further held, that the defendant could not be excused because he had two cats on board; the court declining to follow the continental authorities⁴ which hold that cats on board a ship, even if they fail to secure the cargo from rats, will at any rate protect the carrier, so far as rats are concerned, against the consignee.—

In Pennsylvania, in 1809, the court held that the destruction of goods at sea by rats, is a "peril of the seas" for which the carrier is

not responsible.⁵ It will be seen from this sketch, that there is no dominating authority on either side of the question, and the House of Lords may, in due season, decide the great rat case either way without subjecting itself to any serious charge of rendering an absurd decision. We have only two remarks to make on the subject. One is that the rats are permitted to cut too large a figure in the case, that the damage was done by contact with salt water which is emphatically a danger of the sea and within the exception in the bill of lading, and the only question in the case is one of fact, whether the master of the ship was guilty of negligence in permitting the presence of rats in the ship at all. If he used all available and appropriate means to exclude or destroy them, fumigation, cats, "Rough on Rats" etc., the carrier is not responsible; if he did not, the carrier is responsible. The other is, that we do not appreciate the distinction made by the Court of Appeal between the liability of the insurer and the exemption of the carrier. If a loss is chargeable to an underwriter because it resulted from a peril of the sea which he insured against, such a loss cannot be charged against a carrier who in his bill of lading expressly excepts liability for "perils of the sea."

COMMERCIAL LAW—NEGOTIABLE PAPER—CONSIDERATION—IGNORANTIA JURIS.—The Supreme Court of Vermont recently decided a case⁶ of some interest, on the subject of negotiable paper, the consideration thereof, and ignorance of the law connected therewith. A note, payable in bank, was taken up before maturity, by the principal, who paid the bank with the money of the plaintiff, under an agreement with him that he should hold the note as owner. The bank, however, marked the note "paid," and the plaintiff induced the surety to sign a new note. The surety did not know that the bank note had been marked "paid" at the bank, until after he had signed the new note. After the maturity of the new note, suit was brought upon it against the surety, who resisted on the ground that the old note had been paid be-

¹ *Roccus de Navibus*, n. 58; *Emengon* I. 375, 376: *Story on Ballments* § 513.

² *Hunter v. Potts*, 4 Camp. 208.

³ *Lavaroni v. Drury*, 22 L. J. Exch. 2.

⁴ *Roccus de Navibus*, etc. *Supra*.

⁵ *Carrigues v. Coxe*, 1 Binne. 592.

⁶ *Churchill v. Bradley*, 6 East R. 314. July 19, 1886.

fore he executed the new one, that there was no consideration for the new note, and that the payment of the bank note by the principal discharged him, the mere surety. The court, however, decided that the surrender of the bank note, by the plaintiff to the surety defendant, was a good consideration for the new note, and that if the defendant in signing the new note, acted in ignorance or under a mistake, it was ignorance or mistake of law, which could not relieve him.

The reasoning of the court in this case is not altogether satisfactory. The *strictissimi juris* rule, as to the liability of sureties, is well established, and its application to the case under consideration is obvious. It is true that, as to the bank, he was a principal debtor, and his obligation was to pay the note at its maturity, to the bank or its assigns. He was principal, however, as to nobody else. The plaintiff in this action was a mere volunteer, he contracted only with the principal debtor, (Brown,) and furnished him with the money with which he paid the note. When that was done, and the bank, understanding it to be a payment, not a purchase, marked the note "paid," and passed it to Brown, the release of the defendant was complete, the transaction between Brown and the plaintiff, by which the former obtained from the latter, the money, which was paid to the bank, was *res inter alios acta*, he was no party to any agreement between them. Whether Brown merely borrowed the money to pay the note from the plaintiff, or, as his agent, purchased the note, and by mistake it was marked "paid" instead of being endorsed, was no matter to the surety, as to him, (in a court of law at least,) it was paid. How was it as to Brown? The court says: "Treating the bank note as paid, as to the defendant, and him as discharged therefrom, it certainly remained good in the hands of the plaintiff as against Brown, the principal." Of this we are by no means satisfied. If Brown borrowed the money to pay the note, which is one theory of the case, he became indebted to the plaintiff in the precise sum that he received, as soon as the money was in his hands, and whether he ever paid the note at all, or, having paid it, handed it to the plaintiff or not, he continued to owe him the money he borrowed. If he received the

money from the plaintiff to buy the note, he converted the money to his own use, for he paid the note, he did not buy it. If, in either event, he had torn up the note as soon as he received it, he would have been equally liable to the plaintiff. In no event, and under no circumstances, could an action at law be sustained against Brown on the note, because it bore on its face evidence that it had been paid. That equity would relieve in such a case is obvious, but we hardly think it could fairly be said that the note was certainly good in the hands of the plaintiff against Brown.

The courts says correctly: "Any act that is a detriment to the plaintiff is a sufficient consideration for a promise to pay money."⁷ The court adds, we think incorrectly: "It was a detriment to the plaintiff to give up the old note, as it was good against Brown." Could it be a detriment to plaintiff to give up a note on which he could not maintain an action? And could he maintain an action at law on a note which showed upon its face that it had been paid? If therefore the note could not be used as a cause of action against either of its makers, had it any such value as would support a promise to pay money? In a case cited by the court,⁸ Parke J., says: There is no doubt that the giving up of any note on which the plaintiff might sue would be a sufficient consideration." A later case however goes much further, a promise to pay money may be supported by the consideration of anything which the plaintiff parted with although he might have kept, and the defendant desired and obtained.⁹ In other words this ruling is in effect that, anything which a party will accept as a consideration for a promise to pay money is a sufficient consideration.

⁷ Williamson v. Clements, 1 Taunt. 523.

⁸ Shortredge v. Cheek, 1 Ad. & El. 316.

⁹ Haegh v. Brooks, 10 Ad. & El. 306.

FORMALITIES AS ESSENTIAL TO THE VALIDITY OF A MARRIAGE.

1. The question stated.
2. The effect of Inter-State law.
3. General principle.
4. Necessity of formalities under the unwritten or primary law.
5. Necessity of formalities under statutes.
6. Result—States in which formalities are necessary.
7. Result—States in which marriage by mere consent is valid.
8. Result—States in which the question is still in doubt.

1. *The Question Stated.*—The question is, whether competent persons may enter the Married State by a mere agreement to that effect between themselves, or whether they must give notice of their intention to marry or get a license, and must have some authorized person to marry them, and must have the fact of their marriage recorded. In some States formalities are necessary, and in other States the contract alone is essential.

2. *The Effect of Inter-State Law.*—The necessity of formalities to the validity of any particular marriage depends on the law of the place of the marriage, *i. e.* the place where the parties contract to be husband and wife; this is a settled principle of International and Inter-State law.¹ Thus, if two persons from some other part of the world desire to marry in Maryland, they must be married as the law of Maryland requires—by a minister of some recognized sect.² If, on the other hand, Marylanders desire to avoid any formalities whatever, they need only go into Pennsylvania, where none are required.³

3. *General Principle.*—To determine whether or not, in any given State, formalities are essential to the validity of a marriage, (supposing this question not to have been expressly settled by decision) reference must

be had to the primary law or law existing before the passage of any statutes on the subject, and then to the statutes, and the latter must be harmonized with the former as far as possible.⁴ Thus, if the primary law requires no formalities to the validity of a marriage, a statute requiring formalities will not be held to touch the validity of a marriage, unless it expressly refers to such validity or invalidity,⁵ as we shall see below.

4. *Necessity of Formalities Under the Primary or Unwritten Law.*—No formalities are necessary by the law of nature,⁶ or by the Canon law, prior to the Council of Trent,⁷ or by the civil law,⁸ or by the law of Scotland.⁹ Whether or not any are necessary by the common law of England is disputed. In England, after much hesitation, a divided court settled the affirmative;¹⁰ and this view has been sustained in Maryland,¹¹ Massachusetts¹² and North Carolina.¹³ But the contrary has been held by the Supreme Court of the United States,¹⁴ and in Alabama,¹⁵ California,¹⁶ Georgia,¹⁷ Illinois,¹⁸ Iowa,¹⁹ Kentucky,²⁰ Michigan,²¹ Minnesota,²² Missis-

⁴ Stewart Mar. & Div. § 58; Cotterall v. Sweetman, 1 Rob. § 304, 817, 320; Meister v. Moore, 96 U. S. 76, 79; *infra* n. 31.

⁵ Campbell v. Gullatt, 43 Ala. 57, 67, 68; *infra* n. 31.

⁶ See Richard v. Brehm, 73 Pa. St. 140, 144; Lindo v. Belisario, 1 Hagg. Consist. 216, 4 Eng. Eccl. § 367; Dumaresly v. Fishly, 3 A. K. Marsh. 368, 370.

⁷ Dalrymple, 2 Hagg. Consist. 54, 4 Eng. Eccl. 465; Reg. v. Mills, 10 Clark v. F. 534; Hallett v. Collins, 10 How. 174; Patton v. Phila. 1 La. Ann. 98, 101; Prevost, 4 La. Ann. 347, 349.

⁸ Hallett v. Collins, 10 How. 174, 181.

⁹ Wright, 15 Sess. Cas. Sa. § 767; McAdam v. Walker, 1 Dow. 148; Dalrymple, 2 Hogg, Consist. 54, 4 Eng. Eccl. § 485.

¹⁰ Reg. v. Mills, 10 Clark & F. 534; several hundred pages of discussion; see pp. 624, 626, 655, 703, 707, 768, 784, 815, 832, 856, 858, 890; Beamish, 9 H. L. Cas. 274; Du Moulin v. Druitt, 13 Ir. C. L. 212; Catherwood v. Cazlon, 13 Mees. & W. 261, 8 Jur. 1076.

¹¹ Dennison, 35 Md. 361.

¹² Com. v. Munson, 127 Mass. 459.

¹³ State v. Samuel, 2 Dev. & B. 177, 179.

¹⁴ Meister v. Moore, 96 U. S. 76, 78, 77; *infra* n. 44.

¹⁵ Campbell v. Gullatt, 43 Ala. 57, 69.

¹⁶ Graham v. Bennett, 2 Cal. 503, 506.

¹⁷ Askew v. Dupree, 30 Ga. 173, 179.

¹⁸ Port, 70 Ill. 484, 486.

¹⁹ Blanchard v. Lambert, 43 Iowa, 228, 231.

²⁰ Dumaresly v. Fishly, 3 A. K. Marsh. 368, 370.

²¹ Hutchins v. Kimmell, 31 Mich. 126, 130.

²² State v. Worthingham, 23 Minn. 528, 533.

¹ Dicey Dom. pp. 200 *et seq.* Wharton conf. L. § 169; Westlake conf. L. s. 344; Story conf. L. s. 121; Stewart Mar. & Div. § 108; 1 Bish. Mar. & Div. § 353; Pearson, 51 Cal. 120, 125; Roth, 104 Ill. 35, 42; Roche v. Washington, 19 Ind. 53, 57; Boyder v. Dively, 58 Mo. 510; State v. Patterson, 2 Ired. 346, 356; Canjolle v. Ferrie, 38 Barb. 177, 187; Phillips v. Gregg, 10 Watts 158, 166; Morgan v. McGhee, 5 Humph. 13, 14; *et passim*.

² Dennison, 35 Md. 361; *infra* n. 35.

³ Redgrave, 38 Md. 93, 98; *infra* n. 57.

ssippi,³² Missouri,³⁴ New York,³⁵ Ohio,³⁶ Pennsylvania³⁷ and Tennessee,³⁸ and the English decision has been disapproved in Canada.³⁹ Formalities were necessary by the Mexican law.⁴⁰

5. *Necessity of Formalities Under the Primary or Unwritten Law.*—All the States have statutes providing for some formalities of marriage, for example, relating to the permission or license which must be gotten or the notice which must be given before the ceremony, to the persons who may perform the ceremony, and to the record which must be made of the marriage, but, unless such statutes state that marriages not in conformity with their terms shall be void, such marriages are valid, if valid by the primary or unwritten law.⁴¹ Thus, the Maryland statutes provide that no marriage shall be had without license and that all marriages must be solemnized by a minister of some recognized sect, and it is has been held in Maryland that the failure to obtain a license does not affect the validity of a marriage,⁴² but that a marriage not solemnized by a minister is invalid,⁴³ the ground of such apparently inconsistent decisions being the (from that court's point of view) good one, that by the common law no license was necessary while a religious ceremony was, and that as the statutes said nothing about validity, the rule stood as at common law. A disregard of these statutory provisions, however, renders the parties liable to certain penalties in the statutes provided.

Kentucky is the only State, as far as this writer can discover, where the statute express-

ly says, that any marriage not in accordance with its terms shall be void. In all the other States the validity of marriages not in accordance with statute depends upon construction.

6. *Result—States in Which Formalities are Necessary.*—In the following States a marriage celebration by some duly authorized officer, civil or religious, is necessary to the validity of the marriage: Kentucky, by statute,⁴⁴ Maryland,⁴⁵ Massachusetts,⁴⁶ North Carolina,⁴⁷ Tennessee⁴⁸ and Texas,⁴⁹ by primary or unwritten law. Likewise in England,⁴⁰ and probably Canada.⁴¹

7. *Result—States in Which Marriage by Mere Contract is Valid.*—In the following States two persons may become husband and wife by merely agreeing to be such and assuming the status of married persons: Alabama,⁴² California,⁴³ District of Columbia,⁴⁴ Georgia,⁴⁵ Illinois,⁴⁶ Iowa,⁴⁷ Louisiana,⁴⁸

³² Stat. 1881, p. 15, § 2; Estell v. Rogers, 1 Bish. 62, 64. As to formerly see *supra* n. 20.

³³ Cases cited *supra* n. 33.

³⁴ Com. v. Munson, 127 Mass. 459; Thompson, 114 Mass. 566, 567; Milford v. Worcester, 7 Mass. 48, 52.

³⁵ Rev. 1873, p. 587; State v. Samuel, 2 Dev. & B. 117, 179; Cooke, Phill. (N. C.) 538, 586. But this does not seem finally settled; State v. Tachanatah, 64 N. C. 614 616.

³⁶ Stat. 1871, §§ 24, 39; Grisham v. State, 2 Yerg. 569, 592; Bashaw v. State, 1 Yerg. 177. But see Johnson, 1 Cold. 626, 635; Rice v. State, 6 Humph. 14, 15. *Contra* Andrews v. Page 3 Helsk. 653, 667.

³⁷ R. S. 1879, pp. 410, 411; Rice, 31 Tex. 174, 178, 179; Nichols v. Stewart, 15 Tex. 230, 232; Smith, 1 Tex. 621, 632. But see Lewis v. Ames, 44 Tex. 319, 339, 340; Sapp v. Newsom, 27 Tex. 537, 540. None of these are direct decisions.

³⁸ Cases cited *supra* n. 10.

³⁹ See Breaky, 2 U. C. Q. B. 349.

⁴⁰ Campbell v. Gullatt, 43 Ala. 57, 69; Robertson v. State, 42 Ala. 509, 513; State v. Murphy, 6 Ala. 754, 772.

⁴¹ Civ. Code 1881, § 55; McCausland, 52 Cal. 566, 577; Graham v. Bennett, 2 Cal. 503, 506; Titcomb, Myr. Prob. 55, 57. Holmes, 1 Abb. U. S. 525, is not law. See case, 17 Cal. 598.

⁴² Melster v. Moore, 97 U. S. 76, 78; R. S., D. C., 1875, § 718; U. S. v. McCormick, 1 Cranch C. C. 593; U. S. v. Lambert, 2 Cranch C. C. 137; Blackburn v. Crawfords, 3 Wall. 175. The contrary has been held in one of the district courts by Judge Cox.

⁴³ Code 1873, § 1698; Askew v. Dupree, 30 Ga. 173, 179.

⁴⁴ R. S. 1880, pp. 704, 705; Port, 70 Ill. 484, 486; Hebblethwaite v. Hepworth, 13 Chic. L. N. 19, 93 Ill. 126.

⁴⁵ R. S. 1880, § 2195; Blanchard v. Lambert, 43 Iowa, 228, 231. And see State v. Williams, 20 Iowa, 96; State v. Wilson, 22 Iowa, 364; Kilburn v. Mullen, 23 Iowa, 496; White v. State, 4 Iowa, 449.

⁴⁶ Civ. Code, 1875, Acts 86-98; Holmes, 6 La. 466,

³² Hargraves v. Thompson, 31 Miss. 211, 215.

³⁴ Dyer v. Brannock, 66 Mo. 391, 402.

³⁵ Fenton v. Reed, 4 Johns. 51, 52; Rose v. Clark, 8 Paige, 573, 579.

³⁷ Carmichael v. State, 12 Ohio St. 553, 557, 559.

³⁸ Guardians v. Nathans, 2 Brewst. 149, 152.

³⁹ Grisham v. State, 2 Serg. 589, 592.

⁴⁰ Breaky, 2 U. C. Q. B. 349, 352.

⁴¹ Rice, 31 Tex. 174, 178.

⁴² Cotterall v. Sweetman, 1 Rob. Eccl. 304, 312; Meister v. Moore, 96 U. S. 76, 78, 79; Campbell v. Gullatt, 43 Ala. 57, 69; Port, 70 Ill. 484, 486; Carmichael v. State, 12 Ohio St. 553, 557, 559; cases *supra* nn. 14-27. But see Com. v. Munson, 127 Mass. 459; Bashaw v. State, 1 Serg. 177; Grisham v. State, 2 Serg. 589, 592.

⁴³ Blackburn v. Crawfords, 3 Wall. 175. See Greaves, 4 R. 2 P. & D. 423; Ely v. Gammel, 52 Ala. 584; Askew v. Dupree, 30 Ga. 193; Campbell v. Beck, 50 Ill. 171; Stevenson v. Gray, 17 B. Mon. 193; Gatewood v. Tank, 3 Bibb, 246; Sabalot v. Populus, 31 La. Ann. 854; Johnson, 1 Cold. 636.

⁴⁴ Dennison, 35 Md. 361; Classen, 57 Md. 510, 512.

Michigan,⁴⁹ Minnesota,⁵⁰ Mississippi,⁵¹ Missouri,⁵² New Hampshire,⁵³ New Jersey,⁵⁴ New York,⁵⁵ Ohio,⁵⁶ Pennsylvania,⁵⁷ Rhode Island,⁵⁸ South Carolina⁵⁹ and Wisconsin.⁶⁰

8. *Result—States in Which this Question is Undecided.*—In the following States it has not been decided whether a marriage by mere contract is valid, though the cases cited will show the inclination of the several courts on this subject: Arkansas,⁶¹ Connecticut,⁶² Colorado,⁶³ Dakota,⁶⁴ Delaware,⁶⁵ Florida,⁶⁶

Indiana,⁶⁷ Kansas,⁶⁸ Maine,⁶⁹ Nebraska,⁷⁰ Nevada,⁷¹ Oregon,⁷² Utah,⁷³ Vermont,⁷⁴ Virginia⁷⁵ and West Virginia.⁷⁶ In these States the law is in such a condition that should the question arise directly it might be decided either way;⁷⁷ but that on principle it should be decided in favor of mere contract marriages seems clear.⁷⁸ A contrary decision would probably be reached in Delaware, Maine, Virginia and West Virginia.

Baltimore, Md.

DAVID STEWART.

470; Patton v. Phila. 1 La. Ann. 98, 101; Prevost, 4 La. Ann. 347, 349; Cole v. Langtry, 14 La. Ann. 770; Philbrick v. Spangler, 15 La. Ann. 46; Huber, 20 La. Ann. 97; Blasini, 30 La. Ann. 1388.

61 Hutchins v. Kimmell, 31 Mich. 126, 130; Meister v. Moore, 98 U. S. 76, 78; stat. 1882.

62 Stat. 1879, p. 623; State v. Worthingham, 23 Minn. 533, 533.

63 R. S. 1880, § 1150; Floyd v. Calvert, 53 Miss. 37, 44; Dickerson v. Brown, 49 Miss. 357; Rundle v. Pegram, 49 Miss. 751; Hargroves v. Thompson, 31 Miss. 211, 213.

64 R. S. 1879, § 3267; Dyer v. Brannock, 66 Mo. 391, 402; Boyer v. Dively, 58 Mo. 510.

65 G. L., 1878, pp. 428, 429; Londonderry v. Chester, 1 N. H. 268, 279; Clark, 10 N. H. 380, 383; State v. Winkley, 14 N. H. 480. But see Dunbarton v. Franklyn, 19 N. H. 257.

66 Rev. 1877, § 631; Pearson v. Hovey, 11 N. J. L. 12, 13; Goldbeck, 18 N. J. Eq. 42, 43; Vreeland, 18 N. J. Eq. 43, 45; Wilson v. Hill, 13 N. J. Eq. 143, 145. Perhaps a doubt.

67 R. S., 1882, p. 2382; Hynes v. McDermott, 82 N. Y. 41, 46; Chamberlain, 71 N. Y. 423, 427; Hayes v. People, 25 N. Y. 390; Caujolle v. Ferrie, 23 N. Y. 90; 13 Wall. 565; Van Tuyl, 57 Barb. 235; Bissell, 55 Barb. 325; Davis, 1 Abb. N. C. 140; Taylor, 9 Paige, 611; Rose v. Clark, 8 Paige, 574; Fenton v. Reed, 4 Johns. 62.

68 Carmichael v. State, 12 Ohio St. 553, 557, 559. See R. S. 1880, §§ 63, 68; Duncan, 10 Ohio St. 181, 183.

69 Dig. Laws 1872, p. 1002; Richard v. Brehm, 73 Pa. St. 140, 144; Com. v. Stump, 53 Pa. St. 132, Brice's Est. 11 Phila. 98; Hartz v. Sealy, 6 Birn. 405; Guardians v. Nathans, 2 Brewst. 149; Physick, 2 Brewst. 179.

70 Matthewson v. Phoenix, 23 Am. Law, Rep. N. S. 401, 403; Peck, 12 R. J. 485, 488; P. S. 1882, p. 416.

71 Fryer, Rich. Eq. Cas. 85, 92. See G. L. 1871, § 440; State v. Whaley, 10 S. C. 500; North v. Valk, Dud. Eq. 212.

72 R. S. 1873, § 2331; Williams, 46 Wis. 464, 475.

73 Dig. 1874, §§ 4171, 4178; Scoggins v. State, 32 Ark. 205, 212.

74 G. L. 1875, p. 1185; Budington v. Munson, 33 Conn. 481, 487; Hammiok v. Bronson, 5 Day, 290, 293; Roberts v. State, 2 Root, 381, 382; Goshen v. Stonington, 4 Conn. 209, 218; State v. Boswell, 6 Conn. 446, 450; Kiffe v. Antram, 4 Conn. 134, 139.

75 G. L. 1877, p. 611.

76 Holmes, 1 Abb. U. S. 525, which decides *contra*, but is probably not law, case 17 Cal. 598.

77 Rev. Code, 1874, p. 473; Pettyjohn, 1 Houst. 332, 334.

78 Dig. 1881, p. 751; Burns, 13 Fla. 369, 380; Ponder v. Graham, 4 Fla. 23.

67 R. S. 1881, § 5330; Trimble, 2 Ind. 76, 78; Fleming, 8 Black. 234, 235; Nossaman, 4 Ind. 648, 650.

68 Comp. L. 1881, pp. 537, 538. Consult State v. White, 19 Kan. 445, 449.

69 R. S. 1871, pp. 454, 484; State v. Hodgskins, 19 Me. 155, 157; Damon, 6 Me. 148, 149; Cram v. Burnham, 5 Me. 213; Brunswick v. Litchfield, 2 Me. 28.

70 Stat. 1881, pp. 341, 342.

71 Stat. 1873, § 197; Fitzpatrick, 6 Nev. 63, 66.

72 G. L. 1872, p. 661. See Holmes, 1 Abb. U. S. 525, 538, 539, 544.

73 Supreme court would probably be followed. See Meister v. Moore, 98 U. S. 76, 78, 79.

74 R. L. 1881, § 2310; Newbury v. Brunswick, 2 Vt. 151, 160, affirms this; Northfield v. Plymouth, 20 Vt. 582, 591, denies it. See also State v. Rood, 12 Vt. 396, 399; Northfield v. Vershire, 33 Vt. 110.

75 Code 1873, p. 364; O'Neale, 17 Gratt. 582, 587; Francis, 31 Gratt. 283, 286, 287. See Trimble, 2 Ind. 76, 78.

76 R. S. 1879, p. 167.

77 See Peck, 12 R. I. 185, 488.

78 See Andrews v. Page, 3 Helsk. 653, 667; cases *supra* n. 31.

ON SOME COMMON ERRORS IN ADVOCACY.

It is sometimes said that the reply is so much more important than the opening of a case, that it is an advantage worth manœuvring for. On the other hand, I had not long commenced my studies for the bar, when I heard a very distinguished Nisi Prius advocate, now a judge, express just the contrary opinion, saying in effect, that, let him have the opening, he cared little who had the reply, and he was undoubtedly right. Generally speaking, a case well opened is half won. It is the opening speech that gives the cue to the jury. Throughout the course of the evidence, they follow the lines then given them. The connection of each separate proof with the whole chain is readily made when that chain has already been carefully sketched out to them and, what is very im-

portant, they have a natural bias to complete the chain, and fill up, and fit in each part. We all know, that in an argument upon any subject whatever, if we first start off with the theory, and then undertake to prove it, we find the task of making the proof sufficient, a comparatively easy one, and one to which we are, as it were, committed; whilst, if we reverse the process, and, beginning with the proof, endeavor afterwards to construct the theory, we are very likely to end in rejecting the theory as not sufficiently proven. In the latter case, our critical faculties are first excited, and it is more congenial to our minds to detect flaws in the chain of proof than to accept it as complete, whilst in the former case our love of system and harmony is first called into play, our mental powers are engaged in the support of our proposition, and we are not easily induced to examine too closely the evidence upon which we are acting. This is exactly the feeling of the average juror, and if, at the very beginning, he clearly understands what is the litigant's case, he will retain, to the end of the trial, an unconscious bias in favor of that case being proved. The superior value of the opening to the reply is equally apparent, even when the tribunal is a judge alone without a jury. It is true that the opening speech will not disarm a judge's critical faculty so easily as it will a jury's, but it is equally true, that when the close of the case is reached, a judge's mind is generally made up for all practical purposes, and the closing remarks of counsel are, in nine cases out of ten, quite powerless to change him. Your opening will probably have some influence even with him, your reply will most likely have none.

Another error, to my mind, an error specially prevalent amongst young advocates, is the exaggerated importance attached to cross-examinations. At least half the witnesses, who are daily examined in our courts, are honest men telling the truth to the best of their power. If you want some additional statement which has not come out in the examination-in-chief, and which you know the witness can make, you have only to ask him for it and it will be made. Now, with all such witnesses, it should be remembered that the advocate's business is not to cross-examine them with that more or less apparent hos-

tility which the term cross-examination, as generally used, implies, but to examine them in chief for your side. If you have no substantial reasons for thinking that they can add something which will improve your case, or that your opponent has induced them to express themselves more strongly than they intended to do, leave them alone altogether; but if you really think it necessary to question them, do so in the same quiet, friendly way in which you deal with your own witnesses. It never pays to frighten or bully an honest witness, and to endeavor to brand, as dishonest, a witness, whom the judge or jury deem to be honest, is a hazardous attempt, failure in which will go a long way towards damning your case. Of course, there is a considerable percentage of really dishonest witnesses, and with them, cross-examination finds its proper scope, but it is quite foreign to the purposes of this short paper to enter into a disquisition upon the art of cross-examination in all its branches. The subject has already been treated *ad nauseam*. Suffice it to repeat, that cross-examination is a double-edged sword which always cuts the reckless or unskillful swordsman, and that Mr. Punch's famous advice, to persons about to marry, should always be present to the minds of counsel rising to cross-examine. Finally, do not go fishing for evidence, and do not let your client persuade you to cross-examine against your own judgment.

A whole crop of very common errors arise from that excess of zeal which Prince Talleyrand so persistently condemned in diplomacy, and which is equally harmful at the bar. Constant interruption, constant squabbles over little points, an eagerness to explain away on the spot, some passing inconsistency, which, if left alone, can be cleared up later on, or will very probably disappear of itself, bad temper shown to the other side, or to your own too officious client, all these accompaniments of excessive zeal, are not put down to your credit by the jury. Not at all excited themselves, they make no allowance for your own excitement, but jump at once to the conclusion that you are nervous or angry because you expect to lose. They may have no very distinct idea why you should lose, but if they once think that you expect to do so, they will not be apt to disappoint you.

I believe many jurymen pay little, if any, attention to the actual argument and evidence, but watch the counsel engaged, and go in favor of the man who appears to be least anxious about the result. The most apparently indifferent, careless, man that I ever saw in practice, was Sir John Holker, and he was the most uniformly successful. In fact, he almost made a specialty of winning rotten cases. The most zealous, nervous, angry advocate that ever came under my observation, was Dr. Kenealy, and he was the most uniformly unsuccessful. Yet he was incomparably the better speaker, and the more brilliant man of the two. All his gifts were neutralized by his dreadful temper and his ungovernable zeal.

And now, not to trespass on the patience of my readers, let me close this rambling paper, shrouding my *ex cathedra* remarks behind the impalpable obscurity of initials.

A. B. M.

CRIMINAL LAW — FORMER CONVICTION
—PROOF OF—RECORD OF JUDGMENT—
DEFECTIVE INDICTMENT.

JAMES GRISHAM v. STATE.

Texas Court of Appeals.

1. The indictment upon which a former conviction or acquittal took place must be set out or exhibited by a plea setting up as a defence such former acquittal or conviction.

2. If an indictment is defective, no legal jeopardy is incurred by the trial, and the acquittal or conviction on such an indictment is no bar to another prosecution.

3. If upon the trial of an issue made upon a plea of former jeopardy, any evidence (other than that of the record) is offered, it is the duty of the court to submit such evidence to the jury, and this should be done although the trial court in the former case might well have set aside the conviction upon its own motion.

WHITE, P. J., delivered the opinion of the court.

Appellant was convicted in the court below of an assault with intent to murder, upon an indictment charging him with that offence. In connection with his plea of not guilty, he pleaded specially in this case that he had already been tried and convicted for the same offence in the county court upon a complaint and information for an aggravated assault, growing out of the same identical transaction upon which the indictment in this case was founded.

As presented, the plea in itself was defective and insufficient in that it did not allege, as re-

quired, the proceeding which resulted in such former conviction. Such a plea, to be sufficient, should set forth in *laec verba*, at least by exhibit, both the complaint, information or indictment (as the case may be), of the former trial and also the judgment of the conviction. Willson's Crim. Forms, 615, p. 277; 1 Bish. Crim. Pro., 3d ed., § 814; Williams v. State, 13 Ct. App. 286; Adams v. State, 16 Ct. App. 162; Hefner v. State, 16 Ct. App. 573; C. C. P. art. 525.

This is essential in order that the court, trying the plea, may know that the former trial was upon a good and valid information or indictment, without which the conviction would be no bar. "When the indictment is in form so defective that the defendant, if found guilty, will be entitled to have any judgment entered thereon against him reversed for error, he is not jeopardy; and should he be acquitted, he will be liable to be tried on a new and valid indictment." 1 Bish. Crim. Law, 7 ed. § 1021; Whart. Crim. Pl. and Pr., 8 ed. § 457.

The judgment is also essential to a plea of former conviction in order that it may be made to appear that the prisoner has received the proper punishment and sentence required by law. In a word, the accused is required to show, not only the nature of the former prosecution and conviction or acquittal with certainty, but also show the record or its substance to the court. Coleman v. Tennessee, 7 Otto, 525.

The plea was defective in this instance, in omitting to set out the information upon which the former trial was had. It was, therefore, demurrable, though not void. However, there was no exception taken to it except by the prosecution, and the court permitted evidence to be introduced by the defendant in support of it. This was entirely proper. For the rule is that "Where a plea is a mere nullity, evidence may be properly excluded which is offered in support of it. Not so, however, when it is merely defective and liable to be held bad upon exemption, for that would be a trial of the sufficiency of the pleading upon the admission of evidence on the trial after the time for its amendment had passed, and might exclude a good defence without objecting to the manner in which it was pleaded to the surprise and injury of the defendant." Deaton v. State, 44 Texas, 446; Quitow v. State, 1 Ct. App. 47.

From the evidence adduced it appeared that an information was properly filed in the county court charging defendant with the commission of an aggravated assault upon the same injured party, and at the same time and place as mentioned and charged in the indictment; that at a regular term of said court when said case was called for trial, defendant appeared, waived a jury, pleaded guilty, and judgment was rendered against him by the court finding him guilty of an aggravated assault and assessing his punishment at a fine of \$25. But it is further shown by the evidence that a few days after the rendition of the judgment,

and before the term at which it was rendered, had expired, the county judge, of his own motion and without the consent of defendant or his attorney, set aside, annulled and vacated said judgment of conviction and granted defendant a new trial, he having never requested the same by motion or otherwise. Such being the evidence for and against the plea of former conviction in the case, the learned special judge trying the case refused to submit in his general charge the truth or falsity of the plea as an issue in the case to be found by the jury and also refused to give them in charge a special requested instruction of defendant and presenting the issues on the plea.

It is urgently insisted on this appeal that, the learned judge erred in declining and refusing to submit the plea on the evidence as an issue to be found and determined by the jury, because it is strenuously contended that the action of the county court in attempting to vacate, annul and set aside its judgment, and grant a new trial was, under the circumstances stated, absolutely null and void for want of legal authority, and that on account of such want of authority said judgment of conviction has not been set aside, but was and still is a valid and subsisting judgment, in full force, and binding both upon the court and the defendant. And, if of force and effect, notwithstanding the attempt to vacate it, that the evidence adduced amply supported the plea of former conviction, and hence it should have been submitted as a matter to be found by the jury.

If a special plea of former acquittal or conviction is sufficient to admit of evidence and is supported by any evidence at the trial, it is the bounden duty of the court to submit whether it is true or untrue as an issue to be tried and found by the jury, and it is error to neglect, fail or refuse to do so. C. C. P. arts. 525, sub-div. 1, 526, 527, 712; Davis v. State, 42 Texas, 494; Deaton v. State, 44 Texas, 446; Quitzow v. State, 1 Ct. App. 47; Brown v. State, 7 Ct. App. 619; McCampbell v. State, Ct. App. 124; Simco v. State, *Idem*, 338; Smith v. State, 18, Ct. App. 329; Pickens v. State, 9 Ct. App. 270; White v. State, 9 Ct. App. 390; 20 Fla. 869; 95 Ind. 471; 33 Iowa, 335.

But the primary question to be solved is, had the county court any authority of its own motion to set aside its judgment of conviction for aggravated assault without the consent and in opposition to the wishes of defendant? It is claimed in behalf of the prosecution that the case in the county court being a misdemeanor, the same rule would obtain with reference to such judgments as obtain in civil cases, which is that "until adjournment of the term a court has full control over its judgments, and can, upon its own motion, set aside or reform the same or grant a new trial according to the justice of the case upon the merits as well as matters of form." Wood v. Wheeler, 7 Texas, 13; Puckett v. Reed, 37 Texas, 308; By-erly v. Clark, 48 Texas, 345; Blum v. Wettermark,

58 Texas, 125; Hooker v. Williamson, 60 Texas, 524; Willson's Civil Cases, §§ 313, 572.

We have a statute upon former acquittals or convictions which declares that, "a former judgment of acquittal or conviction in a court of competent jurisdiction shall be a bar to any further prosecution for the same offence, but shall not bar a prosecution for any higher grade of offence over which said court had no jurisdiction, unless such trial and judgment were had upon indictment or information, in which case the prosecution shall be barred for all grades of the offence." C. C. P. art. 558. But if the trial in the first instance, though for a minor grade, and in a court having no jurisdiction of the major or higher offences, is for the same transaction, and by virtue of an information or indictment, the judgment will be a bar to a higher grade though the latter be pending in another and different tribunal having jurisdiction of it. Allen v. State, 7 Ct. App., 298; Achterberg v. State, 8 Ct. App. 463; White v. State, 9 Ct. App. 390.

Before the adoption of our statute, the rule in this State was that, "if on the trial of a major offence there can be conviction of the minor, then a former conviction or acquittal of the minor will bar the major. Citing Whart., § 563. And it is in connection with this that the same author says: "When the evidence necessary to support the second indictment would have been sufficient to procure a legal conviction upon the first, the plea is generally good, and this is true, although the first trial was for a misdemeanor and the second for a felony." Citing Whart., §§ 565, 566; Thomas v. State, 40 Texas, 36. "Where the evidence necessary to support the second indictment would have been sufficient to procure a legal conviction upon the first, the plea is generally good, but not otherwise. Even where the first trial was for a misdemeanor and the second for a felony, the test holds good that the plea is sufficient if the evidence requisite to support the second indictment must necessarily have supported a conviction of the first." Whart. Crim. Pl. and Pr., 8 ed., §§ 456, 471; Rogers v. State, 10 Ct. App., 655.

We have been led into a discussion of the branch of the law of the case with a view of showing that the judgments in misdemeanor cases may, and oftentimes become most effectual in preventing judgments of a more serious character affecting both liberty and life. The principles underlying these rules is that, "by selecting a minor stage and prosecuting it with the evidence of the major stage, declining to present an averment of the latter, the prosecution may preclude itself from afterward prosecuting the major offence in a distinct indictment. Otherwise the prosecution might arbitrarily subject a defendant to trials for a series of progressive offences on the same proof tentatively applied until at last a conviction should be reached." The prosecutor may bar himself by selecting a special grade of the defence. Whart. Crim. Pl. and Pr., §§ 465, 467. He may carve as

large an offence out of a single transaction as he can, yet he must cut only once. *Quitzow v. State*, 1 Ct. App., 47; *Simco v. State*, 9 Ct. App., 338.

Former jeopardy is another reason for the rule. This constitutional safeguard is that "no person for the same offence shall be twice put in jeopardy of life and liberty." Const. art. 1, § 14. Mr. Bishop says: "The construction of which is, that properly, the rule extends to treason and all felonies, not misdemeanors: 'yet practically and wisely the courts, by an equitable interpretation, apply it to all indictable offences including misdemeanors. * * * We have seen that, while statutes are to be strictly interpreted as against persons charged with crime, provisions introduced in their favor should be construed liberally; and the same distinction applies to a written constitution. Therefore the constitutional provision now under consideration should be liberally interpreted extending to cases within its reason, though not within its words. On which principle plainly the courts should, as we have seen they generally do, hold it applicable to misdemeanors the same as to treason and felony." 1 Bish. Crim. Pro., 7 ed., §§ 990, 991. "The ancient common law, as magna charta itself, provided that one acquittal or conviction should satisfy the law; or, in other words, that the accused should always have the right secured to him of availing himself of the pleas of *autrefois acquit* and *autrefois convict*. To perpetuate this wise rule so favorable and necessary to the liberty of a citizen in a government like ours, so frequently subject to changes in popular feeling and sentiment, was the design of introducing into our Constitution the clause in question." Com. v. Olds, 5 Litt. Ky., 137. "If there is anything settled in the jurisprudence of England and America it is that no man can be twice punished for the same offence." Ex parte Large, 18 Wall. U. S., 163. See authorities fully cited in *Mitchell v. State*, 44 Ohio St., 383. The difference between jeopardy and the pleas of *autrefois acquit* and *autrefois convict* is the important distinction that the latter presuppose, and are predicated upon verdicts rendered; the former for valid causes which have operated in cases where no verdict has been reached. Whart. Pl. and Pr. § 491.

To apply these great and salutary principles of both statutory and constitutional law to the case before us, we recur to the question of the authority of the county court to set aside the first judgment of conviction. If its action in doing so was nugatory and void, then most clearly had defendant already once before been placed in jeopardy for this same offence, for he had been tried upon a valid information for the lesser grade in a court of competent jurisdiction in which the evidence, necessary to conviction, was the same as was essential in the second trial, and his plea of former conviction was therefore good under the rules of law heretofore announced.

As to the power of the court over its judgments

in criminal cases during the term, Mr. Bishop remarks: "As the court may alter its docket entries and other records at pleasure during the term in which they are made, it may, until the term ends, revise, correct and change its sentences, however formally pronounced, if nothing has been done under them. But steps taken under a sentence (it matters not what steps), doubtless at least a part execution thereof, will cut off the right to alter it even during the term. And with the expiration of the term the power expires." 1 Bish. Cr. Pro., 3 ed., § 1298. "And subject to exceptions, such as where rights are acquired or relinquished through entries, excepted as perfect judicial transactions, the orders and judgment of the court appearing upon the docket may be abrogated or modified, or new ones may be added or substituted for the former ones, or the entries may be amended to conform to the facts whenever the judge in his discretion sees fit to direct, but not after the close of the term." *Idem*, § 1242.

But in criminal cases, the power of courts over their judgments during the term at which they are rendered does not extend to cases where punishment has already been inflicted in whole or in part. Ex parte Large, 18 Wall. U. S., 163. "A conviction followed by an endurance of punishment will bar a future prosecution for the same offence." Whart. Crim. Pr. and Pl. 8 ed., § 460, citing Com. v. Lond., 3 Met., 328; Com. v. Keith, 8 Met., 531; Fritz v. State, 40 Ind. 18.

In the judgment of conviction rendered in the county court, and which was read as evidence by defendant in support of his plea of former conviction, it is recited and ordered that he be remanded to the custody of the sheriff of Hunt county till such fine and costs are fully paid." It was, as stated, a day or two after the rendition of the judgment that the court, of its own motion, set it aside. It is but fair and reasonable to presume that in the interim between its rendition and attempted annulment and vacation defendant had, according to its terms, either paid the fine and cost imposed, or been held in custody of the sheriff in default of such payment. If so, in either event he had suffered some punishment under said judgment, and it was then beyond the power of the court either to set it aside, vacate, annul or change it in any substantial respect unless at the instance or motion of defendant.

Our conclusion of the whole matter is, that the plea of former conviction was, under the circumstances of this case, a matter, the truth of which should have been submitted in the charge of the court by appropriate instructions authorizing the jury to try the issue as to whether it was true or untrue.

Because the court erred in refusing to submit defendant's special plea of former conviction to the jury, we are of opinion that our previous judgment of affirmance would be set aside, and that the judgment of the lower court should be reversed and the cause remanded for a new trial.

Motion for rehearing granted, and judgment reversed and remanded.

Reversed and remanded.

NOTE ON THE DEFENSE OF FORMER CONVICTION OR ACQUITTAL. (1) *Of the Plea.*—The plea of a former conviction or acquittal for the same offence must be taken specially, for this defense is not admissible under the plea of not guilty.¹ Hence, a petition to be released from custody on *habeas corpus* is not a proper mode of presenting the defense that the prisoner has already been acquitted of the crime charged.²

In making the plea, the identity of the defendant must be alleged; it is not sufficient if the names in the two indictments appear to be the same, for there may be two persons of that name, or the same person might be charged under different names.³

And it must also be distinctly alleged that the two offences charged in the former proceeding and in the present, are one and the same; identity must clearly appear.⁴ And it must be made manifest that the court before which the former trial was conducted, had jurisdiction of the subject matter and of the person of the defendant; this should in general appear from the record, but it may be necessary to show it by extraneous evidence.⁵ The plea must also set out the record of the former proceedings, including the words of the indictment.⁶ And it seems to be the result of the various and somewhat conflicting authorities, that the plea must show either a conviction or acquittal, but that a verdict of the jury, without the judgment or sentence of the court upon it, sufficiently shows that the cause has reached a definite end.⁷ In some of the States it is permitted to a defendant, who has pleaded a former conviction or acquittal, to also plead over to the main charge by adding "not guilty."⁸ But in some others, and notably Massachusetts, such a joinder of pleas is regarded as wholly inadmissible.⁹ But the right to answer over, when the special plea has been taken alone and found against the defendant, is nowhere questioned.¹⁰ The plea of former conviction or acquittal is of a mixed nature, embracing generally both law and fact, and therefore ordinarily requires a trial by jury.¹¹ And if the plea is sufficiently well

framed to admit of evidence, and if testimony is offered in support of it at the trial, the truth of the plea is an issue of fact which must be submitted to the jury, and the failure of the court to so submit it is error for which the judgment is liable to be reversed.¹²

(2.) *Sufficiency of Former Conviction or Acquittal as a Bar.*—As is well stated by Mr. Bishop: "Where the indictment is in form so defective that the defendant, if found guilty, will be entitled to have any judgment entered thereon against him reversed for error, he is not in jeopardy; and, should he be acquitted, he will be liable to be tried on a new and valid indictment."¹³

Proceedings on *habeas corpus* are not generally a bar to a subsequent prosecution on the same charge.¹⁴ And one preliminary examination for a criminal offence is no bar to another preliminary examination for the same offence; nor is it any bar to a full prosecution for such offence, although the defendant may have been discharged on the first preliminary examination.¹⁵ "The entry of a *nolle prosequi* by the competent authority does not put an end to the case, and is no bar to a subsequent indictment for the same offence, unless the jury has been actually empanelled, in which case, if the defendant refused to consent, or if (in some jurisdictions) he was put in jeopardy of his life by the jury being charged, or if the entry be made after the evidence closes, the entry operates as an acquittal; though it may be otherwise in cases where the defendant was not in jeopardy, and where the local law authorizes a *nolle prosequi* during trial."¹⁶ In the next place, the court must have had jurisdiction. Thus, a plea of a former acquittal, by a magistrate or other inferior court, of an offence of which such court has no jurisdiction, is no bar to an indictment for the same offence.¹⁷

The general rule is, that if the evidence necessary to support the second indictment would have been sufficient to procure a legal conviction upon the first, the plea will be good.¹⁸ And conversely, if the record shows that the evidence necessary now would not have been sufficient then, the plea is not sustained.¹⁹ So where the second indictment charges a less offence than that averred in the former, but on the same facts, and it is seen that the evidence offered in support of the first indictment must have been sufficient to cover the less offence charged in the second; and if the defendant might have been convicted of the less offence under the first indictment, a failure to so convict will be a virtual acquittal of the less offence, while a conviction will be virtually a conviction of both offences.²⁰

¹ *Thomas v. Commonwealth*, 29 Gratt. 912; *Pitner v. State*, 44 Tex. 578; *Brill v. State*, 1 Tex. App. 152; *Comm. v. Merrill*, 8 Allen, 545; *State v. Conlin*, 27 Vt. 318; *Comm. v. Chesley*, 107 Mass. 222; *State v. Washington*, 28 La. Ann. 129.

² *Brill v. State*, 1 Tex. App. 152.

³ 1 Bish. Crim. Pro. § 814, citing *Faulk v. State*, 52 Ala. 415.

⁴ *State v. Wister*, 63 Mo. 592; *King v. State*, 43 Tex. 351; *Jenkins v. State*, 78 Ind. 133; *Thomas v. State*, 40 Tex. 26; *Rex v. Bird*, 5 Cox C. C. 11; *McQuoid v. People*, 3 Glm. 76.

⁵ *State v. Spencer*, 10 Humph. 431; *State v. Hodgkins*, 42 N. H. 474; *State v. Salge*, 2 Nev. 321; *Quitson v. State*, 1 Tex. App. 47.

⁶ *Crocker v. State*, 47 Ga. 568; *Smith v. State*, 52 Ala. 407; *Williams v. State*, 13 Tex. App. 226; *Adams v. State*, 16 Tex. App. 163.

⁷ *Shepherd v. People*, 25 N. Y. 406; *People v. Goldstein*, 32 Cal. 423; *State v. Eiden*, 41 Me. 166; *Bailey v. State*, 26 Ga. 579; *Exp. Clements*, 50 Ala. 459; *O'Brien v. Comm.* 9 Bush, 333.

⁸ *Pritchford v. State*, 2 Tex. App. 69; *State v. Johnson*, 11 Nev. 273; *Clem. v. State*, 42 Ind. 420; *Faulk v. State*, 52 Ala. 415.

⁹ *Comm. v. Bakeman*, 105 Mass. 53; *Nauer v. Thomas*, 12 Allen, 572.

¹⁰ *Bird v. State*, 53 Ga. 602; 2 Hawk. P. C. c. 23 § 122.

¹¹ *Quitson v. State*, 1 Tex. App. 47; *Miller v. State*, 3

Ohio St. 476; *Comm. v. Chilson*, 2 Oush. 15; *Page v. Comm.* 37 Gratt. 964.

¹² *Smith v. State*, 18 Tex. App. 329; *Davis v. State*, 42 Tex. 494; *Seibert v. State*, 95 Ind. 471.

¹³ 1 Bish. Crim. Law, § 1021.

¹⁴ *Whart. Crim. Pl. and Pr.* § 445, citing *Ex parte McCann*, 14 Gratt. 570.

¹⁵ *State v. Jones*, 16 Kans. 608.

¹⁶ *Whart. Crim. Pl. and Pr.* § 447, and cases cited.

¹⁷ *State v. Payne*, 4 Mo. 376; *State v. Odell*, 4 Blackf. 156; *Marston v. Jennis*, 11 N. H. 162; *State v. Hodgkins*, 42 N. H. 477.

¹⁸ *Rex v. Emden*, 9 East. 437; *Comm. v. Tenney*, 97 Mass. 50; *Comm. v. Hoffman*, 121 Mass. 399; *Comm. v. Trimmer*, 84 Pa. St. 65; *State v. Reed*, 12 Md. 263; *Price v. State*, 19 Ohio, 423; *Gruedel v. People*, 43 Ill. 226; *State v. Moon*, 41 Wis. 684; *Holt v. State*, 28 Ga. 187.

¹⁹ *Comm. v. Trimmer*, 84 Pa. St. 70.

²⁰ *Sanders v. State*, 55 Ala. 43; *State v. Standifer*, 5 Port. (Ala.) 523; *Thomas v. State*, 40 Tex. 26; *Dunn v. State*, 70 Ind. 47; *State v. Townsend*, 2 Harringt. 543; *State v. Pitts*, 57 Mo. 85.

But where there are several grades in the offence, and the first indictment charged a minor or inferior grade, and a conviction of the major offence could not have been had under it, then a conviction or acquittal of the minor under the first indictment does not bar a second indictment for the major offence;²¹ although, as suggested in the principal case, the prosecution should not be allowed to experiment towards securing a conviction by using the same proof for a series of progressive offences.

H. CAMPBELL BLACK.

²¹ Comm. v. Evans, 101 Mass. 25; Wilson v. State 24 Conn. 57; People v. Smith, 57 Barb. 46; State v. Warner, 14 Ind. 573; Severin v. People, 37 Ill. 414; People v. Knapp, 26 Mich. 112; State v. Martin, 30 Wis. 216.

CEMETERY—DEED—POWER — REVERTER SPECIFIC PERFORMANCE — WHAT IS A GOOD TITLE.

SECOND UNIVERSALIST SOCIETY OF THE CITY OF BALTIMORE v. DUGAN.

Court of Appeals of Maryland, June 23, 1886.

If, by the express terms of a deed, conveying land to a religious society for use as a burial ground, it was the intention of the parties to dedicate the property conveyed to the uses therein specially declared, neither they, their heirs, the *cestuis que trust*, nor the lot-holders, have any right to divert it from those uses, and the employment of covenants of warranty in such a deed will not enlarge the powers of the parties claiming thereunder.

2. In equity a purchaser will not be compelled to take a title which is not free from reasonable doubt, and which might in reasonable probabilities expose him to the hazards of litigation.

Appeal from circuit court of Baltimore.

E. Otis Hinkley and Fred. W. Story, for appellant; *M. A. Mullin*, for appellee.

IRVING, J., delivered the opinion of the court.

This is a special case stated, wherein all the facts are agreed upon and filed, instead of a regular bill for specific performance. The only question for determination is whether the appellant has "a good title to the property which the appellee has agreed to buy as and for a good marketable and sufficient" title. Upon the case stated that question was submitted to the circuit court of Baltimore city, with right to appeal reserved. The circuit court decided the title was not "good and marketable," and decreed that the case stated should be dismissed. From that decree appeal was taken.

The real estate which is the subject of controversy is part of a tract of land which was conveyed in trust for the use of the society of Christian people calling themselves Quakers inhabiting and dwelling in and near the town and county of Baltimore. The appellant derives whatever title it has through two deeds conveying the property for the use already stated. One, which is described as Exhibit F. is a deed from Andrew Stigar to

John Cornthwait and Gerard Hopkins, dated the nineteenth day of June, 1773. The consideration is "thirty-five pounds and four shillings," and the conveyance is made to John Cornthwait and Gerard Hopkins, "their heirs, executors, and administrators." The *habendum* clause is:

"Unto the said John Cornthwait and Gerard Hopkins, their heirs, executors, administrators, or assigns, for and to use of and purpose following; that is to say, for the use of the society of Christian people called Quakers, inhabiting and dwelling in and near the town and county of Baltimore, in the province aforesaid, to inclose and keep the same for a burying place to bury or inter those of the same society that may from time to time depart this transitory life, and also to erect or build a meeting-house for the same society of people, for the public worship of Almighty God, or such other improvements as they, the said society, may think proper," etc.

To this deed was added a covenant of the grantor that he was seized in fee, and had right to convey, and of warranty against all persons.

The other deed, marked "G," is from John Deaver to John Cornthwait and Gerard Hopkins, and their heirs, executors, and administrators, and is dated the twenty-first day of June, 1773. The consideration of this deed is £18 11s. The *habendum* clause of this deed is in the following language:

"Unto the said John Cornthwait and Gerard Hopkins, their heirs, executors, administrators, for and to the use of and purposes following: that is to say, for the use of the society of Christian people called Quakers, inhabiting and dwelling in and near the town and county of Baltimore, in the province aforesaid, to inclose and keep the same for a burying place to bury or inter those of the same society that may from time to time depart this transitory life, and also to erect or build a meeting-house for the same society for the public worship of Almighty God, and other business concerning the affairs of the said society of people called Quakers, according to the custom and manner used and practiced by the said society and people called Quakers, and to, and for no other use, intent, or purpose whatsoever," etc.

To this is added a covenant that if the land is taken away "by due course of law" the grantor and his heirs will make good all damages the said John Cornthwait and Gerard Hopkins, and their heirs of the society, shall sustain by the recovery of the same aforesaid.

It appears that the title of John Deaver to the land conveyed by the immediately preceding deed was regarded as defective by reason of the non-recording of the deed to him; and on the ninth day of March, 1786, the heirs of Thomas Sligh, the grantor, by deed marked "H" in the record, executed a deed of confirmation for the property to John Deaver, only son and heir at law of John Deaver, the grantor in deed marked "G," which deed of confirmation was to John Deaver, his

heirs, forever, to the only proper use and behoof of the society of Christians known and distinguished by the title "friends," and now in possession of said society, their successors and assigns, forever. To this is added a covenant of warranty against all persons claiming under them.

By chapter 20 of the Acts of 1793 the legislature, referring to and reciting the provision of the bill of rights that no religious society should hold more than two acres of land without the leave of the legislature, and reciting the application of the Quaker society for an act making it lawful for them to hold the property, made it lawful for the society to hold the lots hereinbefore described. But that act, by its second section, saved all and every person their several and respective rights; and by its third section described the uses to which the property was to be put, and to which the legislature assented, and added, "and for no other use or purpose whatsoever."

Subsequently to this act assenting to the holding of this property by the Quakers, Gerard Hopkins, the last mentioned John Deaver, son and heir of the first named John Deaver, and divers other persons, united in deed to Gerard Hopkins, Isaac Tyson, John Dukehart, and John Trimble, of Isaac, their heirs and assigns, forever, of all that property for the uses and purposes therein mentioned. That deed was dated the fourth day of April, 1800; and the *habendum* clause was that all those persons named as trustees should hold the property in trust for the use of the society of people called Quakers, according to the tenor of the act of the general assembly of Maryland passed at November session in the year 1793, entitled "an act to confirm the title of certain lots of ground to the society of people called Quakers in Baltimore town, whereon is their meeting house and burying ground," and for the uses and purposes in the said act expressed and contained.

The act of the general assembly of 1852, (chapter 268,) after reciting in the preamble that John C. Turner, Isaac Tyson, Jr., William Riley, John Brown, and Joseph Matthews held certain lands for the purpose of a burying ground and meeting house by the society of Friends or Quakers appointed agreeably to the provisions of the act 1821, and that certain portions of land were unfit for the object intended, proceeds to authorize the sale of such portions, or the lease thereof, and the application of the proceeds to the inclosure and improvement of the remainder, and the purchase of other burying grounds elsewhere. Under the supposed authority and protection of this act, the trustees on twenty-first of June, 1855, leased the ground now involved, to Charles W. Roback for 99 years, renewable forever, reserving a yearly rent of one cent, with a covenant to convey the fee on request to him or his assigns. This lease, Roback assigned to Jesse Marden, Eliza Whitman, and Edward W. Robinson, and their administrators or assigns, and on request of Roback the fee was conveyed to them, and from them, by

inseparable conveyances, the appellants have acquired their title.

Now, it is very clear that if these original deeds did not convey an indefeasible title, and that in consequence of the diversion of the property from the uses to which it was conveyed, any reverter thereof would occur to the grantors and their heirs at law, then the act of 1852 would not have the effect of diverting vested rights of individuals, and thus make the alienation pursuant to the act of 1852 effectual in confirming a good and indefeasible title. The original conveyances, which have been recited, conveyed the property for certain specified uses of certain Christian people, and for no other use whatever. The act of 1793, (chapter 20,) which assented to the holding and use by such Christian denomination, confirmed its assent to a holding for the uses named, and in express terms saved all individual rights, which would embrace the reversionary rights of the grantors and their heirs if they had any. A second act of assembly was passed for the benefit of the same society, and the same property in 1812, being chapter 158 of that year's enactments. That act seems, by its recitals, to have been made necessary by the death of some of the trustees, and was for the purpose of naming others, and vesting in them the property. It does so for the same uses and purposes as are mentioned in the act of 1793, (chapter 20,) and for no other purpose whatsoever, saving to all and every person their several and respective rights.

The same reasons which induced the passage of this act of 1812 appear to have caused the passage of the act of 1821, (chapter 130,) for the benefit of the same body of Christians, and respecting the same property. This appears by the preamble thereof. It seems also to have been designed to settle some controversies respecting the extent of burial in the lot, and what parts were subject to that use. This act, by its sixth section, makes this provision: "That nothing herein contained shall authorize, or in any manner empower, any of the aforesaid trustees, or their successors, to sell or dispose of any of the property vested in them by this act." Thus it appears to have been the design of both the deeds, and the laws sanctioning the holding under them, to confine the holding, and the assent to the holding, to a holding for the expressed uses of burial and church purposes.

In *Reed v. Stouffer*, 56 Md. 253, this court in passing upon the rights of certain German Baptists called Dunkers to have certain property held in trust for them for burying ground, under a deed from John E. Howard, said:

"By the express terms of the deed, it was the intention of the parties to it, to dedicate the lot conveyed to the uses therein specially declared; and neither they, their heirs, the *cestuis que trust*, nor the lot holders, have any right to divert it from those uses. The fact that a valuable consideration was paid for the grant can make no differ-

ence. The estate conveyed and granted in express and exclusive terms cannot be enlarged by the amount of consideration paid. Where uses are declared, they are to be had correspondent to the consideration. 2 Fonb. Eq. § 4, notes and authorities there cited. And it certainly cannot be inferred, from the amount of consideration paid, that the grantor intended to convey an estate which the grantees were expressly prohibited by the thirty-fourth article of the declaration of rights from taking; that article declaring void all gifts and conveyances of land to religious societies except not exceeding two acres on which to erect a building for divine worship, or to be used as a place for the burial of the dead. It is manifest that neither the original trustees named in the deed of 1818, nor their heirs, nor the lot holders, have any right to have the lot sold, and the proceeds distributed among them, or any of them. It must be held and used in strict conformity to the terms of the deed by which it was conveyed, and for the uses therein specially declared. Should it be diverted from those uses, the terms of the deed under which alone it is now held would be violated, and the heirs of Gerard Howard would immediately become reinvested with title to the lot."

The appellee contends that this case of Reed v. Stouffer is decisive of the question at issue here, and fully establishes that the appellant has no such title to the property proposed to be sold to appellee, as a court of equity will compel him to take. On the other hand, the appellant contends that there is an important element in this case, which is wanting in the Stouffer case, which makes a material distinction between the cases. In these deeds of 1773 and 1786 there are covenants of seisin and of warranty which appellant contends operate to negative any restriction which might be inferred from the uses set forth in the earlier portions of the deeds. The language of the covenants of warranty include these words:

"For himself, and his heirs and assigns, doth covenant and grant to and with the said John Cornthwaite and Gerard Hopkins, their heirs, and assigns, and the society of people called Quakers, that he, the said Andrew Stiger, and his heirs, will, well and truly, warrant and defend the same," etc.

It is contended, that the use of the word "grant" in the covenant gives it additional force, and operates to pass an estate in fee without restriction, and that the warranty effectually estops the heirs of the grantor from attempting any disseizin. No rule is better settled than that contended for by appellants: that the intention is to be gathered from the expressions of the whole instrument, and that it is to be construed most beneficially for the grantee. But, following it, we cannot draw the conclusion contended for by appellants. Guided by that rule, we find nothing in the deeds outside the *habendum* clause to justify the conclusion that any other estate or different estate

was designed to be conveyed than that which is so expressly designed in the *habendum* of deeds. The uses are clearly and distinctly set forth, and in one of them the words "and for no other use whatever" are added; thereby expressly excluding the idea that a larger estate was intended to be granted. In addition, it may be said, as was said in Stouffer's case, 56 Md. 253, that it cannot be supposed an intention existed to grant what the *cestuis que trust* could not take under the prohibition of the declaration of rights. The covenant is to be construed with reference to the estate and interest which is described as conveyed, and which the *habendum* clause limits; and the allegation to assure which is thereby created can, and should only be held to be an allegation to assure the precise estate granted in the deed, and nothing more. Being co-extensive with the estate granted, it ceases when that ceases. This was the view maintained in Zittle v. Weiler, 63 Md. 190. No authority is there cited, but abundant authority exists. In 2 Co. Litt. 385b, it is said: "But a warranty, of itself, cannot enlarge an estate; as, if the lessor by deed release to his lessee for life, and warrant the land to the lessee and his heirs, yet doth not this enlarge his estate." The same statement of the law is made in 1 Shep. Touch. 182. In Rawle, Cov. 415, it is said to be a familiar principle that warranty will not enlarge an estate. Warranty is a defense, and not a title. 1 Shep. Touch. 181, 182; Hurd v. Cushing, 7 Pick. 169; Adams v. Ross, 30 N. J. Law, 509, 510; Register v. Rowell, 3 Jones, (N. C.) 312. The introduction of the word "grant" into the covenant cannot enlarge the operation of the covenant beyond that for which the covenant was introduced and was intended, viz., to assure the particular estate granted. It cannot make it a new granting clause. Many old forms use the word in that connection. In old Maryland forms it was very common. 1 Harris, Entries, 10, 42, 44-46. But in all such cases it is used in a covenanting sense only, and it was never held to make the covenant a granting clause. In all cases of plain conflict or inconsistency in the clauses of a deed, the first clause prevails. 63 Md. 190.

There having been a clear diversion of the property from the uses to which it was devoted by the original deeds, the rights of the heirs at law of the original grantors of the property, who from the great lapse of time may be supposed to be dead, to have the land again by reverter, have arisen, and clouds the title of the appellant. It does not appear that the heirs of Thomas Stiger or of John Deaver have failed, and that the reversion had escheated to the State before the act of 1852. It is true that the son of John Deaver, the original grantor in one deed, and his only heir at law, took title for the use of the Quakers by way of confirmation of their rights, but it was for the same uses, and no other; and the same difficulty arises over his possible heirs as exists with respect to the possible heirs of Stiger. Notwithstanding the

long possession of the appellant without molestation, it does not appear by the admission in the case to have been such a possession as could be relied on against the possible heirs of these grantors; for infancy, coverture, and other disabilities may have existed to protect them.

Entertaining the views we have expressed with respect to the effect of the original deeds, and the results of the diversion of the property from the uses for which it was granted, we have not thought it necessary to consider how the title of the appellants would stand under Exhibit C, D, in view of the provision of the declaration of rights. In any event, their title is dependent on the title of the Quakers, and as we decide, as to that title, that there may be heirs of the original grantors to assert rights adverse to them, which would have to be respected, which clouds the title, further consideration of appellant's title is unnecessary. Nor have we found it necessary to decide whether any of the acts of assembly with reference to the Quakers has had the effect to make them a corporation; for, if such effect had resulted from any of the acts, their power to use the property otherwise than as granted would not have thereby increased, and diversion from the use created would still leave the reversionary rights, in consequence thereof, unaffected.

It is the established rule in equity that a purchaser will not be compelled to take a title which is not free from reasonable doubt, and which might in reasonable probability expose him to the hazards of litigation. Therefore the decree must be affirmed.

EQUITY — FRAUDULENT REPRESENTATIONS — ESTOPPEL — AGENT — OFFICER OF CORPORATION — PURCHASER.

BOOTH v. SMITH.*

Supreme Court of Illinois, June 12, 1886.

1. *EQUITY—Fraudulent Representations Inducing Purchase.*—This was a will to rescind a purchase of 392 shares of the capital stock of a coal company, induced, it is alleged by fraudulent representations of the defendant and his agent as to the value of said stock, and of the investments and business of the company. The evidence in the case was conflicting. Without analyzing the evidence in detail, the court held that the preponderance of the evidence was with the complainant, and affirmed the decree sustaining the bill.

2. *ESTOPPEL—Acts as Agent of Purchaser of Stock and Acts as Officer of Corporation Distinguished—Purchaser not Estopped by His Agent's Acts in Later Capacity.* In this case the husband of the purchaser of stock acted as her agent in the purchase. He then became an officer of the corporation, and the funds paid in for the stock were paid out with his approval as such officer of the corporation. This does

not constitute an estoppel against the purchaser's rescinding the purchase for the fraud of the seller.

Appeal from the First district.

SCOTT, C. J., delivered the opinion of the court:

This was a bill in chancery, brought by Josephine C. Smith against Caleb H. Booth, Oliver M. Parsons, and the Western Indiana Coal Company. The relief sought, however, is principally as to defendant, Caleb H. Booth. It is set forth in the bill, that complainant was induced, by false representations made by Oliver M. Parsons, as his agent, to purchase of Booth 392 shares of the capital stock of the Western Indiana Coal Company, paying therefor the sum of \$4,000; and the object of the bill is to set aside the sale on account of the alleged fraud practiced upon her, and for an account against Booth, from whom it is alleged she bought the stock through her agent transacting the business for her. The fraud charged is, that Parsons falsely represented the company was successfully operating its mine, and paying its current expenses out of the proceeds of the coal taken from the mine, and that the capacity of the mine could be easily increased to 50 tons per day, when the mine would pay a large profit; that the coal taken from said mine was worth 25 cents a ton more than any coal mined in the State of Illinois; that the coal could be mined and placed on the cars at the mine at a cost not to exceed \$1.27 per ton; that there had been invested, by the stockholders of the company, in the plant and purchase of its property, the sum of \$3,500; and that its indebtedness was \$1,500. The bill then charges that, relying upon and believing the representations so made to be true, she, through her agent, made the agreement to purchase the stock. The answer made to the bill was not under oath, and serves no other office than to put the matters alleged against defendant at issue, and it will not, therefore, be necessary to state the contents. On the final hearing of the cause upon the pleadings and the evidence, the court rendered a decree in favor of the complainant, setting aside the sale of the stock to her, and adjusted the equities between her and the defendant, Booth, by taking an account, and rendering a decree against him for the balance found due from him, after appropriating to complainant the amount in the hands of the receiver. That decree was affirmed, on the appeal of Booth, in the Appellate Court of the First district, and he brings the case to this court on his further appeal.

Most, if not all, the questions involved are purely questions of fact, and as to some of them the testimony is quite conflicting. It does not seem to be seriously controverted, either by Booth in his answer to the amended bill, which charged the fact of agency, or by the evidence that Parsons was his agent, and acted as such in making the sale of the stock to complainant. That fact in the case may be regarded as proved with such cer-

* S. C. 7 N. E. R. 610.

tainly that will be taken as established in the further consideration of the case. Nor can it be seriously questioned that complainant relied upon the representations, whatever they were, in making the purchase of the stock. She could have but little other information as to the value of the mines, and the plant owned by the company. Had it not been for the representation made to her agent, it is evident she never would have purchased the stock at the price she did. The sequel shows, past all doubt, the amount paid for the stock was out of all proportion to its real value. There must have been something, other than the slight personal examination of the mines and plant made by her agent that induced the making of the purchase of the stock. The testimony touching the representations alleged to have been made will be considered further on in the brief discussion that is to follow. There is no ground for the objection that the offer to rescind the sale was not made in apt time. No considerable delay was suffered to intervene in giving notice to Parsons of the intention to insist upon a rescission of the contract. The delay in filing the bill is satisfactorily explained, and it was perhaps done to favor Parsons himself, that he might be able to effect another sale of the stock. It was not practicable, in the first instance, to give Booth notice of the rescission of the contract. He lived in another state, and, under the circumstance in evidence, it is thought notice to the agent that transacted the business, and who continued to act for him, was quite sufficient.

Coming now to consider the alleged false representations made to complainant's agent to induce her to buy the stock, the most difficulty in the case is experienced. Most of the testimony bearing directly on that branch of the case comes from the agents of the parties that transacted the business for their respective principals. One of them (Smith) is the husband of complainant, and the other (Parsons) is the son-in-law of defendant, Booth. Much of their testimony is irreconcilably conflicting. It would answer no good purpose to enter upon any close analysis of the evidence. It is not necessary to do more than state the conclusions reached, after a careful study of the whole case as it appears in the record. There can hardly be a reasonable doubt that Parsons made certain statements to the agent of complainant as to the cost of mining the coal, the cost of transportation, and the price at which it could be sold when it reached the market, that were very material in reaching a conclusion as to the value of the stock it was proposed to sell. Other representations—for instance, as to amount that had been invested in the mine and plant, and as to whether the mines were then paying expenses—were, no doubt, made, but whether to the extent insisted upon by complainant, the evidence is unsatisfactory. If the statements and representations as alleged by complainant were in fact made, they were vital and material, and affected,

in a large measure, the value of the stock in the company.

There are some facts and circumstances that tend rather to support the testimony given by the agent, Smith, and if what he says concerning the representations made by Parsons is true, a rather strong case is made for relief. According to his testimony, what Parsons stated were not mere expressions of opinion as to value, but representations as to actual facts, within his personal knowledge, which if true vitally affected the value of the stock, and if untrue were hurtful to complainant, as they must have induced her to buy stock in the company that she would not otherwise have done. What representations Parsons may have made to complainant's agent to effect the sale of Booth's stock to her, and whether such representations were willfully false, and made with a view to deceive her as to its value, are questions depending, as they do, so much on conflicting testimony, this court can hardly say the decree of the court below is not warranted by the evidence, and for that reason should stand. If the representations as to matters affecting the value of the stock were in fact made as testified to by Smith, and as the courts below have found, not the slightest doubt is entertained that they are material, and were confidently relied upon by complainant's agent in buying defendant's (Booth's) stock for her. Conflicting as the evidence is, it is still thought there is sufficient to support the decree of the trial court; at least, no ground is perceived on which the decree can be reversed, and it must stand.

It is said, with some confidence, complainant is estopped to make any claim against defendant, Booth, for reimbursement. The facts relied upon as creating the bar to relief are that, after she had purchased the stock and paid for it, her husband, who had acted as her agent in buying the stock, became an officer in the corporation, and much of the money which she had paid in for the stock was paid out under the direction and with the consent of her husband, as an officer of the company. A sufficient answer to the position taken is that while her husband was paying out, or consenting to the paying out of, the money, he was not then acting as complainant's agent, but as an officer of the corporation. While acting in that capacity it would seem he was no more the agent of complainant than of defendant, Booth, or any stockholder in the company. In that capacity he was the agent of the corporation, and not the personal agent of complainant, and there can be no ground for an estoppel for that reason, as to complainant.

The judgment of the appellate court must be affirmed.

WEEKLY DIGEST OF RECENT CASES.

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1. ACTION.—Practice—Repleader and New Trial.—

Where issue is joined on several insufficient pleas and on the general issue, and there is a general verdict for the defendant on all the issues; while the bill of exceptions, purporting to set out all the evidence, shows that the plaintiff made out a *prima facie* case, and that the defendant's evidence only supported the insufficient pleas; the award of a repleader, if not technically correct, is the same in substance as granting a new trial, with leave to amend the pleadings, and accomplishes substantial justice. *Ex parte, Pearce*, S. C. Ala., Dec. Term, 1885-86.

2. ASSIGNMENT—Negotiable Instruments—Instru-

ment Depending on Extrinsic Proof is not—Covenant for Rent May be—For Rent "From Occupancy," or "For Rent, and Performance of Other Covenants," is not—Guaranty—Joint Guaranty—Withdrawal of One, Before Completion, Without Notice to Others, Releases Them—Appeal—Certificate of Judge That he did not Consider Certain Evidence Immaterial.—By the statute of this State on negotiable instruments, (2 Starr & C. St. c. 98, pars. 3, 4,) any instrument in writing for the payment of money or articles of personal property is assignable, as are bills of exchange. But an instrument depending on extrinsic proof to establish its character as a binding obligation is not so assignable. *Kingsbury v. Wall*, 68 Ill. 311, followed. A covenant for the payment of rent simply may be assignable; but a covenant for the payment of rent "from occupancy," or for payment of rent from such time, and the performance of other covenants as to the condition of leased property, is not absolutely assignable under the statute; and *a fortiori*, a guaranty of such a lease is not assignable absolutely under the statute, so as to enable the assignee to sue in his own name. Where negotiations were made for the joint guaranty of a lease by several persons, and afterwards, before completion of the contract, one of the proposed guarantors withdrew from the proposed agreement, and notified the lessor, who thereupon accepted the lease as guaranteed by the others, without notifying them of the withdrawal of the proposed joint guarantor, he cannot enforce the guaranty against them. In the consideration of a cause on appeal, the certificate of the trial judge, in a case tried by the court, that he did not consider certain evidence contained in the bill of exceptions, is immaterial. Where the court heard the testimony, it will be presumed that it was duly considered, and the judge will not be permitted,

any more than a jury to say he has disregarded his duty, and not considered the evidence. *Potter v. Gronbeck*, S. C. Ill. June 12, 1886; 7 N. East Rep. 586.

3. BONDS—Bond and Contract of Agent Construed Together—Liability of Bondsmen—Principal and Surety—Release—New Contract.—Where a bond is executed concurrently with a contract of agency they should be construed together, and the bondsmen can only be held liable for the acts or default of the agent in matters contemplated in the contract of agency. Where, after breach of a contract, the performance of which is guaranteed, the creditor and principal debtor, without the consent of the sureties, enter into a new contract, the creditor accepting notes for the damages, payable at a future time, and upon terms differing from the original contract, the new contract supersedes the old, and the sureties will be released. *Weed S. M. Co. v. Winchell*, S. C. Ind., June 15, 1886; 7 N. East. Rep. 881.

4. CARRIERS—Of Passengers—Injury by Train Starting Suddenly After Apparently Stopping—Evidence of Negligence.—In an action for injury caused by a sudden jerk of a railroad train, after the station had been announced, and the train was moving so slowly as to appear to the passengers to have stopped, the judge charged that, "if the train appeared to have stopped, then, for all practical purposes and for the consideration of this case, it had stopped." *Held*, no error. After the announcement of the station, the train was run so slow as to appear to a person of ordinary intelligence and observation to have stopped; and ordinary care for the safety of the passengers required the train to be so managed as not to endanger their lives; and a sudden jerk or a start, without any warning, when the passengers were upon their feet moving towards the platform of the cars, was sufficient evidence of carelessness to impose liability upon the defendant. *Bartholomew v. New York, etc. Co.*, N. Y. Ct. App. N. Y. June 1, 1886; 7 N. East. Rep. 623.

5. CONSTITUTIONAL LAW—Excessive, Cruel, or Unusual Punishments—Assault and Battery—With Deadly Weapon—Verdict—Indictment—Criminal Law—Illegality of Part of Sentence.—Punishment of an assault with a deadly weapon, by imprisonment in the State prison or county jail not exceeding two years, or by a fine not exceeding \$5,000, or both, as authorized by § 245 of the California Penal Code, is not an excessive, cruel, or unusual punishment, within the meaning of § 6, art. 1, of the California constitution, which prohibits such punishments. Under § 245 of the Penal Code of California, in a prosecution for an assault with a deadly weapon it is unnecessary to charge in the indictment, or for the jury to find, that the assault was made with intent to produce great bodily injury. It is sufficient to follow the language of the statute in charging the offense, and for the jury to find in the language of the charge. Where part of a sentence imposed as a punishment for crime is illegal, if the part that is valid can be separated from the rest it will be enforced. *Ex parte Mitchell*, S. C. Cal. May 29, 1886; 11 Pac. Rep., 486.

6. COVENANT—Covenant for Title—Quiet Enjoyment—Covenant for Quiet Enjoyment—Breach of—Eviction—Measure of Damages—Landlord and Tenant—Action for Rent—Damages—Set-Off and

Recoupment.—An express covenant, in a lease, for quiet enjoyment, implies a covenant that the lessor had title to the property leased, and power and right to demise it; and therefore, if, at the time of a lease with such covenants, there be, as to part of the property leased, another valid and outstanding lease, the lessor, had, at the time of the second lease, no power to so demise the part of the property already demised by the first lease, and his covenant would be immediately broken. There can be no breach of a covenant for quiet enjoyment without an eviction, actual or constructive. Recovery in an action of trespass against the covenantee is such a disturbance of his possession as will constitute a constructive eviction, and therefore a breach of the covenant. The measure of damages in an action against a lessor for breach of his covenant of quiet enjoyment, where the covenantee has been evicted, cannot be less than the amount of the judgment for damages and costs recovered against the covenantee. That amount may properly be classed as "expenses properly incurred by the covenantee in defending his possession." When damages have been sustained by a lessee by a breach of the lessor's covenant, if an action for rent is brought, the lessee may recoup his damages from the rent, or, at his election, he bring a separate action for the recovery of the damages, and the fact that the lessee has paid the rent for the greater part of the term will not deprive him of the right to counter-claim his damages for the entire term. *McAlester v. Landers*, S. C. Cal. June 29, 1886; 11 Pac. Rep. 505.

7. **CRIMINAL CASE—Continuance—Important Witness Absent—Homicide—Evidence—Previous Killings by Defendants.**—The wife of the victim of an alleged homicide, who can prove that deceased had made repeated threats against the lives of defendants; that at the time he had made the alleged dying statement he had not believed in the imminency of death: that he told her that, under certain conditions, he would have no charge in such statement against one of the defendants, mentioning him; and that the victim, while suffering from his wounds, kept drinking intoxicating liquors continually, and did not obey the physicians' instructions, is an important witness, and, in case of her unavoidable absence, through sickness, after her having been duly summoned, the trial should have been put off until she could attend. In a trial upon an indictment for murder, evidence is not admissible to prove that the defendants, or some of them, had some time previously killed the brother of their alleged victim. *Wyatt v. Commonwealth*, Ky. Ct. App. June 19, 1886; 1 S. W. Rep. 196.

8. **CRIMINAL LAW.—Affidavit and Information—Ambiguous Use of Pronoun—Selling Intoxicating Liquors—Failure of Proof.**—Where a personal pronoun is so used in an affidavit and information that it may refer to either of two persons, it does not necessarily refer to the person whose name immediately precedes it, but to the one to whom the entire affidavit shows it was intended to refer. *Müller v. State*, S. C. Ind. June 10, 1886. 7 N. East. Rep. 898.

9. ——— **Fraud—Evidence.**—If a party attempts to practice a fraud on the court, by procuring or assisting to procure testimony which he knows to be false, or resorting to any other artifice designed to deceive or mislead, this is a circumstance which the jury may properly consider to his disadvantage; but, to justify a charge invoking this princi-

ple, there must be something more than a mere contradiction between the defendant's own testimony and the testimony of the witnesses against him. An abstract charge, even though it assert a correct legal proposition, will work a reversal, when it may have misled the jury. *Beck v. State* S. C. Ala. Dec. Term 1885-1886.

10. ——— **Good Character of Accused—Effect of—Larceny—Proof of Good Character—Possession of Stolen Goods.**—Proof of previous good character is admissible on behalf of the defendant in a criminal prosecution, as tending to mitigate or cast a doubt upon his guilt, but its value must depend on the peculiar circumstances of each particular case. Proof of previous good character held not sufficient to rebut the presumption of guilt arising from the possession of stolen property under the circumstances of this case. *Wagner v. State*, S. C. Ind. June 18, 1886. 7 N. East. R. 896.

11. **DEED.—Description—"All the Land by Me Owned"—Mortgage—"All the Land Owned by Me."**—Where a conveyance is made with no particular description of the land, the words "all the land by me owned" are more naturally understood to mean "all the land now owned by me," which is equivalent to "all the land which I have not heretofore conveyed." Where A. executed a mortgage to B., embracing four different parcels or clusters of land, and in respect to the first three of these there was a description of land, or a reference to deeds, which were designated, sufficient to enable one to ascertain the boundaries of a larger quantity of land originally owned by A., from which he had conveyed certain portions or lots, but in respect to the fourth parcel, the land was described as "all the land owned by me in my New City, so called, in said L." which description included certain lots previously conveyed to C. and D., but the deeds of which had not been recorded at the time the mortgage was recorded, held, that the intention of the mortgagor was to include only such land as he owned at the time of the execution of the mortgage, and did not include the lots previously conveyed to C. and D. *Fitzgerald v. Libby*, S. Jud. Ct. Mass. July 2, 1886. 7 N. East. 917.

12. **DIVORCE.—Pleadings—Libel—Dismissal "Without Prejudice" Not a Bar—Record Cannot be Attacked by Matter in Pais—Amendment.**—Common-law pleadings are not required in divorce cases. A decree dismissing a libel for divorce, "without prejudice," even after the evidence has been heard, is not a bar to a new libel for the same cause. It cannot be shown by matter in pais under a rejoinder that the words "without prejudice" were added to the record after the term of court, in which the case was dismissed, was adjourned sine die. A bad surrejoinder is a sufficient answer to a bad rejoinder. The county court has power, on an oral motion and without notice to the defendant, to allow the libellant to amend his replication: and the exercise of such power is not revisable. *Burton v. Burton*, S. C. Vt. July 1, 1886. 6 East. Rep. 341.

13. **EJECTMENT.—Deed—Proof of Consideration—Evidence—Mortgage—Assumption by Vendee—Vesting of Title—Consideration—Ejectment—Defenses—Breach of Covenant—Abatement—Plea of Action Pending.**—In ejectment, plaintiff (who claims under a deed from defendant, payment of the consideration of which deed is denied by de-

fendant) may, if his deed is regularly executed, read it in evidence, without being first required to allege or prove the consideration or payment thereof. Where, by terms of deed, grantee, as part of consideration, is to pay mortgage, or assume grantor's indebtedness thereunder, this does not operate as a condition upon the breach of which the title would revert in the grantor, but vests the title absolutely in the grantee, and creates between him and the creditor of the grantor the relation of debtor and creditor. Where, in ejectment, the title to property is shown to be vested absolutely in the plaintiff, his right to recover its possession from the defendant, his grantor, cannot be defeated by showing that he had failed to pay the stipulated consideration for it. In such case the grantor's remedy is by action for damages for breach of covenant. Pendency of an action for unlawful detainer, after expiration of an alleged lease, cannot be properly pleaded in abatement to an action between the same parties for the recovery of the possession of the same land. *Martin v. Spivale*, S. C. Cal. May 26, 1886. 11 Pac. R. 484.

14. EQUITY.—*Cross-Bill—Dismissal—Drains and Sewers—Right of Drainage—Agreement—Drainage and Sewage Distinguished.*—When a cross-bill pertains to the subject-matter of the original bill, a discontinuance of the original bill does not operate to dismiss the cross-bill. An agreement giving a right of drainage into and through a drain gives no right to turn sewage into the drain. As used nowadays, the words "drainage" and "sewage" suggest to the mind a difference, and a sewer is a conduit for liquid filth. When the simple term "drainage" is used as appurtenant to lands, the most obvious suggestion is a drainage of water. *Wetmore v. Fiske*, S. C. R. I. July, 1886. 5 Atl. R. 375.

15. ——. *Specific Performance—Parol Contract—Part Performance—Execution—Sale—Title Acquired by Purchaser.*—Equity will not interfere with the operation of the statute of frauds, and compel specific performance of a verbal land contract, unless there has been such part performance that a failure to interfere would operate as a fraud on the vendee, and when his recovery at law would be inadequate to restore his *statu quo*. The purchaser at a valid execution sale succeeds to whatever title the execution debtor had at the time of levy. *Sullivan v. O'Neal*, S. C. Texas. June 21, 1886; 1 S. W. R. 1885.

16. ——. *Specific Performance—Statute of Frauds—Pleading—Practice.*—S. and R. were partners and, as such, owned a starch factory and had unsettled dealings. In view of a settlement, S. offered to sell out to R. for \$250, if accepted before a certain time limited, and R. was willing to accept, if he could raise the money. Within that time S. decided to the defendant, who, with knowledge of the facts, took a deed on a verbal condition that he should fulfil S.'s offer to R.; R. tendered fulfillment on his part; but the defendant refused. A bill having been brought to compel specific performance, the defendant did not plead the statute of frauds, but denied the contract, and objected to the admission of oral evidence to prove it. The master received the evidence, but the defendant failed to file exceptions to the report. *Held*, (1) that all objections to the admission of testimony were waived; (2) that the contract was not void, and having been proved, was enforceable

ble and the orators entitled to a decree; (3) that S. was a proper co-orator. *Schofield v. Stoddard*, August 2, 1886; S. C. Vt. 6 East. Rep. 33.

17. EVIDENCE—*Opinion—Value of Services—Witness—Hostility of—Master and Servant—Financial Condition of Servant—Long-Standing Claims.*—Opinions as to the value of services are admissible in evidence under proper conditions, such as a knowledge shown of the character, extent, and quality of the services, and a knowledge of the business in which they were rendered. Although it is proper for a party to show the hostility of an opposing witness, he will not be allowed to go into the details of such hostility. When one claims demands against a responsible party, long overdue, and not demanded, it is proper to show that the claimant was in such a stress peculiarly, that he could not well forego payment, as evidence tending to show that the claim is false; but it is not enough to show that the claimant was poor; it must appear that he was in need of money to use. *Stone v. Tupper*, S. C. Vt., Aug. 6, 1886; 5 Atl. Rep. 387.

18. EXECUTORS AND ADMINISTRATORS — *Special Administrator—Discharge—Notice—Estoppel—Allowance of Account.*—A special administrator, appointed pending the contested probate of a will, may settle, and be discharged, without giving pre-notice of the contemplated settlement. A probate decree allowing the account of a special administrator, and discharging him, is a binding and conclusive judgment, unless appealed from within the statutory time limited therefor. *Robards v. Lamb*, S. C. Mo., June 7, 1886. 1 S. W. R. 222.

19. FRAUD—*Charge to Jury—Reasonable Hypothesis.*—A charge which instructs the jury, in a civil case, "that to justify the imputation of fraud, the facts must be such that they are not explicable on any other reasonable hypothesis," exacts too great a measure of proof, and is erroneous. The cases of *Thompson v. Nichols*, 58 Ala. 197, and *Steele v. Kinkle*, 3 Ala. 352, where similar language was used, are declared to be overruled. *Adams v. Thornton*, S. C. Ala., Dec. Term, 1885-86.

20. ——. *Fraudulent Conveyance—Pleading.*—Whether a conveyance assailed as fraudulent was made with intent to hinder, delay and defraud the creditors of the grantor, or was made without such and in good faith, depends upon the circumstances surrounding the transaction, the credit to be given to the witnesses and the inferences proper to be drawn; and where a referee has found the fact in defendant's favor, and that conclusion is reasonable and possible upon some views of the evidence, it must prevail. A defendant is not called upon to meet and answer a cause of action not only absent from the pleadings, but entirely inconsistent with their allegations. *Third Nat. Bk. v. Corns*, N. Y. Ct. App. N. Y. June 26, 1886. 6 East. R. 36.

21. LIMITATIONS—*Statute of Limitations—Mutual Account—Assumpsit.*—In assumpsit to recover the balance of an open and running account, in which three of the charges, and none of the credits, were within six years from the date of the writ, it is error for the presiding judge to instruct the jury that, unless these three items were had as part of the general account, the plain-

tiff could not recover anything. *Dunbar v. Dunbar*, S. C. Me. June 23, 1886. 5 Atl. R. 384.

22. NEGLIGENCE—Contributory Negligence—Railroad.—A railroad company can not be held liable for carelessly permitting a child to get upon its passenger trains, where it does not appear that the child was not, so far as the servants of the company could observe, in company with adult persons who entered the train at a regular station; nor that the company's employees knew, or could have known, that he had no right to take passage. Intruders as a general rule cannot impose any duties upon the person on whose property they intrude. The act of the conductor in expelling from the train, miles from its home, a child so young as to be incapable of taking care of itself or comprehending its danger, without requesting any one to look after its safety, and the wrong of those in charge of a freight train in negligently failing to stop the train, when it was within their power to do so, before it ran upon the child, make a case establishing negligence on the part of the company and excluding contributory negligence on the part of the child; and the injury is not so remote that it cannot be attributed to the negligence of the company. The age of a child is an important element to be considered in determining whether the person who injured him was negligent, as well as in determining whether the child himself was guilty of contributory negligence. The rule as to the responsibility of the wrongdoer does not differ in cases of actionable negligence from that which governs in cases of wilful or malicious tort, though exemplary damages may be given in the latter case. In order to enable the court to determine whether any injury was done the appellant by excluding a question asked a person called as a juror, the entire examination of the person should appear in the record. It was error to submit to the jury, by an instruction, the pecuniary condition of the appellee, and his inability to employ servants, as one of the elements to be considered by them. *Indianapolis etc. Co. v. Pitzer*, S. C. Ind. June 11, 1886. 4 West. R. 250.

23. OFFICER—Municipal Corporation — Constitutional Law—Dedication to Public Uses.—When the plaintiff sues in an official character, and his term of office expires by limitation of law before the termination of the suit, his successor may be substituted as plaintiff on motion; but, where a plaintiff makes a voluntary assignment *pendente lite*, his assignee does not become a necessary party. The constitutionality of the legislation abolishing the city of Mobile, and creating the port of Mobile as a new municipal corporation, cannot be questioned by a party who does not show that he is in a position to be injured by it; as by being a creditor of the old corporation, whose remedies for the collection of his debt are destroyed. Although trustees, when officers of the Chancery Court, may not have the right to commence an action at law without first obtaining the sanction of the court; yet it may be doubted whether the defendant can interpose this objection in defense of the action, and it certainly cannot be raised for the first time in the appellate court. The State itself, in the exercise of the right of eminent domain, cannot take the private property for public uses, with a regular judgment of condemnation in a proper judicial proceeding first making payment of just compensation to the owner; nor can a municipal corporation dedicate private property to

public use by mere ordinance so declaring, without the owner's acquiescence or consent. A dedication of land for a street, in an incorporated city or town, must precede an acceptance by the corporate authorities; and a dedication will not be presumed from mere user for any period short of twenty years, when unaccompanied by any act on the part of the owner clearly showing his acquiescence; nor even after the expiration of twenty years, when it is shown that the owner, during that period, contested or constantly interrupted the user. *Smith v. Inge*, S. C. Ala. Dec. Term, 1885-6.

24. PARTITION—Parties—Judgment—Estoppel—Execution—Contribution—Several Defendants—Sale—Several Defendants—Rights of Purchaser.—In partition case the same rules apply as to parties and estoppel as in other cases. All persons interested in the land should be made defendants, and they and their privies, and none others, are estopped by the decree. Where execution issues against several defendants, and is good as to some, but voidable as to others, any defendant who satisfies the same, may enforce equitable contribution against his co-defendants. If a defendant in execution acquiesce in real estate levy and sale, he is thereby estopped from questioning the title of the purchaser at such sale, on the ground that such writ issued unlawfully against some other defendant therein named. *Stark v. Carroll*, S. C. Tex. June 1, 1886. 1 S. W. R. 188.

25. PARTNERSHIP—Surviving Partner—Patent—Equity.—The contract of partnership implies an agreement that all the assets of the firm, including letters patent as well as other kinds of property shall be used for the common benefit of all the partners, and supercedes the relation which the parties would otherwise sustain to each other as co-owners. On a bill in equity maintained against the surviving partner by the administratrix of a deceased partner to obtain sale of the letters patent belonging to the partnership, and for an account of the profits received by the surviving partner from the use thereof since dissolution of the partnership, to calculate the profits annually and to add interest thereon, in the absence of evidence that such profit was or could be annually set aside and invested elsewhere would not be just to the defendants. In such a suit, where the patent was for a product and not for a process or machine for making a product, the profits from the use of the patent would be fairly ascertained by finding the difference between the cost of the articles produced and the amount received from the sale thereof. In estimating the cost, all the elements which go to make up the expenditures in the manufacture and sale are to be taken into account, including, as compensation to defendant for his personal services, 6 per cent. on the sales, and 20 per cent. for "manufacturer's profits," risk of capital, etc. Plaintiff will be entitled to half the ascertained profits, and, in addition, to half of the amounts collected, and to the half of the property taken at an appraisal by defendant, and further to an order upon the master to pay over to her, one-half of the net proceeds of the sale of the letters patent. *Freeman v. Freeman*, S. J. Ct. Mass. June 29, 1886; 2 N. Eng. Rep. 520.

26. Removal of Causes to the Federal Court—Suit Between State and Corporation.—A suit between a State and one of its own corporations can be removed into the federal court if the construction of

the Constitution or laws of the United States arises in the case; and the right to recover does not depend upon the solidity of the claim set up. *Southern Pac. etc. Co. v. California*, S. C. U. S., April 26, 1886; 22 Rep. 226.

27. **SALE—Validity of Sale of Goods by Insolvent Debtor to Creditor, as Against Other Creditors.**—A sale of his entire stock of goods by a failing of insolvent debtor, at a fair and reasonable valuation, in absolute payment and satisfaction of a *bona fide* debt, no interest or benefit being reserved to himself, is not fraudulent as against his other creditors; and the payment of an additional sum of money by the purchasing creditor, the estimated difference between the amount of his debt and the value of the goods, does not render the transaction fraudulent, when it is shown that the money was paid under an express stipulation that it should be applied in payment of the debt due to another *bona fide* creditor, and that it was so applied. *Rankin v. Vandiver*, S. C. Ala., July, 1886.

28. **SUNDAY—Carrying on Business on—Indictment—Defense—Religious Belief.**—The carrying on of one's ordinary business on Sunday is an indictable offense at the common law, and also under the statutes of Tennessee, if conducted so openly as to attract public observation, and tend thereby to the corruption of public morals. It is no defense against such a prosecution that the accused conscientiously believes in observing, and actually observes, the "seventh" rather than the "first" day of the week as the Sabbath. *Parker v. State*, S. C. Tenn. June 5, 1886; 1 S. W. Rep. 202.

29. **TITLE TO PROPERTY—What Acts Constitute Passage or Retention of.**—The property in a manufactured article does not pass to the purchaser by his order to the manufacturer and its acceptance; there must be the selection and appropriation of one particular article, and facts showing an intention to pass the title to, or property in it—and if the manufacturer, on receipt of the order, selects a particular article, and forwards it by railroad as directed, taking the bill of lading in his own name attaching to it the draft for the price, and endorsing it to the freight agent at the place of destination, with instructions to "deliver to bearer on presentation;" these facts show an intention to retain the title until payment, and a loss by accidental fire falls on him. *Jones v. Brewer*, S. C. Ala. Dec. Term, 1885-86.

30. **TRIAL—Demurrer—Objection to Admission of Evidence—Admissions—Execution—Exemptions—Husband and Wife—Joint Note.**—An objection made by the defendant to the reception by the trial court of any evidence on behalf of the plaintiff, for the alleged reason that plaintiff's pleadings disclose no cause of action, is in the nature of a general demurrer. On the argument of such an objection the court will assume every material allegation of the objectionable pleading as having been admitted to be true in fact. Under the laws of Missouri, (§§ 8295, 8296, Revision 1879,) where two persons execute their joint and several note, and afterwards intermarry, the marital interest of both in their property may be subjected to the payment of the debt, and neither can claim exemption. *Conrad v. Howard*, S. C. Mo., June 7, 1886; 1 S. W. Rep., 212.

31. **TRUST—Will—Legacy—Trustees under a will** must be prudent and vigilant and exercise a sound

judgment where they are empowered in their discretion to sell real estate and reinvest the proceeds; and if safety and profit can be combined, neither should be unnecessarily sacrificed by changing investments already made. The will gave the life legatees \$5,000 each by specific bequest, and it is not reasonable to suppose that the testator did not mean to have the income of these bequests go for the comfortable support of the life legatees if the income of the residue should fall short; and if he meant to have the income of the bequests go for such support of the life legatees, there is no ground on which to decide that he did not mean to have the bequests themselves, or any other property belonging to the life legatees, go to the same purpose before recourse to the capital of the residue, given over in remainder. Where the residue was devised to an association with the name of "Home for the Aged," and there is a corporation formerly called "The Association for the Aid of the Aged," the name of which was subsequently changed to "The Townsend Aid for the Aged," and the existence of no other association is shown which so closely corresponds to the designation in the will, the capital of the residue should go to "The Townsend Aid for the Aged." Where a legatee, to whom was bequeathed a government bond or its equivalent in money, declined and formally renounced the bequest, the rule obtains, that lapsed and void specific or pecuniary legacies fall into the residue in the absence of any indication to the contrary. *Peckham v. Newton*, S. C. R. I. May 14, 1886; 2 N. Eng. Rep. 608.

32. **VENDOR AND VENDEE—Contract—Rescission—Assumpsit—Common Counts.**—When an executory contract for the sale of land is rescinded by mutual consent of the parties thereto, or by the act of the vendor, he must restore whatever has been received by him thereon prior to such rescission, and the law implies his promise to do so. In such a case the vendee may recover in *assumpsit* on the common count for money had and received. Such an action does not put in issue the title to the land, but only the fact of rescission after payment. *Benton v. Marshall*, S. C. Ark. July 3, 1886; 1 S. W. Rep. 201.

33. —. **Executory Contract—Rights and Liabilities of Purchaser—Accident to Land.**—The purchaser of real property under an executory contract, is the equitable owner, and must sustain any accidental loss accruing after his purchase, and before the conveyance of the legal title, he being entitled also to any benefit which may accrue to it during that time. *Martin v. Carver*, Ky. Ct. App. June 10, 1886; 1 S. W. Rep. 199.

34. **WAYS—Dedication—Reversion—Notice.**—Where the owner of land conveys the same to be used for street purposes only, coupled with a covenant for reversion unless the lands are so used, the use of such land for other than street purposes, without the grantee's consent, will not divest his title, nor will reversion accrue until he has had reasonable notice of such misuse, and an opportunity to correct the same. What would be a reasonable notice to enable the grantee to protect himself against a reversion depends upon the circumstances of each particular case. *Carpenter v. Graber*, S. C. Tex., June 22, 1886; 1 S. W. Rep. 178.

35. **WILLS—Testator's Capacity—Contesting Probate—Evidence.**—Where the probate of a will is contested on the ground of the testator's insanity,

there is but a single issue—mental capacity—and the true inquiry is as to the testator's mental condition at the precise time when he executed the instrument sought to be probated. The instrument sought to be probated is admissible in evidence as part of the *res gestæ*, and its precise character may be considered by the jury, in connection with the other testimony. *Vance v. Upson*, S. C. Tex., June 25, 1886; 1 S. W. Rep. 179.

QUERIES AND ANSWERS.*

[Correspondents are requested to draw up their answers in the form in which we print them, and not in the form of letters to the editor. They are also admonished to make their answers as brief as may be.—Ed.]

QUERIES.

30. Please answer the following questions, citing authorities. A. purchases from B. a certain business, and in connection therewith, certain chattels and trade fixtures used in running the business; all constituting one of the same transaction. A. afterwards brings suit against B. for damages for fraudulent representations as to amount of business done; average receipts and expenses of running the business; amount of receipts above expenses of running; amount of business done between different dates. Upon the trial, fraud is clearly shown; the representations; their falsity; defendants knowledge of their falsity; plaintiff's reliance upon them that the receipts of the business had always run below cost of running, etc. A. fails to prove the value of the chattels received with the business, and the court dismisses the action on the ground that plaintiff has failed to prove the measure of damages; plaintiff fails to prove the difference between the value of the business as represented, and as it actually came into his possession, would not plaintiff be entitled to a verdict for nominal damages, actionable fraud being clearly made out. If A. had attached the goods of B. would not the fact that, the liability of A. and his sureties on the bond was conditioned upon A's recovering judgment entitle A. to his verdict for nominal damages, and should not the case have gone to the jury with an instruction from the court to that effect? Please answer, and give authorities as soon as convenient.

DOUBT.

QUERIES ANSWERED.

Query No. 41. [22 Cent. L. J. 382.]—In Missouri the State has a lien on lands for delinquent taxes assessed against them, enforceable by civil action in courts of general jurisdiction, upon notice to the owners as in other suits to enforce liens. R. S., §§ 6836-7. The statute endows widows of one-third for life of all lands of which husbands were seized at any time during marriage. R. S., § 2186. Will decree and sale in tax suits against husbands in life defeat dower? If not, when against husbands only, will they, if wives be joined as defendants? G. H.

Answer.—The wife's contingent right to dower is a valuable interest, but not a vested estate, and the State can alter it or take it away entirely before it becomes vested by the husband's death. Bishop's Mar. Women, § 42. The law provides, that the action shall be against the owner (§ 6837); that the judgment shall be the first lien on the land (§ 6838); and that the sale shall convey a title in fee (§ 6839). It has been decided, that the law is constitutional; that the judgment is not personal against the owner but merely en-

forces the lien against the land; and that it need not be against the true owner, if it is against the owner of record, *State v. Heman*, 70 Mo. 441; *State v. Sergeant*, 76 Mo. 557; *State v. Hunt*, 79 Mo. 661. Under such sales the purchaser takes a valid and unimpeachable title. *Cooley's Con. Lim.* 445. The wife is not a proper party to the suit, but a sale thereunder will bar her inchoate right of dower. S. S. M.

Query No. 42. [22 Cent. L. J. 406.]—July 8, 1881, P. bought a threshing machine of S. for \$300, to be paid for, in three equal annual payments, and agreed verbally to give S. his promissory notes for the same within a reasonable time. July 9, of the same month S. delivered the threshing machine to P. at his request but P. never gave the notes as agreed. August 1, 1885, S. commenced suit against P. who pleads the statute of limitations. Under our law an account outlaws in 4 years and a note in 5 years. Is the plea of the statute of limitations good? What is meant by a reasonable time? Cite authorities. Under the circumstances as stated in this case, is the time from July 8, to August 1, more than a reasonable time? Daniel City, Neb. J. W. M.

Answer.—The limitation as to the right of action must be computed from the time when the creditor first had a right to commence suit. *Hall v. Vandegrift*, 3 Binn. (Pa.) 374; 7 Walt's Act. & Def. 242, § 12. No right of action accrued till a breach of the contract, which at the earliest was the failure to give the notes, for which a reasonable time was allowed. This reasonable time is to be determined by a jury. *Evans v. Hardeman*, 15 Tex. 480. It varies with the circumstances of each case, though it has been held that, that construction is to be preferred in doubtful cases which will preserve rights and prevent forfeitures. *O'Connor v. Towns*, 1 Tex. 107. We should think that this action was not barred. S. S. M.

RECENT PUBLICATIONS.

A TREATISE ON THE LAW OF NEGLIGENCE.—By Horace E. Smith, B. A. of Trinity Hall Cambridge, and of the Inner Temple and Midland Circuit, Barrister-at-Law, Recorder of Lincoln, Author of "The Law of Landlord and Tenant," Editor of "Addison on Contracts," "Roscoe's Criminal Evidence," etc. First American, from Second English Edition. Elaborated with Notes and References to American Cases. By W. H. Whitaker, of the Cincinnati Bar. St. Louis, Mo. The F. H. Thomas Law Book Co. 1886.

The publishers of this volume are entitled to the thanks of the profession for their enterprise in reproducing this excellent and standard English text book, so well "done into" American by the learned editor, Mr. Whitaker.

His elaborate notes form a large and most valuable portion of the book, and not only bring the learning of the subject down to date, but furnish, in full detail, the results of the very numerous American decisions, some three thousand cases, examined and cited by the indefatigable editor.

The classification of the subject adopted by Mr. Smith, and the division of negligence into several and separate degrees and grades, is not in favor on this side of the water, and may in some cases prove misleading to the unwary. But it must be said, in justice to the author and his work, that these grades and degrees do exist, and are constantly recognized by American courts. Although they may not use the terms,

"gross negligence," slight negligence," "ordinary care," "less than ordinary care," etc., they nevertheless express the same ideas in different words. Things are never altered by changing their names. Apart from this blemish, if it is a blemish, the arrangement of the work is very good. We prefer shorter sections, but the practice which Mr. Smith has adopted is very generally used and approved, especially in England. That, however, is a matter of detail, and affects the value of the work in no perceptible degree.

There are already many text-books on negligence, but the subject is so large and grows so fast, so many new points are made, and new distinctions are taken, that there is ample room for any reasonable number of new-comers, and the work before us can well bear comparison with the best of its competitors for the favor of the profession.

JETSAM AND FLOTSAM.

PRACTICAL.—There are comparatively few surly or obstinate people whose dispositions, tact, kindness and courtesy will not at least modify. And there are few persons so amiable that they cannot be badgered into a show of temper. The practice of brow beating witnesses by lawyers will drive the most amiable person to retaliation, and is both senseless and cruel. A woman who was giving her testimony in a case of assault was "nagged at" persistently by the attorney for the defendant, who inquired:

"How did he strike him, my good woman?"

"Why, you see, sir, he stood!"

"But how did he hit him? I want to know just how."

"I'm a tryin' to tell yer! Ye see, Ike was a stand-in!"

"I can't stop to hear all that! I want to just know how he hit him. You can tell a straight story, can't you?"

The woman hesitated, whereupon the counsel bel-lowed forth, "If you have come here to testify, will you have the goodness to tell me how the blow was struck?"

The woman's eyes blazed, but she answered, quietly, "Ef ye'll fetch me a broom-stick and stand nigh enough, I'll be most happy to illustrate the performance!"

WHO IS A GENTLEMAN?—It is not many years ago since singular notions prevailed in Great Britain as to gentility. Even now, the House of Lords is practically closed to a doctor or a tradesman, and "society" does not smile upon any person who makes money by buying and selling the staples of the country.

In 1845, a man named Kelley sued a Mr. Young for a racing cup and stakes which he refused to give up. Kelley had ridden his own horse in a race and won it, but the prizes had been awarded to Lieut. Young, of Her Majesty's regiment, whose horse came in second.

One of the conditions of the race was that the horses should be ridden by gentlemen, and it was claimed that as Young was a gentleman and Kelley was not, therefore Young deserved the prize.

On the trial, Kelley proved that he "lived idly and without manual labor," and bore "the port, charge and countenance of a gentleman," and should therefore be considered a gentleman, according to Blackstone's definition of the word.

The other side proved that the Marchioness of

Clanricarde did not visit at Mr. Kelley's, though living within a short distance of his house, and that, therefore, "society" did not recognize Mr. Kelley as a gentleman.

One witness having declared on oath that he did not consider Mr. Kelley a gentleman, was asked, on his cross-examination, to define the meaning of the word.

"A gentleman is a person whose father was a gentleman," answered the witness.

"So that if Mr. Kelley's father was a peasant," asked the counsel, "Mr. Kelley would be a peasant still, no matter what amount of wealth or education he possessed?"

"Precisely so, sir."

"Is a barber a gentleman?"

"Most certainly not."

"Did you ever hear of Sir Edward Sugden, the present Lord Chancellor of Ireland?"

"Oh, yes; frequently. His father, I am told, was a barber."

"Is the Lord Chancellor a gentleman?"

"Most certainly not," and the witness went down, amid loud laughter.

The jury's verdict pronounced Mr. Kelley a "gentleman," and gave him the silver cup, stakes and costs.

WHAT BETTS SAID.—A sharp-visaged, keen-eyed and very garrulous old lady named Betts was a witness in a case tried in a country village. When asked to state what she knew of the matter before the court, she replied, "Well, it was like this: My man and me we both see the fuss, and sez I to Betts, sez I, and sez Betts to me, sez he"—

"State what you saw only."

"Very well. 'Betts,' sez I, just like that, sez I: and sez Betts to me, sez he, 'Lizabeth,' says he, and"—

"No matter what either of you said."

"No, I s'pose not. Well, sez I to Betts, sez I, 'Betts,' and Betts he sez, sez he, 'Look yender.' And sez I to Betts, sez I, 'Where?' jest like that, sez I. And Betts he sez, sez he"—

"We care nothing for what your husband or you said," again interrupted the lawyer.

"Oh, I s'pose not. But if Betts hadn't of said to me, as he did say, sez he, 'Look yender,' and if I hadn't of said to Betts, 'Where?' as I did say to him, jest like that, and if Betts hadn't gone on then and said, sez he, 'Over there,' sez he, and I sez to Betts, sez I"—

"Stop! What has Betts to do with this case?"

"Nothing, thank goodness! Betts is too decent a man to be mixed up with rows of this sort; only he comes in, and sez he to me"—

"What did you see?"

"Didn't see the first livin' thing, till Betts sez, sez he"—

"Let the witness step down," said the lawyer.

THE United States Supreme Court has a Bible which has been in constant use since 1808. It was printed at Oxford in 1799. On the fly-leaf is written "U. S. Supreme Court, 1808." And every justice of the court, and every attorney who has been admitted to practice before the bar since that date, has been sworn upon that Bible.

A MAN who was at Auburn last week asked one of the prisoners how he came to be there. "Want," was the answer. "How was that?" "Well, I wanted another man's watch. He wanted to keep it himself, and the judge wants me to stay here five years."

ATTORNEY-GENERAL HAHN says that a woman is equally a "person." But just let him catch a woman and call her one!—

The Central Law Journal.*ST. LOUIS, SEPTEMBER 10, 1886.***CURRENT EVENTS.**

AMERICAN BAR ASSOCIATION.—The special committee of the American Bar Association on the "Delay and Uncertainty in Judicial Administration," in their recent report to the Association embody the following recommendations which, if adopted, would, in their judgment, go far to remove, or certainly alleviate the present prevailing evils in the administration of Justice.

1. Summary judgment should be allowed upon a negotiable instrument or other obligation to pay a definite sum of money at a definite time, unless an order of a judge be obtained, upon positive affidavit and reasonable notice to the opposite party, allowing a defendant, on terms, to interpose a defense.

2. In an ordinary lawsuit, the methods of procedure should be simple and direct, without a single unnecessary distinction or detail; and whatever can be done out of court, such as the statement of claim and defense, should be in writing and delivered between the parties or their attorneys without waiting for the sitting of a judge.

3. Trials before courts, whether with or without juries, should be shortened, by stricter discipline, closer adherence to the precise issue, less irrelevant and redundant testimony, fewer debates and no personal altercation.

4. Trials before referees should be limited in duration, by order made at the time of appointment.

5. The record of a trial in every court in which official stenographers are in attendance, should contain short-hand notes of all oral testimony, which notes, if the court shall so order, shall be written out in long-hand and filed with the clerk; but only such parts should be copied and sent to an appellate court as are relevant to the point to be discussed on the appeal, and if more be sent, the party sending it should be made to pay into court a sum fixed by the appellate court by way of penalty.

6. A motion for or against a provisional
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remedy should be decided within a fixed number of days, and if not so decided, the remedy should fail. In all other cases a decision within a fixed period should be required of every judge and every court, except a court of last resort.

7. The ordering of new trials should be restricted to cases where it is apparent that injustice has been done.

8. Whenever a court of first instance adjourns for a term, leaving unfinished business, the executive should be not only authorized, but required, to commission one or more persons, so many as may be necessary, to act as judges for the time being and finish the business. Such temporary judges should be commissioned in all courts except the court of last resort.

9. The time allowed for appealing should be much shortened. One month, or at most two, should seem to be enough in all cases.

10. Greater attention should be paid to the selection of judges, without which no other reform, however good in itself, can succeed.

11. The statistics of litigation in the courts of the United States and of each State should be collected and published yearly, that the people may know what business has been done and what is waiting to be done.

These recommendations will bear a good deal of tough cogitation and we will not venture to express anything more definite than our first impressions. The first recommendation is liable only to one objection, that the defendant should interpose a defence only "upon terms." What those terms may be is left indefinite. If it means that he shall give security for the debt, it is grossly unreasonable; if, that he shall give security for the costs, it is less so but still unjust. An affidavit that he has a real defence made after notice to his adversary, with a statement of its nature should be sufficient. The second is perhaps all right, but we are not at all clear that as much uncertainty would not be created as cured by the extreme simplicity contemplated by this recommendation. There does not occur to us any reasonable objection to the third, fourth, fifth, sixth or seventh of these recommendations. The eighth, however strikes us as an expedient unworthy of the general reform contemplated by the recommendations. If, as we suppose, the framers

Of this scheme of reform contemplate plenary legislative action on the subject, it would be much better to stipulate at once for more regular judges and smaller circuits. The courts should be sufficiently numerous and the terms long enough to dispose of *all* the business without calling into requisition special terms or special judges either. A jury-mast is no doubt a treasure in a tempest, but no man who ever followed the sea would like to trust one where he could help it. So the special or "temporary" judge is a make-shift at best, and, however learned and able as a lawyer, is seldom sufficiently judicial to be as satisfactory as the regular judge, whose mind has been fitted by years of service into its appropriate juridical grooves.

The remaining recommendations call for no particular remark except that the recommendation that "greater attention should be paid to the selection of judges," (in many of the States) will have to be addressed to the political "bosses," and their rule for selecting candidates, for judgeships as well as other offices, proceeds upon principles very different from those which, presumably, control the framers of these recommendations.

CRITICISING JUDGES.—We reprint by request an article entitled "Are judges above criticism," and find no difficulty in answering the question. If ever there was "a divinity that doth hedge a" judge, and secure him against public animadversion, that protection has surely been withdrawn. The privilege is now freely used by the press and the public, of criticising not only the formal and *ex-cathedra dicta* of the courts, but their minor, and incidental rulings and every exercise of that elastic and indefinite power denominated judicial discretion. And this is as it should be. There is no reason why judges should not be held to a responsibility to public opinion not less stringent than that of political officers. Indeed, as judges hold their offices, if not by a life tenure, at least for a long term of years, and as their removal from office can rarely be effected by impeachment or otherwise, and only in cases of flagrant offences, the reason is stronger for their responsibility to public sentiment, than

for that of the political officer who must needs face his constituents, within a year, or two, or three, and stand or fall upon the account he can then give of his stewardship.

Of course we will not be understood as saying that judges should be swerved or controlled in their judgments by popular sentiment. On the contrary quite the reverse. They should declare the law, and administer justice irrespective of all outside influences. While their duty in this respect is plain, the right of the public to criticise and discuss their performance of it, is equally clear. In many minor matters however, judicial notice may well be taken of lay criticism. If a judge is too slow, permits unnecessary delays, allows cases to go over from term to term, or if he falls into the opposite error, forces counsel to premature trial of their cases, and thereby produces a plentiful crop of appeals, writs of error and reversals, it is well that his fault should be fully ventilated in newspapers or anywhere else. And if a judge is tyrannical or peevish, or impatient, any one may well say so: In England, lately, a judge upon the bench took exceptions to the conduct of a solicitor, lost his patience, which seems however to have been no very great loss, and fell to scolding like a very Billingsgate fishwoman. The principal legal Journals of London commented in unmeasured terms on the scandalous scene, and in the name of the profession, tendered their sympathy to the aggrieved solicitor. Upon faults such as these, and they are not uncommon, the public may and should comment freely, but if a judge honestly and faithfully strives diligently to do his whole duty, he is entitled to the commendation of the community however distasteful to the feeling or adverse to the interests of the people his rulings may be. The recent proceedings in California against the judges of the Supreme Court of that State, upon which we commented some weeks ago, is a striking illustration of the extremes to which a people may be carried by an adverse ruling on a point of great public interest. Not only was the legislature convened in extra session for the avowed purpose of repealing out of office the Judges who made the obnoxious decision, but charges of imbecility, physical and mental, were preferred against two of the judges in aid of the nefarious project of removing from office, judges confess-

edly upright because they expounded the law the way they understood it. Judges ought to be subject to fair criticism of their official acts, but surely they should hold their offices free from such perils as those which environed the California judges.

NOTES OF RECENT DECISIONS.

DOMESTIC ANIMALS—INJURIES BY—LIABILITY OF OWNER.—In a recent case in New Hampshire,¹ the Supreme court settled a question of some interest as to the liability of an owner of a domestic animal for injuries inflicted by it. The animal in question, a horse, was known by its owner to be vicious, a "notorious kicker," but not otherwise depraved, so far as the information of his owner extended. On one occasion, however, being in harness at the depot, he "reared, squealed," and struck out with his forefoot, very seriously injuring the plaintiff, who brought suit and recovered a verdict in the court below.

The defence was, in effect, that although the defendant was aware of the evil reputation and bad habits of his horse as a kicker, he did not know, nor had he ever heard, that he was otherwise vicious, disposed to bite, or to strike with his forefoot. The court regarded this line of defense as quite thin, and disposed of it in the following language:

"It is not necessary that the vicious acts of a domestic animal, brought to the notice of the owner, should be precisely similar to that upon which the action against him is founded. If it were, there would be no actionable redress for the first injury, of a particular kind, committed by such an animal, because its owner would necessarily be exempt from all liability until it should commit another injury of exactly the same kind. It is enough to say that the law sanctions no such absurdity."

The question in such cases is, whether the notice of the vicious propensities of the animal is sufficient to put the owner on his guard, and require him, as a prudent man, to anticipate and make provisions against

such an occurrence. It is not necessary to fasten a liability upon him, that he should have had actual notice of a previous injury of this character, inflicted by the animal. In a New York case,² the owner of watch-dogs was held liable for their biting a passer-by, although, so far as the evidence showed, it was their first exploit of that description. In Vermont there is a like ruling,³ the animal being a bull-terrier, and biting the plaintiff in the public street of the village.

The courts do not seem to make the proper distinction between dogs and other domestic animals. It is the conceded mission of every dog to bite, in proper cases, and his nature is usually in accordance with his mission, but it is not a part of the duty of a horse to kick, in him it is a vice. Hence there is a presumption, in the absence of proof, either way, that a dog *will* bite, and that a horse will not kick, or bite, or strike with his forefoot. The evidence of vice in the horse, therefore, should be stronger to charge the owner with notice and fix his liability than that necessary to charge a like liability on the owner of the dog.

The notice to charge the owner of an animal with liability for its misdeeds, must be notice that he will do the particular thing laid to his charge. Notice that a dog will worry and kill sheep, although the penalty of that canine crime is, everywhere, death without benefit of clergy, will not be held notice that such a culprit will bite people.⁴ The rule is, that as soon as the owner of an animal has notice that he is likely to do mischief, he must, at his peril, take care and secure the brute.⁵

It seems, that a *biting* horse is especially obnoxious to the law. In an action in England,⁶ Lord Denman held that, whoever knowingly kept an animal accustomed to attack and bite mankind, is *prima facie* liable for damages, and in a Massachusetts case,⁷ the ruling was followed. In that case de-

¹ Rider v. White, 65 N. Y. 54.

² Gordeau v. Blood, 52 Vt. 251.

³ Cooley on Torts, 344; Keightlinger v. Egan, 65 Ill 235.

⁴ Cockerham v. Nixon, 11 Ired. 269; Earhart v. Youngblood, 27 Pa. St. 331; Dolph v. Ferris, 7 Watts & S. 367; Barnes v. Chapin, 4 Allen, 444.

⁵ May v. Burdett, 9 Ad. & El. N. R. 101.

⁶ Popplewell v. Pierce, 10 Cush. 509.

⁷ Reynolds v. Hussey, S. C. N. H., July 30, 1886, 5 Atl. Rep. 458.

fendant's horse bit a woman, and the court held that it was sufficient to allege that the defendant knew his horse was accustomed to bite people, and that no allegation of negligence was necessary. And in Pennsylvania, if a horse is permitted to go at large, in the streets of a city, he is liable for such injuries as it may do, whether he had, or had not, notice that it would bite or kick.⁸

In an English case,⁹ the rulings, as to the liability of the owner of a horse which kicked a child, is a little remarkable. The child was lawfully on the highway, the horse was there too, *unlawfully*. The court conceded that his presence, loose and unattended, upon the public highway, was in violation of the Highway Act, but as there was no evidence that he was vicious, or as to how he came to be on the highway, where he kicked the child, nor was there any evidence of specific negligence on the part of the defendant, the owner of the horse, the court held that the action could not be maintained. It seems to us that the fact that the horse was unlawfully on the highway, a trespasser there, was sufficient evidence of negligence to charge the defendant with the direct consequences of his unlawful presence on the highway. If one horse might kick one child, under such circumstances, why might not a drove of horses, being unlawfully on the highway, run over and trample down half a dozen children?

⁸ Goodman v. Gay, 15 Pa. St. 188.

⁹ Cox v. Burbridge, 13 C. B. (N. S.) 430.

LIABILITY OF THE PROPERTY OF MARRIED WOMEN ON MECHANIC'S LIEN.

It is always essential to the filing of a mechanic's lien, that the person, whose property is sought to be charged, has made a contract for its improvement. Unless such a contract has been made, there can be no lien. Therefore the liability of a married woman's property to a mechanic's lien depends upon her power to make a contract.

At Common Law.—At common law a married woman's executory contract is not void-

able, but void.¹ If, however, her husband is imprisoned for life, or years, or has fled the country, or is exiled,² or has never visited this country,³ or has deserted her and has a residence in another State,⁴ or has permanently abandoned his wife,⁵ or has renounced his marital rights,⁶ then the husband is civilly dead, and the wife can contract as a *femme sole*. Her disability also ceases, when she is permitted to act as a sole trader, as in England by custom of London, and in this country by special legislation.⁷ In some States this right is secured by statute without any legal proceedings,⁸ while in others there must be a judicial determination of an abandonment.⁹

When Included under the Mechanic's Lien Law.—Unless the mechanic's lien law expressly mentions married women, they are not subject to its provisions. Where the law authorizes a lien, when the owner of property has made a contract for its improvement, this is not held to be an act removing the disabilities under which certain owners of property, such as married women and minors, are incompetent to contract, but merely as referring to contracts valid under existing laws.¹⁰

Separate Estate of Married Women.—Though a married woman can make no executory contract, which will bind her general estate, yet, under the care of courts of equity she has acquired greater control of property, which has been secured to her as her separate

¹ Copeland v. Kehoe, 67 Ala. 594; Davis v. Smith, 75 Mo. 219; 2 Bla. Com. 293; Bank v. Partee, 99 U. S. 325.

² Bank v. Partee, *supra*; Walford v. Duchess de Pienne, 2 Esp. 534; Newsome v. Bowyer, 3 P. Wms. 37; Rhea v. Rhenner, 1 Pet. 105.

³ Gregory v. Paul, 15 Mass. 31.

⁴ Phelps v. Walther, 78 Mo. 320.

⁵ Prescott v. Fisher, 22 Ill. 390.

⁶ Ayer v. Warren, 47 Me. 217.

⁷ Bank v. Partee, *supra*; 3 Burr. 1776.

⁸ Black v. Tricker, 59 Pa. St. 13; Conley v. Bentley, 87 Pa. St. 40; Elsey v. McDaniel, 95 Pa. St. 472.

⁹ Hannon v. Madden, 10 Bush 664.

¹⁰ Kirby v. Tead, 10 Mete. 149; Rogers v. Phillips, 8 Ark. 366; O'Neill v. Percival, 20 Fla. 937; Fetter v. Wilson, 12 B. Mon. 90; Gray v. Pope, 35 Miss. 116; Sibley v. Casey, 6 Mo. 164; O'Malley v. Coughlin, 3 Tenn. Ch. 431; Warren v. Smith, 44 Tex. 245; *Contra*; Shilling v. Templeton, 66 Ind. 585; Stephenson v. Ballard, 82 Ind. 87. Where the consent of the owner to the erection of a building authorized a lien, it was held, that no contract was necessary, and that a married woman could consent. Husted v. Mathes, 77 N. Y. 388; Gilman v. Disbrow, 45 Conn. 563; Flannery v. Rohrmayer, 46 Conn. 553.

property. Different views are held in the various courts as to her power over such estate. The English rule, which is also held by many courts in this country, is, that she can charge such property, or dispose of it, in any way not forbidden by the conveyance through which she obtains her title.¹¹ Other courts hold, that she has no power to charge her separate estate, except what the conveyance expressly gives her.¹² Under the latter view of her power, it is very doubtful how far her separate estate can be affected by a suit under the mechanic's lien law. It is generally held, that such a claim is valid against her separate estate, and that by incurring such a debt, she meant to charge such estate—in fact her right to take and hold the property for her separate use authorizes her *ex necessitate rei* to contract for improvements¹³—yet as a sale of the property, to satisfy the judgment of a lien, would be an alienation of the property contrary to the provisions of the conveyance, it cannot be resorted to. The rents and profits can be applied from time to time to the satisfaction of the judgment, which is as far as the English courts would, at one time, go in proceedings against the separate estates of married women.¹⁴ Though it has been held that in such cases there is no liability whatever.¹⁵ Where the more liberal rule as to her power over her separate estate is followed, no reason is seen why the corpus itself should not be sold to satisfy the indebtedness.¹⁶

¹¹ Davis v. Smith, 75 Mo. 219; Mauzy v. Mauzy, 79 Va. 537; Radford v. Carwile, 13 W. Va. 572; Racouillet v. Sansevain, 32 Cal. 376; Imlay v. Huntington, 20 Conn. 146; Dale v. Robinson, 51 Vt. 20; Perkins v. Elliott, 23 N. J. Eq. 526; Wadhams v. Am. H. Soc., 12 N. Y. 415; Todd v. Lee, 15 Wis. 365.

¹² Conkling v. Doull, 67 Ill. 355; Cooke v. Husbands, 11 Md. 492; Hardy v. Holly, 84 N. C. 667; Maurer's Appeal, 86 Penn. St. 384; Doty v. Mitchell, 9 S. & M. 435.

¹³ Kuhns v. Turney, 87 Pa. St. 497; Germania Sav. Bk's Appeal, 95 Pa. St. 329; Einstein v. Jameson, 95 Pa. St. 403.

¹⁴ Hulme v. Tenant, 1 Bro. C. C. 16; s. c. 1 White & Tudor's Lead. Cas. in Eq. [Hare & Wallace's notes.] Part 2, page 679; Palmer v. Rankins, 30 Ark. 771; Henry v. Blackburn, 32 Ark. 445; Lewis v. Yale, 4 Fla. 418; French v. Waterman, 33 Grat. 617; Charleston L. & M. Co. v. Brockmyer, 18 W. Va. 586; Machir v. Burroughs, 14 Ohio St. 519.

¹⁵ Selph v. Howland, 23 Miss. 264; Gray v. Pope, 35 Miss. 116.

¹⁶ Whitesides v. Cannon, 23 Mo. 457; Yale v. Dederer, 31 Barb. 290; Dale v. Robinson, 51 Vt. 20.

Personal Judgment for Deficiency.—Generally these statutes provide for a special judgment against the property, and a general judgment, or a judgment for any deficiency after a sale of the property, against the contractor. In the absence of any statutory provision about married women, a personal judgment against a married woman would be improper and should not be requested.¹⁷ The fact that the mechanic's lien law authorized such a judgment was one of the strongest arguments for holding that the law did not apply to married women.¹⁸

Contracting Relative to Separate Property through Agent.—A married woman can make no contract relative to her general property even though she join with her husband, unless she is especially authorized to do so by statute,¹⁹ even though she has a separate estate,²⁰ and is living apart from her husband.²¹ As to her separate property, however, she is considered, in many respects, as a *femme sole*, and can act by agent as well as any other property owner.

Husband as Agent.—She can appoint her husband her agent.²² Since agency may be proved by knowledge of, and assent to, or subsequent ratification of, the acts of the alleged agent, the courts differ very much as to the evidence required to prove that the husband was the authorized agent of his wife, relative to her separate property. His agency cannot be inferred from the marital relation alone,²³ though in Tennessee, by the settled custom of the country, he is considered to represent her in all matters of business.²⁴ Other courts hold, that the evidence of his agency must be clear, cogent and strong,²⁵ and more satisfactory than would be required between persons occupying different relations.²⁶

¹⁷ Tucker v. Gest, 46 Mo. 339; Davis v. Smith, 76 Mo. 219; Bradley v. Johnson, 46 N. J. Law 271. See as implying the contrary: Swayne v. Lyon, 67 Pa. St. 436.

¹⁸ O'Neil v. Percival, 20 Fla. 937.

¹⁹ Sexton v. Alberti, 10 Lea (Tenn.) 452.

²⁰ Marshall v. Rutton, 8 Durnf. & E. 545.

²¹ Parker's Ex. v. Lambert's Adm'r, 31 Ala. 89.

²² Wells v. Smith, 54 Ga. 262; Greenleaf v. Beebe, 89 Ill. 520.

²³ Price v. Seydel, 46 Iowa 696.

²⁴ Kendell v. Frazer, 9 Helsk. (Tenn.) 727.

²⁵ Rowell v. Klein, 44 Ind. 290.

²⁶ Eysra v. Capelle, 61 Mo. 578; McLaren v. Hall, 26 Iowa 297.

When is she Estopped to Deny Husband's Agency?—It has often occurred, that after a mechanic had improved property, and had applied to his employer for his compensation, he then learned that the employer's wife owned the place as her separate property. The courts have tried to prevent the husband from improving his wife out of her estate, and on the other hand to prevent wives from using their separate estates as a means for defrauding mechanics and material men. The husband is not the wife's agent, when she dissents from the proceedings,²⁷ or does nothing showing her approval,²⁸ or even consents to the work, and approves of it, and gives some directions about it, if she has no reason to think the work is being done at her expense, but believes her husband is doing it at his own expense.²⁹

On the other hand, where the improvements were made with her knowledge and consent, and she took no step to prevent them, did not disclose her title, and was then enjoying the improvements, it was held, she was estopped to deny that her husband was her authorized agent.³⁰ Where an insolvent husband used his lumber and his labor on his wife's separate estate, it was held, that his creditors were entitled to the lumber, and the rents and profits of her land, should be applied to satisfy that claim, but that they could assert no lien on account of his labor.³¹

Statutory Provisions.—In many States the difficulties on this subject have been removed by statutes expressly subjecting the property of married women to mechanics' liens.

Control of Property by Married Women—Present Status of the Question.—The whole question of the power of married women over property, has been well characterized as a Babel of confusion. While in one place she is the powerless *femme couverte* of a century ago, in another she is as independent of her husband, in all matters relating to her property, as though he were a stranger and she a

*femme sole.*³² It may be said that her liability to mechanics' liens advances *pari passu* with her increasing control of her property.

St. Louis, Mo.

S. S. MERRILL.

³² Wells v. Caywood, 3 Colo. 487.

ARE JUDGES ABOVE CRITICISM?

It is a well understood fact, that in this country at least, the just criticism of public officers and servants, is not only the privilege, but the duty, of those who are served. It is claimed by some that the judges of courts, are, or should be, an exception to this rule. That the official acts of the members of Congress, Governors, Legislators, and other officers, are justly subject to review, and comment at the hands of the public press and the individual citizen there can be no question. That these criticisms should be made with sense, decency and propriety, is equally true. That the official acts of the judges of our courts should be exempt from reasonable criticism, we are not prepared to admit, either upon principle or policy. It is claimed that the nature of the judicial office is such, that the decisions of the judges, however erroneous should not only be received with respect, but acquiesced in with good grace, and without comment. It is also said, that the peculiar character of the administration of the law is, such, and its technical rules are of such a nature, as to preclude the possibility of intelligent criticism, upon the part of the people, or the public press. While it is true, that the final judgments of courts should be acquiesced in with due regard for the authorities promulgating them, yet we deny that there is anything, either in the judicial office, or in the nature of the subject matter with which it deals, that should exempt it from just and fair criticism at the hands of the people, whose rights and interests are daily submitted to the decisions of these tribunals. We deny that there is anything in the administration of justice with which judges have to do, which is above criticism. It is their duty to declare the equities between man and man, and to secure the parties who are suitors in the courts the just rights to which they are entitled; to see that

²⁷ Getty v. Framel, [Iowa, filed Oct. 28 1885].

²⁸ Copeland v. Kehoe, 67 Ala. 594; Myer v. Broadwell, 83 Mo. 571.

²⁹ Copp v. Stewart, 38 Ind. 479; Bickford v. Dane, 58 N. H. 185; Murphy v. Murphy, 15 Mo. Ap. 600.

³⁰ Schwarts v. Saunders, 46 Ill. 18; Schmidt v. Joseph, 65 Ala. 475.

³¹ Hoot v. Sorrell, 11 Ala. 386.

crime is punished, and that the innocent are acquitted. These are the objects for which courts were instituted and are maintained. There is nothing in these subjects, which is beyond the comprehension of the intelligent citizen. In fact he is as good a judge as a rule, of what is right, what is equitable, or what is criminal, as the court itself. The rules by which these questions of equity, criminality, and innocence are determined, in courts of justice, it is true, are somewhat technical, and within the peculiar knowledge of the legal profession. That this is so, by no means relieves the courts from accountability, or criticism; if the people and the press, are not able to fully understand the rules by which judicial decisions are reached, they are fully able to understand the justice and wisdom, or injustice and ignorance of the decisions themselves. The editor may not be able to construct a modern Hoe press, but both he and the reader, are competent to criticise the work of that press, whether it is good or bad, although they do not understand the rules, complications, and mechanical devices by which the work was performed.

Legislators reflect, or should reflect the immediate will of the people. Judges declare the sense of mankind on questions before them as understood during a series of years. If they fail to do this, the people and press detect it at once, and it is not only their privilege, but their duty to publicly criticise the judge, and the decision which has thus failed in its purpose. Once admit the doctrine that the decisions of judges, right or wrong, good or bad, are to be received by the public humbly and without comment, and there is at once an end, not only to justice, but to the law itself. The decisions of the judges would speedily degenerate into individual, dogmatic and tyrannical decrees. No human being can safely be trusted to dispose of the most important interests of mankind, under cover of an office which is admitted to be beyond criticism, comment or question.

If there is any office, if there is any work of an officer, which, should always be open to the full light of day, and subject at all times to a fair, just, and open criticism, it is the judicial office, and the judicial decision. In this alone is there safety, by this alone, can we hope for justice, and to even

maintain correct rules of law. It is a principle to which there is no exception, that the highest perfection in all the departments of life is only attainable when the results are subject to the criticism, and suggestions of those for whom the work is performed.

When we subject the work of judges to a just, and fair criticism, we not only strengthen and purify the administration of justice, but supply the stimulus upon which alone, improvement is possible.

TREATIES OF EXTRADITION.

Extradition is one of those peculiar subjects, upon which there exists, not only a vast amount of ignorance, but also a vast amount of that which is far more dangerous than ignorance—misconception. In conversation with men of more than average intelligence, and sometimes with men who have enjoyed the advantage of sufficient legal training to render them chary in dogmatic assertion, it will be discovered, in nine cases out of ten, that the views expressed are tinged by a fatal fallacy. In the same way as equity will assume that the thing which ought to be done has been done—this, by the way, is a maxim more honored in the text books than in the Chancery Division, or in the Lincoln's-inn—disputants upon the constantly recurring problems of extradition will constantly assume that there is but one law of extradition obeyed by all the nations which have submitted themselves to it in the view of benefits is to be received and in the interests of the cosmopolitan community. More common still the belief that Spain is a safe asylum for fugitive criminals from this country, and the delusion that there exists no treaty of extradition between the English and Spanish Governments. Both the above-mentioned views are encouraged by the tradition of novelists and of the writers of *feuilletons*, who will hardly be grateful for the suggestion that it is safer to omit all allusions to the idea that there exists a general law of extradition, and, when speaking of safe asylums, open to villains proper and to rascally heroes, to transfer the *mise-en-scene* to Portugal.

That there ought to be an international law of extradition, co-extensive with the civilized

globe, is beyond reasonable question. It would be difficult, indeed, to conceive the mental attitude of the man who would hesitate to accept the dictum of M. Georges Lachaud, a well-known advocate in the Court of Appeal at Paris, that "*tous les honnetes gens doivent, par toute la terre, s'unir pour s'entraider et se defendre contre les coquins.*" Differences will probably continue to exist upon the exact significance of the word "coquin" in relation to extradition, and these differences will be examined later, but there exists a general consensus of opinion with regard to criminals belonging to certain and distinct classes and the desirability of bringing such offenders within the power of justice. That consensus of opinion tends to become wider and stronger as the pains of exile become weaker, and as the means of travel from place to place become more easy. The world is gradually coming to the belief that "*tout pays qui devient un lieu d'asile pour les criminels se place, par cela seul, au rang des contrées sauvages.*" Commissions have sat and have arrived firmly at the conclusion stated above, which is in truth an inference of the most obvious and simple character; but those who had a clear view of the universal benefit which might be secured by the exercise of mutual consideration on the part of nations, have been prevented from carrying their views into effect by difficulties involved in changes of government, and in the diplomatic relations between various countries. Nowhere in the history of civilization have the perils of delay been more strongly exemplified. For many years the necessity of an international code of extradition has been accepted, but the code has not been introduced; in the meanwhile the critical question concerning the extradition of political offenders has been forced upon the public mind by a series of hideous crimes, quasi-political in design, but vulgarly brutal in execution, upon which it cannot but happen that a vast difference of opinion will arise.

Plain facts alone will suffice to demonstrate the absurdity of the relations between different governments on this subject of extradition. Let us take a perjurer for example, and imagine that, foreseeing an imminent prosecution he prefers exile to imprisonment, and sets to work with the view of calculating

his chances. He may take it for granted that the comity of nations is a phantom, a fiction of international law of which O'Donovan Rossa, and more particularly Sheridan, are the living contradictions. Portugal is safe, having no treaty of extradition with this country; but Portugal, it may be, offers too narrow a field to his ambition, or he may not like the climate. But the United States of America offer to him a wide territory, an infinite selection of climates, and absolute immunity from justice so long as he obeys the local laws. He has committed neither murder, piracy, arson, robbery, nor forgery; the government of the United States will not allow a finger to be laid upon his person. Austria, under the comprehensive treaty ratified in 1874, will have none of the perjurer; nor, under the treaty of 1876, will Belgium refuse to deliver him to the justice which he has outraged. He may go to Brazil if he pleases, or to Denmark, failing a special arrangement between Her Britannic Majesty and His Majesty the King of Denmark. France, by the treaty ratified in 1878, refuses to protect the perjurer, but he may find a safe asylum within the confines of the German Empire. It will be safer for him to avoid Hayti, but he may wander through the Italian picture galleries at will. He must avoid the Duchy of Luxemburg and the Low Countries, and restrain any fanciful desire to visit the Republic of Salvador. Spain is closed to him, Scandinavia is open; Switzerland alone remains, and refuses to protect the perjurer. A more rational tissue of absurdities it would be impossible to conceive. A perjurer is a criminal of varying degrees of baseness, inasmuch as his false swearing may have brought an innocent man to the gallows, or have saved a friend from punishment which may have been unmerited, but there is not a particle of doubt that a perjurer is, above all others, the most dangerous enemy of justice and the most undesirable of immigrants. His presence is as detrimental to the public morality of America as to that of Spain, and it is in the last degree difficult to realise the fact that, there is a difference of practice upon such a matter where there can be no difference of opinion. The case of perjury is extreme and can hardly be called typical; but it is scarcely less ridiculous than that of other crimes, and there can be no question that when men of the future

begin to criticise the growth of the law of nations nothing will appear to them more marvellous than the tardy and irregular growth of the law of extradition.

There remains only that dangerous subject, the political offender, and for the differences which have arisen over his body, not seldom a vile body, the history of Athens is to a great extent responsible. It is agreed on all hands that the greatness of the Athenian State was due largely to the hearty welcome which it extended to political refugees from other States. England has followed the same course, with results tending in two directions; in other words, she has sheltered a number of heroes and an equally large number of consummate rascals. To a certain extent the result has been good, but it has been manifestly inconvenient, and never was this inconvenience more conspicuous than in the case of the Phoenix Park murders. On that occasion, it will be remembered, the miserable tools paid the penalty which they had incurred deservedly, but the principals and authors of the crime escaped absolutely without punishment, because, forsooth, their offence partook of the nature of a political crime. As a matter of fact they were political offenders, because the motive of their offence was political, but they were vulgar murderers, notwithstanding, and their escape, added to their later conduct, has, by rousing the moral sense of the world, dealt something like a death-blow to the principle that, one country is bound not to deliver up to justice those who have conspired against the existing government of another. Kossuth and Mazzini were heroes and we protected them, but having so acted, we cannot complain that Sheridan, Rossa, and Tynan are safe in New York. In short, the principle which prompts us to extend the ægis of protection over purely political offenders, over men with whom we may from time to time sympathise warmly, is noble in theory; but practical men are beginning to doubt whether the balance of convenience does not lie with the arguments of those who contend that, every State is capable of dealing with its own subjects, and ought to receive every help in so doing.—[*London Times*.]

MASTER AND SERVANT—NEGLIGENCE—INDEPENDENT CONTRACTOR — NUISANCE.

HEXAMER v. WEBB.

New York Court of Appeals, February 9, 1886.

1. If the owner of a building employs a mechanic to make repairs upon the same with no specific arrangement as to terms and conditions, such employment is in the nature of an independent contract which imposes upon the employer the responsibility incurred by the negligence of himself or those who are aiding him.

2. It is absolutely essential in order to establish a liability against a party for the negligence of others that the relation of master and servant should exist.

3. Where other facts exist which show one to be an independent contractor, the mere fact that no price was fixed for the repairs and no specification made as to the work to be done does not create the relation of master and servant between the parties.

4. Nor does the fact that the work is charged for by the day have the effect of rendering the employer liable for the negligence of the employee.

5. A scaffolding suspended from the eaves of a house near a public street, for the purpose of repairing and improving the building, is not necessarily a nuisance.

6. A city ordinance which prohibits the hanging of any goods, wares, or merchandise or other thing in front of any building at a greater distance than one foot does not prohibit such a scaffolding.

Appeal from a judgment of the Court of Common Pleas for the city and county of New York at general term, affirming a judgment dismissing the complaint in an action for damages for personal injuries. Affirmed.

The case sufficiently appears in the opinion.

Mr. I. T. Williams for appellant.

The workmen, including Burford, were the servants of the defendant. *Earle v. Hall*, 2 Met. (Mass.) 353; *Shearm. & Redf. Neg.* § 70.

The work having been done for defendant and upon his premises, of which he was owner and in sole and exclusive possession, the burden of proof that it was done by an independent contractor, if such was the fact, was upon the defendant. *Shearm. & Redf. Neg.* § 71; *Chicago v. Joney*, 60 Ill. 383; *Arc. Fire Ins. Co. v. Austin*, 69 N. Y. 470.

In order to protect the owner from liability the middle man must exercise an independent employment. That is, he must have the right to perform and complete his contract as he may reasonably see fit, to the exclusion of the owner, so that any interference with the doing or completion of the work on the part of the owner would be a breach of the contract under which the work was done representing the will of his employer only as to the result of his work, and not as to the means by which it is accomplished. *Shearm. & Redf. Neg.* § 76; *Blake v. Ferris*, 5 N. Y. 48; *Pack Mayor*, 8 N. Y. 222; *King v. N. Y. Cent. & H. R.*

R. R. Co., 66 N. Y. 181; Town of Pierrepont v. Loveless, 72 N. Y. 211.

The ladder or staging suspended under the eaves of this high building directly over the sidewalk, where thousands were passing and repassing, was itself a nuisance. Dygert v. Schenck, 23 Wend. 446; Hart v. Mayor of Albany, 9 Wend. 607; Harlow v. Humiston, 6 Cow. 191; Lansing v. Smith, 8 Cow. 152.

It was sufficient for the plaintiff to prove that in passing along the sidewalk he was injured by this structure, which was appurtenant to the defendant's premises. People v. Mayor, 59 How. Pr. 277; Mayor v. Bailey, 2 Denio, 433-445; Vincent v. Cook, 4 Hun. 320; Whart. Neg. § 187; Robbins v. Chicago, 4 Wall. 657 (71 U. S. bk. 18, L. ed. 427); Storrs v. Utica, 17 N. Y. 104.

In Ellis v. Sheffield Gas Consumers Co., 2 Ellts & B. 767, Lord Campbell said: "It would be monstrous if a party causing another to do a thing were exempted from liability for that act, merely because there was a contract between him and the person immediately causing the act to be done." Congreve v. Morgan, 5 Duer, 495; Creed v. Hartmann, 29 N. Y. 591.

"If, according to previous knowledge and experience, the work which the proprietor engages the contractor to do is likely to lead to mischief, however carefully performed, it will be incumbent on him to foresee such mischief and take precautions against it." 2 Thomp. Neg. 901.

In Moak's Underhill on Torts, it is said, page 277: "When the act undertaken is one from its very character either a nuisance or one dangerous to others, the person undertaking it is not released from responsibility to any person thereby injured, although he has entered into a contract with some person to perform it, and the injury has occurred through the negligence of the latter. Sulzbacher v. Dickie, 51 How. Pr. 500; Glickauf v. Manrer, 75 Ill. 289; Leslie v. Pounds, 4 Taunt 649; Creed v. Hartmann, 29 N. Y. 591; Irvin v. Wood, 4 Rob. 138; 51 N. Y. 224; Wood v. Luscomb, 23 Wis. 287.

The injury complained of resulted from an act which it was absolutely necessary for Burford to do in order to accomplish the desired end, to-wit: the suspending of the ladder or something equivalent. It may therefore be said to have been directed to be done by the defendant. He is therefore liable for an act which he directed to be done even if done by an independent contractor. Water Co. v. Ware, 16 Wall. 566 (83 U. S. bk. 21, L. ed. 485); McCafferty v. S. D. & P. M. R. R. Co. 61 N. Y. 178, 183.

Mr. George S. Hamlin, for respondent.

There was no proof of negligence causing the injury complained of. There is no presumption of negligence in this case from the falling of the plank, because the facts in regard to its falling are all proved.

The facts being all proved, there is no room for presumption. It is for the court to say, upon the

facts, whether there is anything to show negligence.

If verified, the presumption is immediately superseded; if the reverse, it is wholly destroyed. Burrill, Cir. Ev. 36.

For what is the nature of presumptive evidence? It only has the force of evidence while it remains uncontested. Miller v. The Resolution, 2 Dall. 22 (2 U. S. bk. 1, L. ed. 271); Mullen v. St. John, 57 N. Y. 571.

In order to establish negligence, it must be shown that there was an absence of that care which a man of ordinary prudence would have used under the circumstances.

A person is not bound to anticipate remote and improbable contingencies, and it is for the plaintiff to show in such cases what precaution the defendant has failed to take, which he ought to have taken. Shearm. & Redf. Neg. §§ 4, 12; Thomp. Neg. 1234; Harvey v. Dunlop, Hill & Denio, 193; Hartfield v. Roper, 21 Wend. 615; Brown v. Kendall, 6 Cush. 292; Losee v. Buchanan, 51 N. Y. 476; Stuart v. Hawley, 22 Barb. 619; Calkins v. Barger, 44 Barb. 424.

Even if there was evidence of negligence, it was not the negligence, actual or constructive, of the defendant. King v. N. Y. C. & H. R. R. R. Co., 66 N. Y. 184.

When a man is employed in doing a job or piece of work with his own means and his own men, and employs others to help him or to execute the work for him and under his control, he is the superior who is responsible for their conduct, no matter for whom he is doing the work. To attempt to make the primary principal or employer responsible in such cases would be an attempt to push the doctrine of *respondet superior* beyond the reason on which it is founded. Blake v. Ferris, 5 N. Y. 58; Shearm. & Redf. Neg. § 76; King v. N. Y. C. & H. R. R. R. Co. 66 N. Y. 183; Devlin v. Smith, 89 N. Y. 470; Rapson v. Cubitt, 9 Mees. & W. 710; Erie Co. v. Caulkins, 85 Pa. St. 247.

The fact that such an employe is paid by the day, or that in all the work he consults or defers to the wishes of his employer makes no difference. Shearm. & Redf. Neg. § 77; Corbin v. Am. Mill, 27 Conn. 280; Sadler v. Henlock, 4 El. & Bl. 570; Harrison v. Collins, 86 Pa. St. 153.

Upon the principal *qui facit per alium facit per se*, the master is responsible for the acts of his servant, and that person is undoubtedly liable who stood in the relation of master to the wrong doer; he who had selected him as his servant from the knowledge of or belief in his care and skill, and who could remove him for misconduct, and whose orders he was bound to receive and obey. Quarman v. Burnett, 6 Mees. & W. 509; Kelly v. Mayor, 11 N. Y. 436; Pack v. Mayor, 8 N. Y. 226.

Another condition to be regarded in the application of the rule of *respondet superior* is, that there can be but one responsible superior for the

same subordinate at the same time, and in respect to the same transaction. *Blake v. Ferris*, 5 N. Y. 37; *McMullen v. Hoyt*, 2 Daly, 271; *Laugher v. Pointer*, 5 Barn. & Cress. 560; *Reedie v. London & Northwestern R. Co.* 4 Exch. 244; *Hobbitt v. Same*, 4 Exch. 257.

The principle is the same in cases where the management of real estate is involved as in other cases of negligence. *King v. N. Y. C. & H. R. R. Co.* 66 N. Y. 181; *McCafferty v. S. D. & P. M. R. R. Co.* 61 N. Y. 178; *Milligan v. Wedge*, 12 Ad. & Ell. 737; *Rapson v. Cubitt*, 9 Mees. & W. 713; *Reedie v. London & N. W. R. Co.* 4 Exch. 244; *Hobbitt v. Same*, 4 Exch. 257; *Mayor v. Bailey*, 2 Denio, 433; *Hay v. Cohoes Co.* 2 N. Y. 159.

This action cannot be maintained on the ground of a nuisance, created, maintained or authorized by the defendant. *Dickinson v. Mayor*, 92 N. Y. 588; *Nolan v. King*, 97 N. Y. 571.

It is not pretended that this encroachment prevented the use of the street for its ordinary purposes. It was not, therefore, an obstruction constituting a nuisance. Every encroachment upon a public highway is not a nuisance. *Howard v. Robbins*, 1 Lans. 65; *Peckham v. Henderson*, 27 Barb. 207; *Griffith v. McCullum*, 46 Barb. 561.

Nor are all obstructions in a street nuisances. *Commonwealth v. Passmore*, 1 Serg. & R. 219; *People v. Cunningham*, 1 Denio, 533; *Nolan v. King*, 97 N. Y. 571; *Davis v. Mayor*, 14 N. Y. 524; *Reedie v. London & N. W. R. Co.* 4 Exch. 244.

An act does not become a nuisance merely because it is within the prohibition of a city ordinance, when it is otherwise lawful.

The ordinance of the city is a police regulation but is not of itself sufficient to give a cause of action to a party injured by an act in violation of its terms. *Moore v. Gadsden*, 93 N. Y. 17; *Knupfle v. Knickerbocker Ice Co.* 84 N. Y. 491; *Massoth v. Del. & H. C. Co.* 64 N. Y. 532; *McGrath v. N. Y. C. & H. R. R. Co.* 63 N. Y. 531.

Where a party is bound by the act of his agent, and the declarations of the agent qualify or affect that act, these declarations may be proved against the principal, but they are not proved as admissions or declarations merely, but as part of the *res gestæ*. The act and the work together make the whole thing to be proved. *Thalhimer v. Brinckerhoff*, 4 Wend. 397; *Luby v. H. R. R. Co.* 17 N. Y. 133; *Baptist Ch. v. Brooklyn Fire Ins. Co.* 23 N. Y. 160; *Fairlie v. Hastings*, 10 Ves. 123; *Greenl. Ev.* §§ 113, 114.

MILLER, J., delivered the opinion of the court.

This action was brought by the plaintiff to recover damages alleged to have been sustained by means of the negligence of defendant's agents and servants in making repairs and improvements upon the hotel of the defendant situated in the city of New York.

The alleged negligence consisted in fixing and securing the staging used in performing the work; and the proof showed that the ladder used as a scaffold, was suspended from the roof over the

eaves of the hotel, and upon it were placed planks which were used as a platform upon which the workmen employed stood to do the work. This scaffold was moved from time to time around the bay windows from place to place. A heavy wind was blowing and while shifting the ladder a gust came and the working of the wind and the grating against the cornice and wall cut the rope which held the planks on the ladder, and the wind turned the planks up so that they fell, and one of them in falling to the sidewalk bounded and struck the plaintiff. One, Burford, who was engaged in the roofing and cornice business, was employed by the defendant to do the work which was intended to obviate a difficulty caused by pigeons making their nests under the eaves of the roof of the hotel. At the close of the testimony a motion was made to dismiss the complaint upon the ground, among others, that if there was proof of negligence it was not the negligence of the defendant or his agents or servants, but of an independent contractor; and the plaintiff's counsel then asked to go to the jury upon several grounds which were stated and refused, and the motion to dismiss the complaint was granted; and the defendant's counsel excepted to the decision of the court.

The employment of Burford was of a general character and the contract between him and the defendant was not restricted as to time or amount or the specific services which were to be rendered. The accident occurred while Burford and his men were engaged in the performance of this work; and this action was sought to be maintained, upon the ground that the workmen employed, including Burford, were the servants of the defendant, and that the defendant as owner of the real estate was responsible to third persons for the carelessness, negligence, or want of skill in those who were carrying on or conducting the business; and this whether the persons employed were working for wages or on contract. We think that the principle laid down has no application to the facts presented in the case at bar. As a general rule where a person is employed to perform a certain kind of work in the nature of repairs or improvements to a building, by the owner thereof, which requires the exercise of skill and judgment as a mechanic, the execution of which is left entirely to his discretion with no restriction as to its exercise and no limitation as to the authority conferred in respect to the same and no provision is especially made as to the time in which the work is to be done or as to the payment for the services rendered and the compensation is dependent upon the value thereof, such person does not occupy the relation of a servant under the control of the master, but he is an independent contractor and the owner is not liable for his acts or the acts of his workmen who are negligent and the cause of injury to another. If the owner of a building employs a mechanic to make repairs upon the same without any specific arrangement as to terms and conditions, such employment is in the nature of

an independent contract which imposes upon the employe the responsibility incurred by acts of negligence caused by himself or those who are aiding him in the performance of the work.

It is absolutely essential in order to establish a liability against a party for the negligence of others, that the relation of master and servant should exist. In *King v. N. Y. C. & H. R. R. R. Co.*, 66 N. Y. 184, the rule applicable to such a case is laid down by Andrews, J., as follows:

"It is not enough in order to establish the liability of one person for the negligence of another, to show that the person whose negligence caused the injury was, at the time, acting under an employment by the person who is sought to be charged. It must be shown, in addition, that the employment created the relation of master and servant between them. Unless the relation of master and servant exists, the law will not impute to one person the negligent act of another."

In the case considered, we think that by the contract between the defendant and Burford the relation of master and servant was not created. Burford was a mechanic, engaged in a particular kind of business which qualified him for the performance of the work which he was employed to do. By the arrangement with the defendant, he was an independent contractor, engaged to perform the work in question. He was employed to accomplish a particular object by obviating the difficulty which he sought to remove. The mode and manner in which it was to be done and the means to be employed in its accomplishment, were left entirely to his skill and judgment. Everything connected with the work was wholly under his direction and control. No right was reserved to the defendant to interfere with Burford or the conduct of the work. It was the result which was to be attained that was provided for by the contract without any particular method or means by which it was to be accomplished. So long as the contractor did the work, the defendant had no right to interfere with his way of doing it.

The fact that no price was fixed and no specification made, as to the work to be done, did not render the contract one of mere hire and service, or create the relation of master and servant between the parties. It cannot, we think, be said that Burford did not agree to do the work required of him and that no contract was made because, after the subject matter had been considered and talked about, and the difficulties attending the work, Burford said he would try and do something, and the defendant replied he didn't care how he did it. The conversation had amounted in law to an agreement that Burford would perform all the work that was required of him according to his own judgment as to what was necessary to be done to accomplish the object intended. He was an independent contractor, and the men employed by him were his servants and had nothing to do with the defendant. Burford was not the agent of the

defendant in any sense, in purchasing the material or in hiring the men to do the work.

That the work was charged for by the day could make no difference and did not alter the position which Burford occupied, in reference to the defendant, as an independent contractor. It did not give the defendant control over the job, nor authority to hire or discharge the men, nor render him in any way liable to them instead of Burford. It is very evident that the men employed were the servants of Burford and, therefore, the defendant cannot be made responsible for their negligence.

The test to determine whether one who renders service to another, does so as a contractor or not is to ascertain whether he renders the service in the course of an independent occupation, representing the will of his employer only as to the result of his work, and not as to the means by which it is accomplished. *Shearm. & Redf. Negligence*, § 76.

In *Blake v. Ferris*, 5 N. Y. 58, within the rule last stated, it is held that when a man is employed in doing a job or piece of work with his own men, and employs others to help him or to execute the work, for him and under his control, he is the superior who is responsible for their conduct, no matter for whom he is doing the work. To attempt to make the primary principal or employer responsible in such cases would be an attempt to push the doctrine of *respondet superior* beyond the reason on which it is founded. Upon these authorities there would seem to be no question as to the character of Burford's employment.

We are referred by the learned counsel for the appellant to numerous authorities as upholding the doctrine that Burford was not engaged in an independent employment, and that the defendant was, therefore, liable. After a careful examination, we are satisfied that none of them sustain this position. Those cited from this State are certainly in a contrary direction. The other cases cited, are clearly distinguishable from the case at bar and establish no rule adverse to that which is supported, as we have seen, by the authorities in this State.

The claim, that the ladder or scaffold suspended under the eaves of the hotel was a nuisance, is not well founded. The proof on the trial did not show that the building was on the line of the street. It did show that the hotel was separated from the sidewalk by an area of fifteen feet. Without further proof it is difficult to see how the ladder or staging could be regarded as such an obstruction to the street as to constitute a nuisance. The action is based upon the ground of negligence, and there is nothing in the complaint alleging that the scaffold was suspended over the sidewalk, or was in any respect an obstruction to the street. The gist of the action is negligence and unskillfulness in the construction of the scaffolding.

It may be added that the scaffold itself was

suspended for a legitimate purpose connected with the reparation and improvement of the building. It was not necessarily injurious and dangerous, nor an obstruction on the street, and if properly used might well be employed for the purpose intended. It could only become dangerous by being improperly constructed or by some wrongful and willful act. In view of all the facts it cannot, we think, be maintained that the scaffold necessarily was a nuisance.

The claim that the ladder was suspended in violation of the city ordinance is not well founded. The ordinance referred to prohibits the hanging of any goods, wares or merchandise or any other thing in front of any building at a greater distance than one foot. The ordinance was aimed against the obstruction of the streets. It is not apparent that the ladder overhung the street; but even if such was the case it was a mere temporary structure, erected for the purpose of repairing the building, and not an obstruction within the meaning and spirit of the ordinance, which it is manifest was directed against goods, etc., which were exposed for sale or for the purpose of attracting public attention thereto. The construction contended for would prevent the use of scaffolds in the reparation of buildings which never could have been intended.

It is also insisted that the work in question was intrinsically dangerous, and hence the party authorizing it would be liable whether he did the work himself or let it out on contract. The answer to this position is that the work itself was not necessarily injurious or dangerous. It was merely necessary repairs or improvements for the benefit of the building which, under ordinary circumstances, could be made without any serious results. The accident was caused by a gust of wind, which might well occur in the performance of any work of a similar character, and which could not well be guarded against or provided for. The act itself could only become dangerous and cause injury by some unforeseen circumstance, and the rule stated is not applicable.

There is, we think, no force in the position that the injury complained of was the result of an act absolutely necessary for the contractor to do, in order to accomplish the desired end; and the suspending of the ladder may, therefore, be said to have been done by the defendant, and he is liable, although it was done by an independent contractor.

It is apparent, from the evidence, that the injury resulted, not from anything contracted for by the defendant, but something collateral thereto. The defendant's contract related to the improvement of the building alone. What was necessary to be done for that purpose and the manner in which it should be done rested with the skill and judgment of the contractor. The defendant was absent at the time and had no knowledge of what was done or the manner in which it was done. The doing of the work and the mode in which it

was to be accomplished were matters collateral to the contract between the defendant and Burford. For these the defendant could not be held responsible.

After a careful consideration of the questions presented it follows that no error was committed by the judge in dismissing the complaint, nor in his refusal to allow the case to go to the jury; nor did he err upon the trial in striking out the testimony given, as to the declaration of one of the witnesses sworn upon the trial.

The judgment should be affirmed.

All concur.

NOTE.—There is no conflict of authority upon the subject of the case, and a note need only set forth the application of its principles by the latest decisions.

The difference between a servant and one in an independent employment may be made clearer by one or two definitions.

A servant is "a person hired by another to work for him as he may direct."¹

A contractor is one who, in the pursuit of an independent business, undertakes to do specific jobs of work for others without submitting himself to their control in respect to all the petty details of the work.²

Or by the definition or description used by Mercur, C. J.: "When one renders service in the course of an occupation, representing the will of the employer only as to the result of the work and not as to the means by which it is accomplished, it is an independent employment."³

Though the rule is clear enough, there is no universal and unfailing criterion as to when it applies. The tests usually relied upon are: In whom is the right (1) of selecting, (2) of discharging, (3) of directing workmen, and (4) is the employer concerned only in the ultimate result, but not in the details of the work?⁴

But the fact that the party sought to be charged pays the hands is not decisive. Where the defendant, [a contractor to paint a church,] gave out the work of frescoing to a sub-contractor, and lent to the sub-contractor, who was also a scaffold-builder, two men to put up a scaffolding, these hands still being paid by the defendant, it was ruled that the defendant was not liable for a injury caused by faulty construction of the scaffold. Although paid by the defendant the hands built this scaffold entirely under the direction of the sub-contractor.⁵

Nor is it decisive that the party sought to be charged furnishes material.⁶

The employer may, further, retain a certain measure of control of the work without rendering him liable for his contractor's fault, if only the cause of action did not arise out of the employer's control. Examples are often to be found in cases of railroad construction. A control of this kind, provided that if the contractor did not employ men and tools according to the requirements of the company's engineer, the contract might be annulled. It was held, that the company could only by this provision enforce the doing of

¹ Parsons on Contracts, 101.

² Shearman & Redfield on Negligence, § 76.

³ Harrison v. Collins, 16 Penna. St., 153.

⁴ Railroad v. Norwood, 63 Miss. 555; as to right of selection, Boswell v. Laird, 8 Cal. 469.

⁵ Dittberner v. Rogers, 66 How. Pr. (N. Y.) 85; Devlin v. Smith, 89 N. Y. 470.

⁶ Charge of Welker, J. Fuller v. Bank, 15 Fed. Rep. 875.

the work, not control its manner of performance so to be answerable for injury done by the contractor's operations to adjoining land. In a second case, the work was to be done "according to specifications and agreeably to the directions of the (company's) engineer," "earth excavations to be hauled into embankments as far as the engineer directs."

Suit was brought by one over whose land the contractor had dumped waste dirt. The decision was that the contract did not give the company control over the particular act complained of, and in relation to other clauses of the contract, too long to be put down here, the rule was laid down that a right to direct the amount of work is not identical with a right to prescribe the mode of operation.⁷

On the other hand, where a contract was to take down a house "carefully, and under direction and subject to approval" of the owners, who, it appeared were present and gave directions almost daily, the owners were held liable as masters.⁸

The question of independent employment, then, is ruled largely by the circumstances of the case, and the actual intention of the parties.

There is one set of cases to which the strict rule of master and servant applies, as it is said, with uniformity of decision, where personal property is hired out, and with it a servant of the owner to manage it; the contract is said to be, not with the servant, but with the owner of the property, the owner who has lent or hired out his servant still has control over the doer, and, constructively, over the doing of the work.

Cases of this kind may occur where a railroad company supplies its contractor for building the road with a construction train and hands to run it, the train and the men to be entirely under control of the contractor except, perhaps, as to a maximum rate of speed, and the keeping out of the way of regular trains.

Here the company is liable for injury done by the train.⁹

Another example is that of a workman in the employ of a stevedore, who was injured by the carelessness of the engineer lent by defendants to the stevedore along with their engine.¹⁰

On the question of nuisance, also the principal case accords with the authorities. A municipality may, in cases justified by necessity or custom, as for instance, laying of pipes, building, and the like, permit the highway to be occupied by private individuals to an extent which but for this permission would amount to a nuisance; and in such cases the owner is not answerable for his contractor's neglect. So, also, although the work requires some labor or some engine in its nature hazardous; provided, however, that this dangerous work may, by using proper care be done with safety, and has then the sanction of custom or regulation; and that the contract contemplates only such careful use. The presumption is, the owner intended the work to be done properly and carefully.¹¹

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⁷ *Burmeister v. R. R.* 47 N. Y. S. C. 264; *Hughes v. O. & S. Ry.* 39 Ohio St. 461.

⁸ *Linnehan v. Rollins*, 137 Mass. 123.

⁹ *Railroad v. Norwood*, 63 Miss. 565; *Burton v. Railroad*, 61 Texas, 526.

¹⁰ *Coyte v. Pierrepont*, 37 Hun. (N. Y.) 379; reversing same case, 33 Hun. (N. Y.) 311.

¹¹ *Smith v. Simmons*, 103 Penna. St. 32; *Martin v. Tribune Assn.*, 30 Hun. 391; *Lawrence v. Shipman*, 39 Conn. 587; (*Seymour, J. sitting as arbitrator.*) *Aston v. Nolan*, 63 Cal. 269; *Bailey v. Railroad*, 57 Vt. 252.

CRIMINAL LAW—JURISDICTION OF CRIME.

STATE v. SHAEFFER.

Supreme Court of Missouri, June 21, 1886.

1. *Jurisdiction—Where Crime Consummated*—Where a defendant obtains money by false pretence by means of a sight draft drawn by him in Kansas City, Mo., on a New York bank, and sent by a Kansas City bank, in which it was deposited, for collection to the New York bank, and by it collected and the amount forwarded to the Kansas City bank where the defendant receives the money, the crime is consummated in New York.

2. *Instruction—Reasonable Doubt—Preponderance of Evidence*—An instruction explaining what is meant by a reasonable doubt, which declares that "if all facts and circumstances proven can be as reasonably reconciled with the theory that the defendant is innocent as with the theory that he is guilty," is improperly given, as this directs a verdict upon a mere preponderance of evidence.

Appeal from Jackson County criminal Court.

Messrs. J. V. C. Karnes and John W. Beebe, attorneys for Schaeffer; and *B. G. Boone*, Attorney General, and *F. W. Walker*, for the State.

The facts are stated in the opinion of the court.

HENRY, C. J., delivered the opinion of the court:

The defendant was indicted by the grand jury in the criminal court of Jackson county, at the May term, 1885. The following are the charges:

The first count charges that the defendant obtained a large amount of money from John I. Blair under false pretenses, the false pretenses consisting of representations, to Blair, that he, the defendant, had arranged with the heirs of one Anthony to purchase of them for Blair, their interest in a certain tract of land lying in Jackson county, near Kansas City, and that Blair was to have the land at the lowest price at which it could be obtained, when in fact he purchased it at one price and represented to Blair that he paid a larger sum, and on the foregoing representations obtained from Blair more than the defendant paid to Anthony's heirs.

The second count charged that the defendant was the agent of said Blair, and, as such, received into his possession a large sum of money, which he feloniously converted to his own use. It is not necessary to give any other attention to these two counts, the trial court having, by instruction, withdrawn from the jury all consideration of those counts, confining their inquiry to the charges in the third count, which is as follows:

"And the grand jurors aforesaid, upon their oaths as aforesaid, do further say and present that Samuel C. Shaeffer, at the county of Jackson, in the State of Missouri, on the — day of February, 1884, did unlawfully and feloniously obtain, from one John I. Blair, the sum of \$7,650, lawful money of the value of \$7,650 of goods, chattels, moneys and property of the said John I. Blair, by means and by use of a cheat and a fraud, and a

false and fraudulent representation and false pretense, and false instrument and statement with the intent him, the said John I. Blair, then and there feloniously to cheat and defraud, contrary to the form of the statutes, and against the peace and dignity of the State."

On this count the jury found him guilty, and assessed his punishment at imprisonment in the penitentiary for a term of eight years, and defendant has prosecuted his appeal.

The evidence of the State tended to prove that the defendant made representations to Blair to the effect that he had agreed to pay to the Anthony heirs for their interest in a tract of land near Kansas City, \$8,450, having, in fact, purchased the same at the price of \$800.

The agreement between Blair and defendant in relation to the interest of the Anthony heirs in the tract was, that Blair would place the money to make that purchase to defendant's credit in such bank at Kansas City as defendant might suggest by telegraph, or that he would pay defendant's draft at sight, National Park Bank, New York.

It appears that defendant telegraphed Blair February 12, 1884, that he had drawn on him for \$19,668.83, which sum included the \$8,450 for the Anthony heirs. The draft read as follows:

"19,668.33. KANSAS CITY, MO., Feb. 12, 1884.

"At sight, pay to the order of myself, nineteen thousand, six hundred and sixty-eight dollars and thirty-three hundredth dollars, with exchange, value received, and charge to account of

JOHN I. BLAIR.

"To Park National Bank, New York City.

"S. C. SHAEFFER."

This was indorsed by Shaeffer to the Traders Bank of Kansas City, which sent it for collection to the United States National bank, New York, which collected it and placed it to the credit of the Traders' bank of Kansas City, which, after informed of the payment of the draft in New York, paid the amount to Shaeffer, at Kansas City.

On this state of facts, the question arises, where was the offense with which the defendant is charged committed?

It is no crime to make use of false pretenses, unless, by means of such pretenses, the party making them obtains money, or property from another to which he had no right. And the crime is consummated where the money or property is received. *Commonwealth v. Troyl*, Met. (Ky.) 1; *State v. House*, 58 Ind. 466; *Stewart v. Jessup*, 51 Ind. 415. In the latter case, the substantial facts were that one Kerr, relying upon false representations of Stewart, sold the latter, twelve horses, which Kerr had shipped to New York, where Stewart got possession of them; Stewart was arrested in Indiana on the charge of obtaining the horses by false pretenses, and, on a preliminary examination before a justice of the peace, was adjudged guilty and required to give security in the sum of \$3,000 for his appearance in the circuit

court to answer the charge. Stewart, not having given the security, was committed to jail, and upon a writ of *habeas corpus* was brought before the circuit court of Hamilton county, and on appeal to the Supreme Court of the State from a judgment of the circuit court against him, the Supreme Court reversed the judgment, holding that the crime was not committed in Indiana, where the false representations were made, but in the State of New York, where the property was received. Numerous decisions of that court to the same effect are cited in the opinion. *Norris v. State of Ohio* (25 Ohio State, 217), is also a case analogous to the case at bar. The defendant was a resident of Clark county and, by fraudulent representations as to his solvency, in a letter, he induced the Akron Sewer Pipe Company, located in Summit county, to ship him by rail to Clark county a lot of sewer pipe. He was indicted in Clark county, but the Supreme Court held that the crime was committed in Summit, and remarked that "the weight of authority is clear that the railroad company was the agent of defendant for receiving the goods for him at Akron and carrying them to Springfield, and the delivery to it by the sewer pipe company was, in legal contemplation, a delivery of the goods to the defendant at Akron."

So in the *People v. Sully*, 5 Parke's Com. Ref. 145, defendant was indicted in Buffalo, Erie county, he having obtained by false pretense in Buffalo, a check drawn on a bank in Batana, Genesee county. The indictment was for obtaining the signature to the check, and it was held that he was properly indicted in that county, but the court said: "It is not material where the pretenses were made. The obtaining the signature or property by means of them, with intent to cheat and defraud, completes the crime and determines the place of trial." And further remarked the court: "The prisoner could not have been convicted on the first count for obtaining the money through, or by means of the check, for the money was obtained at Batana, without the territorial jurisdiction of the court."

So in *State v. Wychoff*, 31 N. J. 68, the general proposition is asserted that a crime is to be tried in the place in which the criminal act has been committed. It is not sufficient that part of such acts shall have been done in such place, but it is the completed act alone which gives jurisdiction."

In the *State v. Dennis*, 80 Mo. 594, the defendant was indicted for obtaining, by false pretenses, a lot of mules, and the question was whether he had received the mules in Randolph county or in the city of St. Louis. In delivering the opinion of the court Judge Norton said: "It is, however, earnestly insisted by counsel that, if any offense was committed, the evidence shows that it was committed in the city of St. Louis and not in Randolph county, and that the demurrer to the evidence should have been sustained on the ground that the Moberly court of common pleas, of Randolph county, had no jurisdiction. If the pre-

mises assumed be well founded, the legal conclusion drawn from them is undoubtedly correct." The judgment was affirmed, the majority of the court holding that the mules were received by defendant in Randolph county. I dissented, believing that the evidence established the reception of the mules in the city of St. Louis.

We entertained no doubt that the place where the money or goods are obtained, without regard to where the representations were made, is the place where the party should be prosecuted.

Where did Blair pay the money? Where did he lose his property in the money and his dominion over it? If he deposited it in the Park National bank to the credit of Shaeffer, that was a payment in New York to Shaeffer. If he had money on deposit to his own credit, and directed the bank to pay it on Shaeffer's check or draft, then, when so paid in New York, whether on Shaeffer's check or draft, he then parted with his money. The United States National bank was the agent of the Traders bank at Kansas City, which was unquestionably the agent of Shaeffer. Neither of those banks were, in any sense, the agent of Blair. But whether the United States National bank is to be considered as the agent of Shaeffer, or the agent of the Traders bank, is wholly immaterial, since it is clear that it was not the agent of Blair, or of the National Park bank, after the National Park bank paid the money in the United States National bank. Blair's obligation to pay the money was discharged, and if that bank had become insolvent, or failed to account for the proceeds of the check to the Traders bank, Shaeffer could have had no recourse upon Blair. The Traders bank received the draft for collection for Shaeffer's accommodation, and paid him the amount of the draft only on the assurance from its correspondent in New York that the Park bank had paid the draft; that the Traders bank then paid the amount of the draft to Shaeffer was not a payment by Blair. But the substance of the transaction was the collection of the money in New York from Blair, and a disposition in Kansas City by Shaeffer of that money so collected in New York. If instead of receiving the money, Shaeffer had received property in Kansas City from the Traders bank, instead of the money, the principle applicable would have been the same. The Traders bank paid Shaeffer its money, not Blair's. The United States National bank held the money sent, not as Blair's money but really as Shaeffer's, though nominally as the money of the Traders bank, and the transfer of the draft to the Traders bank by Shaeffer, operated to transfer the proceeds of the draft to the Traders bank when paid by the Park National bank to the United States National bank. A merchant in New York who draws a draft on a customer in St. Louis, which is paid by the latter to the bank in St. Louis, to which the draft is sent for collection, does not thereby pay the money in New York but in St. Louis, and that the New York merchant indorses

it for collection to a bank in New York and secures the money in New York from that bank after the latter has notice of the payment of the draft in St. Louis to its correspondent there, does not make the payment by his customer to the bank in St. Louis a payment of the money to the New York merchant in New York. There are other important questions in this case, which it is not thought necessary to determine, in as much as holding that the crime was not committed in Jackson county, and that the criminal court of that county had no jurisdiction of the cause, the judgment must be reversed and the accused discharged. There is, however, one instruction given by the court for the State, upon which it is thought best to express our views. It is as follows: Sixth—"In law a party accused of crime is presumed to be innocent, until the contrary is proven beyond a reasonable doubt. If, therefore, upon a consideration of all the evidence in this case you entertain a reasonable doubt as to the guilt of the defendant, you will give him the benefit of such a doubt and find him not guilty. In applying the rule as to reasonable doubt, you will be required to acquit, if all the facts and circumstances proven, can be reasonably reconciled with any other theory than that the defendant is guilty; or, to express the same idea in another form, if all the facts and circumstances proven before you, can be as reasonably reconciled with the theory that the defendant is innocent, as with the theory that he is guilty, you must adopt the theory most favorable to the defendant, and return a verdict finding him not guilty. You will observe, however, that the doubt to authorize an acquittal on that ground alone, must, as stated, be reasonable, and it must be also as one fairly deducible from the evidence considered as a whole. The mere possibility that the defendant may be innocent will not authorize an acquittal." "It declares very properly" that "one accused of crime is pronounced to be innocent until the contrary is proven beyond a reasonable doubt. If, therefore, upon a consideration of all the evidence in this case, you entertain a reasonable doubt of the guilt of the defendant you will give him the benefit of such doubt, and find him not guilty," but then proceed to explain what is meant by a reasonable doubt as follows:

"In applying the rule as to reasonable doubt, you will be required to acquit, if all the facts and circumstances proven, can be as reasonably reconciled with the theory that the defendant is innocent, as with the theory that he is guilty, you must accept the theory most favorable to the defendant, and render a verdict finding him not guilty." This attempted explanation of the term "reasonable doubt" would eliminate it from the criminal code, and leave juries to find verdicts in criminal cases upon the mere preponderance of the evidence.

By that explanation, the benefit of a reasonable doubt in criminal cases is no more than the advantage a defendant has in a civil case. The doc-

trine expressed in the explanation is exactly that which is applicable in a civil action, in which if the facts proven, can be as reasonably reconciled with the theory that the defendant owns what he is sued for, as that he does not, the defendant is entitled to a verdict. The plaintiff must make out his case, and if the evidence is evenly balanced he cannot recover. But for the explanation of what was meant by reasonable doubt, the instruction correctly declares the law, and why that should have been injected into the instruction is inconceivable.

The instruction in regard to reasonable doubt approved in *State v. Newshin*, 20 Mo. 111, has been repeatedly sanctioned by this court. Juries understand it. The bench and bar are familiar with it, and it is not safe to depart from it, in efforts to make clear what is now well understood.

This case illustrates the danger of such experiments. Here the said matter introduced into the instruction vitiated it, and if for nothing else, the judgment would have been reversed for that error. As long as this court adheres to what it has ruled, especially in criminal cases, it is the better and safer practice for trial courts to be guided by its rulings. The judgment is reversed, and the prisoner discharged.

Following is Judge Norton's concurring opinion in the above case:]

"I place my concurrence in reviewing the judgment in this case, not only on the ground so clearly stated in the opinion of the court, but on the further ground that the misrepresentations made by the defendant, if made as disclosed in the evidence, and for which it is sought to make him criminally liable, having been made in the progress of a long, real—not bogus—business transaction, are not embraced in the class of offenses against which section 1561, revised statutes, is directed. In what is here said, Judge Ray concurs with me."

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NOTE.—The law deems that a crime is committed in the place where the criminal act takes effect. Hence, in many circumstances, one becomes liable to punishment in a particular jurisdiction while his personal presence is elsewhere. Even in this way he may commit an offense against a State or country upon whose soil he never set his foot. Thus, where a person who puts forth a letter making a false pretense to a person who thereupon parts with his goods in the county where he receives it, he may be indicted in the county to which it is sent, though he does not go there himself.

In *People v. Adams*,² the intent to cheat and defraud were virtually conceded, and the alleged criminal acts were expressly admitted to have been committed by the defendant in the City of New York, through the

instrumentality of innocent agents, the defendant at the time being in the State of Ohio. As there was no question raised as to the form of the indictment or plea, the only point presented to the court for decision was, whether there was an offense committed by the defendant "within the boundaries of the State of New York," the crime charged being a statutory offense. In delivering the opinion, Beardsley, J., said: *Suydam Sage and Co.* were induced by false and fraudulent pretenses to sign certain written instruments, and to part with large sums of money. The fraud may have originated and been concocted elsewhere, but it became mature, and took effect in the City of New York, for there the false pretenses were used with success, the signatures and money of the persons defrauded being obtained at that place. The crime was therefore committed in the City of New York and not elsewhere.³ Personal presence, at the place where a crime is perpetrated, is not indispensable to make one a principal offender in its commission. Thus, where a gun is fired from the land which kills a man at sea, the offense must be tried by the admiralty and not by the common law courts; for the crime is committed where the death occurs, and not at the place from whence the cause of the death proceeds. And on the same principle, an offense committed by firing a shot from one county which takes effect in another, must be tried in the latter, for there the crime was committed.⁴ In such cases the person is an immediate actor in the perpetration of the crime, although not personally present at the place where the law adjudges it to be committed. He is there, however, by the instrument used to effect his purpose, and which the law holds sufficient to make him personally responsible at that place for the act done there." In *Reg. v. Leach*,⁵ a letter containing a false pretense was received by the prosecutor through the post in the borough of C., but it was written and posted in another borough. In consequence of that letter, he transmitted through the post to the writer of the first a post office order for £20, which was received out of the borough. In an indictment against the writer of the first letter for false pretenses, it was held that the venue was well laid in the borough of C. In giving the opinion, Jervis, C. J., observed: "The venue was well laid. The delivery of the letter through the post in the borough, was the making of a false pretense there."

In *Reg. v. Jones*,⁶ money was obtained by means of a false statement of the name and circumstances of the prisoner in a begging letter which reaches the prisoner in County B., but had been transmitted to him in a letter posted at his request in County A. Here it was held that he is liable in A. In the opinion, Alderman, B., cited *R. v. Buttery*, referred to by Abbott, C. J., in *R. v. Burdett*, 4 B. & A. 179 (not reported elsewhere), to show that the offense consists in obtaining the money; and observed, that here, when the party solicited put the letter containing the post office order into the post at Sunbury in Middlesex, the post master became the agent of the prisoner and the latter must thus be taken to have received it in Middlesex.

In *Regina v. Cook*,⁷ on an indictment for obtaining

¹ Bish. on Crim. Procedure, (3rd ed.), § 53; See *Reg. v. Jones*, 1 Den. C. C. 551; *Temp. & M.* 270; 1 Eng. L. and Eq. 533; *Norris v. The State*, 25 Ohio St. 217; *Adams v. People*, 1 Comst. 173; *People v. Adams*, 3 Denio, 190; *Reg. v. Leach*, Dears, 612; *Cox, C. C.* 100, 36 Eng. L. and Eq., 589; *Reg. v. Cooke*, 1 Post. & F. 64.

² 3 Denio (N. Y.), 190.

³ 2 R. S. N. Y. 677, § 53; 1 Chit. Cr. Law, (4th Amer. ed.) 191; *Rex v. Buttery*, mentioned by Chief Justice Abbott in *The King v. Burdett*, 4 B. & A. 95.

⁴ Chit. Crim. Law, 155; *U. S. v. Davis*, 2 Sum. 435.

⁵ 7 Cox C. C. 100; 8 C. 36 Eng. L. and Eq. 589; 8 C. Dears. 642.

⁶ Den. B. C. C. 551.

⁷ 1 Post. & F. 64.

money by false pretenses, which in one count was alleged to have been by sending a certain false return of fees to the commissioner of the treasury, it appearing that the return was received by them in Westminster, with a letter dated Northampton, and an affidavit sworn there; and that they, on the faith of it, drew up a "minute," which operated as an authority to the Paymaster-General to pay a certain amount to the prisoner (as compensation), at Westminster, the venue laid being Northamptonshire. The venue was sustained; for, in effect, the money was obtained by means of the minute, being a mere matter of regulation, and not a judicial proceeding. Coleridge, J., remarked (p. 68): "The letter was written and the affidavit sworn in Northamptonshire, and the jury may infer that the documents were posted there. They are material facts in the case, and one of the counts alleges the offense to have been in this, that the prisoner 'forwarded' to the commissioners a representation which was false, and which he certainly may be presumed to have 'forwarded' in Northamptonshire. There is reasonable evidence that it was so."

In *Stewart v. Jessup*,⁸ referred to in the principal case, where the facts are set out, the court said: "It may be assumed, as a general proposition, that the criminal laws of a State do not bind, and cannot affect those out of the territorial limits of the State. Each State, in respect to each of the others; is an independent sovereignty, possessing ample powers, and the exclusive right to determine within its own borders, what shall be tolerated, and what prohibited; what shall be deemed innocent and what criminal; its powers being limited only by the Federal Constitution and the nature and objects of government. While each state is thus sovereign within its own limits, it cannot impose its laws upon those outside of the limits of its sovereign power. Our own Constitution has expressly fixed the boundaries of its sovereignty.⁹ And the right of punishment extends not only to persons who commit infractions of the criminal law actually within the State, but also to all persons who commit such infractions as are, in contemplation of law, within the State.¹⁰ Every person being without this State, committing or consummating an offense by an agent or means within the State, is liable to be punished by the laws thereof in the same manner as if he were present, and had commenced and had consummated the offense within the State."¹¹

In *Commonwealth v. Van Tuyl*,¹² the indictment was for obtaining money by false pretense. The fraud was concocted in the State of Ohio, where the representations, which were designed to render it successful, were made, but the scheme was consummated and the money obtained in Kentucky. The defendant was tried and punished in the latter State, the court holding that as the crime was not committed until the money had been obtained, not being mature and taking effect until then, the crime was, therefore, committed in Kentucky and not elsewhere, and the defendant was properly indicted and tried therefor in the county where the money was paid to him. EUGENE MCQUILLIN.

St. Louis, Mo.

⁸ 51 Ind. 413.

⁹ See Sec. 2, Art. 4.

¹⁰ 2 R. S. 1852, p. 1, § 2.

¹¹ See also *Johns v. The State*, 19 Ind. 421.

¹² 1 Met. (Ky.) 4.

BAILMENT—FOR HIRE — NEGLIGENCE — QUESTION FOR JURY.

KINCHELO v. PRIEST.*

Supreme Court of Missouri, June 7, 1886.

1. Whether a bailment was for hire, or merely gratuitous, is purely a question of fact for the jury in each particular case.

2. A gratuitous bailee must exercise the same degree of care and diligence that an ordinary prudent man would in relation to his own business affairs.

Appeal from Scotland circuit court.

Action to recover the value of notes left by plaintiff with defendant's testate for collection, and by the latter held, uncollected, until barred by the statute of limitations. Judgment for defendant, and appeal therefrom by plaintiff.

McKee and Smoot, for appellant, James H. Kinchelo.

BLACK, J., delivered the opinion of the court:

The plaintiff, in 1867, before leaving this State, gave to the defendant's testate, Green, 14 notes, and took a receipt therefor, in which it is stated that the notes are to be collected and accounted for. Green died in 1882, and plaintiff filed an account in the probate court, giving a list of the notes, and stating that he did not know whether the notes had been collected; that they could have been collected, and, if not, deceased suffered them to become barred by the statute of limitations; that deceased was to have five per cent. for his services, and that the estate owed him, etc. Three of the notes, signed by Downing and others, and one small one, signed by Green, in all amounting to about \$700, were found by the executor among the papers of the deceased, with credits upon the Downing notes. Some correspondence, offered in evidence, shows that, from 1867 to 1882, Green collected and remitted to the plaintiff various sums of money; and the evidence is strong to the effect that he remitted or applied all money collected. Green, in a letter dated in 1867, says Downing had promised payment in the following January. In 1881 he says Downing had promised several times to pay, and expressed some fears about the Arnold note; and in 1882, speaking of this same note, which was signed by Downing, he says he let the date slip out before he knew it, and that Mr. Downing said "a note never dies with him." The real contest is as to the barred notes.

The court, for the plaintiff, instructed the jury, that if deceased, while in the discharge of his trust, negligently permitted the statute of limitations to run against part of the notes, and by reason of said neglect the debts were lost, then the plaintiff was entitled to recover; and refused to instruct that if the notes could have been collected by resorting to legal means, and yet were al-

*S. C. 1 S. W. Rep. 235.

lowed to run until barred, the plaintiff should recover. The court, of its own motion, in substance, told the jury that if deceased, in his lifetime, exercised the same kind of care, in the collection of the notes, that an ordinarily prudent man would have done with his own business affairs, then the verdict should be for the defendant as to the barred notes.

1. There is no doubt but the confidence induced by undertaking services for another is a sufficient consideration for a faithful discharge of the trust. 2 Pars. Cont. (6th ed.) 98—and a depositor makes out a *prima facie* case, even against an unpaid bailee, by showing a deposit made, demand for, and refusal of, the thing deposited. Huxley v. Hartzell, 44 Mo. 370; Wiser v. Chesley, 53 Mo. 547. But this case does not assume that form of action. So far as the barred notes are concerned, it is based upon negligence of the deceased. In all such actions the burden of proof rests upon the plaintiff, and he must prove each material fact necessary to create a liability. Edw. Bailm. § 106.

The first refused instruction asked the court to tell the jury that the written agreement—the receipt—implied a consideration to be received by Green out of the notes to be collected by him. The receipt did not so say, and it was not the proper province of the court to so declare. The evidence must determine whether the undertaking was gratuitous or not, and the jury should take all the circumstances into consideration. The plaintiff does not appear to have made any effort to show that Green was to have any compensation, nor did he seek to have that question submitted to the jury as a question of fact, but relied upon a supposed presumption of law, which does not arise in this case. It is said, in Schouler, Bailm. 35, if the bailee received the thing in the usual course of his business, and business usage, or his known method of dealing with other customers, gave him the right to demand compensation, then the trust, though accepted without express reference to a charge for services, is not to be taken as gratuitous. Further on, the same author says: "But attendant circumstances should be allowed their weight, and where one undertakes, for a near relative or personal friend, or out of mere charity or favor, and more especially if accomplishing the trust puts him to little outlay of time, trouble, and skill, and the bailment lies outside his remunerated field of labor, we may well presume the undertaking to have been gratuitous." And, in Mariner v. Smith, 5 Heisk. 203, where one deposited a quantity of gold, with a firm engaged in the boot and shoe business, and the gold was stolen from the safe of the merchants, it was held to be error to instruct the jury that, if the nature of the bailment was of such a character as to require extraordinary care and responsibility on the part of the bailee, the law will imply a reward.

Here there is no direct evidence that Green re-

ceived, or was to receive, any compensation. The parties appear to have been personal friends and neighbors. Green was a farmer, and conducted a small country store, and there is no claim that he in any way assumed to be a collecting agent. These facts all tend to show that the undertaking was gratuitous. If the plaintiff desired to put the case before the jury on the theory that Green was a paid agent, he should have asked the court to submit that question to the jurors as a question of fact; but it is evident no such a claim was made, or intended to be made, on the trial, save by way of a presumption of law. The instruction was properly refused.

In Edwards on Bailments, § 77, it is said: "And there is a class of cases in which, without any delivery of goods or property, an unpaid agent is held responsible for the use of diligence in the business he undertakes; as where a man receives a demand to collect gratis. * * * The effort to collect must be made with ordinary diligence. This is stated to be the rule in this class of cases in Newell v. Newell, 34 Miss. 385, which is a case in some of its features resembling the present one. The degree of care which the court required of the deceased, in the collection of the notes, was the same kind of care that an ordinarily prudent man would have used with his own business affairs. This stated the rule favorably to the plaintiff. Nothing appears to have been said in the evidence as to the solvency of the makers of the notes, though it was probably assumed on trial by both parties to the suit, that something could have been made out of Downing by suit. There is no claim of want of good faith on the part of the deceased. The instruction presented the case fairly enough.

2. There was no error in allowing the defendant to read, in evidence, a note, made by plaintiff to Green, for \$300, dated in 1859, and found also among the papers of the deceased. It would have been natural, and in the ordinary course of affairs, for Green to have applied collections in payment of this note. One party being dead, and the other thereby rendered incompetent to testify, it was proper to resort to any circumstances having a tendency to shed light upon the particular transaction in question.

The judgment is affirmed.

WEEKLY DIGEST OF RECENT CASES.

ALABAMA,	10, 14, 29
ARKANSAS,	12, 17
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RHODE ISLAND,	19
TENNESSEE,	8, 4
TEXAS,	15, 21
UNITED STATES,	22
VERMONT,	1, 18, 27

1. **ACCORD AND SATISFACTION.**—*Acceptance of an Admitted Balance—Condition.*—Defendant and plaintiff had an unsettled disputed account. Defendant sent plaintiff a statement of the account as it claimed to be, to which plaintiff made no reply. Defendant then sent the statement, accompanied with its note to cover the admitted balance, and a letter in which it stated that the note covered the balance due, and hoped it would be satisfactory. The plaintiff replied to this letter, giving its version of the disputed items, but kept and used the note, which was paid at maturity. *Held* that, as there was no condition attached to the acceptance of the note for the admitted balance, it was not an accord and satisfaction of the debt. *Boston Rubber Co. v. Peerless etc. Co.*, S. C. Vt. Aug. 11, 1886. 5 Atl. Rep. 407.

2. **ASSIGNMENT.**—*Compromise—Attorney—Judgment.*—A debtor holding a claim against a third person may deliver it into the hands of his creditor and authorize suit to be brought upon it in his own name for the benefit of such creditor. Authority to prosecute a suit does not involve authority to compromise it. Before an attorney can compromise a suit he must have special authority. If a judgment be entered where no indebtedness actually exists, such judgment cannot be used for the purpose of effecting a redemption. A decree for deficiency, entered after a sale on mortgage foreclosure, for the amount remaining due and unpaid on the mortgage after applying the proceeds of the sale, does represent an actual existing indebtedness, and may be used to redeem. *Wetherbee v. Fitch*, S. C. Ill. May 15, 1886. 4 West. R. 220.

3. ———. **General Assignment for Creditors—Partial Assignments for Creditors.**—To constitute a general assignment of a debtor's property for the benefit of creditors, within the meaning of the Acts of 1881, Ch. 121, the fact that it is a general assignment of all the debtor's property must appear on the face of the deed or the sworn inventory required to be annexed, and in that event only will the assignee be entitled to any other property of the debtor not described in the deed or set out in the inventory. A conveyance of a portion of the debtor's property for the benefit of one or more, or all his creditors is good to the extent of the property included therein if not made within three months of a general assignment, and a mortgage or trust deed to secure the price of property bought, or money loaned at the time is good, even if executed within three months of a general assignment. *Hays v. Covington*, S. C. Tenn. June 12, 1886. 2 So. Law Times, 325.

4. ———. **General Assignment for Creditors—Schedule under oath Indispensable.**—The fourth section of the Act of 1881, providing that "The debtor making a general assignment shall annex thereto a full and complete inventory or schedule under oath, of all his property of every description, etc.," is mandatory and absolutely indispensable to the validity of the deed of assignment. The failure to comply makes the deed fraudulent on its face. *Hill Fontaine & Co. v. Alexander*, S. C. Tenn. May 8, 1886. 2 So. Law Times, 330.

5. **ATTORNEY AND COUNSELOR.**—*Relation to Client, when Arises.*—Where an attorney at law is, as such, called upon for "legal advice" by a person acting for himself, and he thereupon assumes to give a professional opinion in relation to the matter as to which he is consulted, the relation of attorney and client arises between him and the person so consulting him. *Ryan v. Long*, S. C. Minn. July 9, 1886. 29 N. W. Rep. 51.

6. **ASSIGNMENT.**—*Contempt—Admissions of Solicitor in Contempt Proceedings—Not Binding on Client—Assignment for Benefit of Creditors—Wife Regarded as any Third Person—Suit to Set Aside Fraudulent Conveyance—Receiver—Creditors must Move through Receiver—Impleading Receiver—Leave of Court must be Obtained.*—In a proceeding as for a contempt, to enforce a civil remedy, a solicitor has no authority to make admissions for his clients, and defendants can only be bound by written admissions, made a part of the record, and examinable on appeal. When there is an assignment for the benefit of creditors by the husband, and a proceeding to attach certain of his wife's property, alleged to have been obtained by fraud, the wife stands in the litigation like any third person; Husband and wife are not mutually responsible for each other's conduct, and if either is chargeable, it must be individually. Creditors cannot attach the interest of third parties, alleged to have been obtained by fraud, until they have obtained a standing by legal proceedings, and when there is a general assignment for the benefit of creditors the remedy is only given to the assignee or receiver. Where a receiver has been appointed, it is contrary to law to allow any one else to implead him in the same proceeding without leave of the court, or to take out of his hands the control of the proceedings. *Scott v. Chambers*, Wayne Circuit Judge, S. C. Mich. July 21, 1886. 29 N. W. Rep. 92.

7. **CONTRACT.**—*Consideration—Promise to Pay Judgment—Extension of Time.*—Where a judgment debtor, in consideration of an extension of time, and the forbearance of execution, promises verbally to pay the balance of such judgment, such consideration is sufficient, and the promise so made is binding, and the creditor may maintain special *assumpsit* thereon. *Fraser v. Backus*, S. C. Mich. July 21, 1886, 29 N. W. Rep. 92.

8. ———. **Construction.**—A promissory note being a written contract, it is to be construed by the court. It is in law the contract of the maker, and the ruling that defendant might show by oral testimony that it was the note of another, violated the settled rule of law that a written contract cannot be controlled or varied by oral testimony. *Davis v. England*, S. J. C. Mass., May 8, 1886; 2 N. Eng. Rep., 871

9. —. *Corporation—Ultra Vires.*—1. Although a contract made by a street railway company to build its road may have been *ultra vires*, yet where it has been fully executed on the part of the one contracting with the company, and for nearly ten years the company has held, enjoyed and taken the fruits of the contract, it is estopped to deny its validity. In order to make a valid ratification, it is sufficient if it is made with the full knowledge of all the material facts; and an instruction which adds a new element, namely: that the principal must have known, not only all the facts, but also the legal effect of the facts, and then, with a knowledge of both law and facts, ratified the contract, is erroneous. Where the circumstances of the case were such as to render the inference of ratification natural and easy, it was error to instruct the jury that, on all the evidence, they would not be warranted in finding a ratification. As a general rule, a contract between a corporation and its directors is not absolutely void, but voidable at the election of the corporation. The right to avoid it may be waived, and it does not necessarily require any independent and substantive act or ratification; but may become finally established as a valid contract by acquiescence; and such acquiescence may be inferred from the acts of the corporation during a long period of time. *Kelley v. Newburyport, etc. Co.*, S. J. C. Mass., May 6, 1886, 2 N. Eng. Rep. 883.
10. CORPORATIONS. — *Statute of Limitations Length of, and when Active against Stockholder.*—When a judgment is obtained in Mississippi, against a private corporation organized under the laws of Alabama, and a bill in equity is filed here to enforce payment out of the unpaid stock of the corporators, the statute of limitations is twenty years, although the original demand was governed by the statute of six years. The statute of limitations does not begin to run in favor of the stockholders, as against the creditors of the corporation, until calls for stock have been made by the directors, or by a court of equity at the instance of creditors. *Brown v. Grangers' Life and Health Ins. Co.*, S. C. Ala., Dec. Term, 1885-86.
11. CRIMINAL LAW.—*Trial—Instruction—Enumeration of Elements of a Crime—Instruction—Jury should Consider Court's Instructions—Witness—Accused as Witness—Credibility.*—While an instruction purporting to state all the elements of an offense necessary to a conviction may be fatally defective if an essential element is omitted, yet where the instruction simply enumerates certain things that the prosecution must prove, without stating that they of themselves are sufficient, and the other requisites are given in another instruction, there is no error. It is not error to instruct a jury in a criminal case that, while they are the judges of the law as well as the evidence, if they are in doubt as to the law, they "should give the court respectful consideration." An accused who goes upon the stand has a right to put his evidence before the jury unprejudiced by adverse criticism of the court, and an instruction calling attention to his interest, and stating that, to have a controlling weight, his testimony should be consistent with other facts and circumstances in evidence, is erroneous. *Bird v. State*, S. C. Ind., June 22, 1886, 8 N. E. Rep., 14.
12. DEED.—*Acknowledgment—Necessity for, and Effect of—Partition—Tenant in Common not in Possession—Joint Tenants and Tenants in Common—Ejectment.*—Conveyances are acknowledged for purposes of registration merely, while, as between the parties thereto, and all persons having actual notice thereof, deeds are good without any form of acknowledgment whatever. A tenant in common who is not in actual possession, and whose title is denied by his co-tenants, cannot maintain partition in equity. Ejectment is the only proper remedy for a tenant in common who is not in actual possession, and whose title is denied by his co-tenants. *Criscoe v. Hambrick*, S. C. Ark., June 26, 1886, 1 S. W. Rep. 150.
13. —. *Delivery—Amendment.*—Delivery is essential to give effect to a deed; but delivery depends on the grantors's intention, and intention is a fact to be found by the trier; thus, a recorded deed was declared void, where the master found that the grantor merely left it in the possession of the grantee, but that she never delivered the deed, i. e., as an operative conveyance. The orator was allowed to amend his bill, brought to set aside a deed, by adding to it as a cause the non-delivery of the deed. *Dwinell v. Bliss*, S. C. Vt., Aug. 2, 1886, 6 East Rep. 324.
14. EVIDENCE. — *Instruction—Negligence—Diligence.*—The credibility of oral testimony being a question for the decision of the jury, a charge is erroneous which assumes, or states as fact, any material matter which depends on the sufficiency of the oral testimony for its establishment; yet, where the record affirmatively shows that certain facts were admitted, or were clearly proved and not disputed, they may be stated without hypothesis. Charges must be construed in connection with the evidence; and if, when so construed, it is free from error, though it assert a rule which, when applied to a different state of proof, would not be correct, it is no ground of reversal. Negligence, as a cause of action or as a defense, must be the proximate cause of the injury complained of; and when contributory negligence is set up as a defense, it is an admission of negligence on the part of the defendant. "Diligence is a relative term, and has not always the same measure; and a charge which instructs the jury that the law ordinarily requires the same diligence from the driver of a carriage and a person on foot in a public street or road, is erroneous. A mere conflict in the testimony—as where one witness testifies that he heard one of the parties make a certain declaration, while others who were present at the time testify that they did not hear it—does not authorize a charge to the jury as to the effect to be given to the testimony of a witness who has sworn falsely in one particular. A party is not bound to produce all the witnesses who may know something about the transaction involved in the issue, nor is any presumption indulged against him on account of his failure to produce them, though, when a witness possesses peculiar knowledge, supposed to be favorable to the party who can produce him, his failure to produce such witness, if unexplained, is ground of suspicion. A charge which is correct as applied to the particular case, though stating a general principle too broadly, or which has a tendency to confuse or mislead the jury, is not a

reversible error; but such a charge may properly be refused. When a charge asked and refused is ambiguous, or susceptible of two constructions, that construction will be adopted which is least favorable to the party asking it. *Carter v. Chambers*, S. C. Ala., Dec. Term, 1885-6.

15. EVIDENCE—*Reputation Former Admissible—Rule as to*—Mynatt resided in Johnson county for a number of years, but for four years preceeding the trial, he had resided in a different county, on the trial, several witnesses who had resided in Johnson county and had known Mynatt there, after qualifying themselves to testify to Mynatt's reputation while residing in Johnson county, were permitted to testify that his reputation for truthfulness while he resided there was bad. Objected to on the ground that the witnesses could not state the reputation of Mynatt at the time they testified. *Held*, That the objection was not good; that his former reputation, considering the time he had resided in a different neighborhood, and his mature age at the time he lived in Johnson county, were facts which the jury might consider in determining whether his evidence was entitled to credence. The law does not presume, under these circumstances, that a person of mature age had reformed so as to acquire a different reputation. *Mynatt v. Hudson*, S. C. Tex., Austin Term, 1886; 1 Tex. Ct. Rep. 696.

16. ———. *Written Contract—Modification of, by Parol—By New Agreement With New Consideration—Instruction*.—The rule that parol evidence is inadmissible to add to or vary the terms of a written contract precludes evidence of the negotiation which preceded, or conversation which accompanied, the making of it, unless necessary to explain ambiguous provisions, the meaning of which cannot be ascertained with certainty by an inspection of the written instrument. A written contract may be modified by a subsequent new and distinct oral agreement upon a new consideration, but in this case the oral evidence of the bargain, and of the explanation accompanying the execution of the written contract, instead of showing a modification of the writing, tends to show simply that the writing never expressed the real agreement of the parties, and plaintiff allowed it to stand unaltered, on the assurance of Martin that a delivery of a certain less number of brick per month would be accepted in lieu of the number called for by its terms. *Held*, that the court erred in refusing to charge that what took place between the parties previous to or at the time of the execution of the written contract was inadmissible to vary or modify it, and that a new agreement must be shown. The court also refused to charge that if the evidence on which the alleged modification of the written contract depends, is only of what took place contemporaneous with the execution of the written contract, then no modification was shown. *Held* error. *Corse v. Peck*, N. Y. Ct. App., June 1, 1886; 7 N. East. Rep. 810.

17. EXECUTION—*Sale—Waiving Defects—Notice—Statute*.—The acceptance and retention by an execution debtor of the surplus realized from the judicial sale of his real estate amounts to a waiver on his part of all irregularities in an otherwise voidable sale. A statute requiring the sheriff to give notice of execution sale, and prescribing the manner thereof, is directory merely, and his neglect to follow literally the statutory directions will

not invalidate the title of an [innocent purchaser. *Huffman v. Gaines*, S. C. Ark., June 28, 1886; 1 S. W. R. 100.

18. FRAUD—*Statute of Frauds—Guaranty Embodied in Lease—Consideration*.—Where a contract of guaranty is entered into contemporaneously with the principal contract, and is either incorporated in the latter, or so distinctly refers to it as to show that both agreements are parts of an entire transaction, the statute of frauds does not require a consideration to be expressed in the guaranty distinct from that expressed in the principal contract. This principle applied to a guaranty embodied in a written lease. *Highland v. Dresser*, S. C. Minn., July 1, 1886; 29 N. W. Rep. 55.

19. ———. ———. *Leasehold Interests*.—Contracts for the sale of leasehold interests, although technically only chattel interests, are within the statute of frauds, and therefore an oral contract which is entire, and includes a sale of buildings and machinery, and of the leasehold interest, is within the statute. The English and Rhode Island statute compared. The omission in the Rhode Island statute, of the words, "or any interest in or concerning them," does not change its meaning. See also, Pub. St. R. I., c. 24, § 9. *Potter v. Arnold*, S. C. R. I., 1886; 5 Atl. Rep. 379.

20. HUSBAND AND WIFE—*Wife, Creditor of Husband—Creditor's Action by Wife—Res Adjudicata—Evidence Necessary to Make Case—Subsequent Divorce—Effect of—Lien on Judgment*.—Plaintiff recovered five judgments in county court against John Carpenter, her husband, for installments of income due her on articles of separation, in which she had agreed to support herself, and sign all deeds; he to pay her a stated sum each month. Upon the trial of the several actions the validity of the agreement of separation, and the status of plaintiff as a creditor of her husband, was litigated between the parties thereto, and was in each action decided in her favor. In this action to set aside as fraudulent, certain conveyances of real estate executed by him to defendants, *held*, that the questions were *res adjudicata*, and defendants were precluded from raising them in this action. That the plaintiff, by putting in evidence the judgment rolls, the executions returned unsatisfied, and the agreement of separation, and proving that the conveyances assailed were voluntarily made with intent to defraud his creditors, with the knowledge of the grantees, made a case which justified the court in rendering judgment for her. The plaintiff had, subsequent to the separation, procured a decree for an absolute divorce from her husband, with no provision for her support. *Held*, that this did not affect her pecuniary claims on him, if secured by legal obligations, either for dower or to an allowance by way of alimony. The court below declared the judgment to be a lien upon the land in question for the several installments due, but not in judgment when the action was commenced. *Held*, error; that the court was limited to the installments in judgment, and that this judgment should be corrected to that extent. *Carpenter v. Osborne*, Ct. of App. N. Y. June 15, 1886; 1 N. East. Rep. 823.

21. INSURANCE—*Fire Insurance Policy—When it Becomes a Liquidated Demand—City Ordinance Becomes Part of the Insurance Contract*.—When a building insured is so destroyed by fire as that it ceases to be within the meaning of the law

building, then, under Revised Statutes, Art. 2971, the policy evidences a liquidation against the company issuing it for the full sum for which the policy was issued. Where the parties contracted in view of a city ordinance which prohibited the reconstruction or repair of a wooden building, situated in the fire limits of the city, destroyed by fire to the extent of one-third its value, unless by leave of the common council, and this leave had been refused, the fire must be deemed the proximate cause of the loss, and the loss total. *Hamburg, etc. Co. v. Carlington*, S. C. Tex. Austin Term, 1886; 1 Tex. Ct. Rep. 698.

22. JURISDICTION—Federal Jurisdiction—State Decisions—Public Officers—De Facto—No Office Existing—Agency—Ratification—Original Authority.—The federal courts will follow the decisions of the State tribunals in the construction of its constitution and laws, where no federal question arises, and no principle of commercial or general law is impaired. There can be no authority to act as a public officer *de facto*, where there could be no such officer *de jure* by reason of the non-existence of the office. No ratification can be affected of the act of an alleged public body which was not capable to act for the community; ratification presumes some original authority. *Norton v. Shelby County*, S. C. U. S. May 10, 1886; 22 Rep. 193.

23. LIEN.—Will—Laches.—Where a person's money is invested in land without his consent he may have an equitable lien on the land for its repayment; but where he has full knowledge and notice that his money formed a portion of the purchase price of the land, his silence during many years, after notice of the investment of his money, will defeat his right to the lien on the property purchased therewith. Where the owner of the property purchased partly with money of another dies testate and bequeathes the property to another, and a certain sum of money to him who furnished part of the purchase price, the latter's silence after he had knowledge of the provisions of the will is decisive. By his own laches he has deprived himself of any right or benefit which he might have had if he had exercised proper diligence. Where his silence had induced the devisee in remainder to believe that plaintiff fully acquiesced in the provisions of the will, it is now too late to set up any claim he might have had to the estate if in season he had insisted upon it; and he is entitled only to the bequest named in the will. *McGivney v. McGivney*, S. J. C. Mass. June 30, 1886. 2 N. Eng. Rep. 538.

24. MERGER.—Trust—Particular Estate—Reversion.—Where a corporation, while holding a leasehold interest in land in trust to be used for church purposes, takes a conveyance from the reversioner, there is a complete merger, the trust is extinguished, and a subsequent deed from such corporation conveys the fee. *Bennet v. Methodist etc. Trustees*, Ct. App. Md. June 24, 1886. 5 Atl. Rep. 291.

25. MORTGAGE.—Chattel Mortgage—Crops to be Grown on Land of Mortgagor—Registration—Notice.—Minnesota Linseed Oil Co. v. Maginnis, 32 Minn. 193, S. C. 20 N. W. Rep. 85, followed, as to the validity of a chattel mortgage of crops to be grown upon land in the possession of the mortgagor. Under sections 2, 3, c. 39, Gen. St. 1878, as the former section is amended in chapter 38, Laws

1888, a chattel mortgage on crops to be grown on land of mortgagor, when filed in the proper office in the town, city, or village in which the land upon which the crops are to be grown lies, is full and sufficient notice to all persons interested, of the existence and conditions thereof. *Miller v. Chappel*, S. C. Minn. July 9, 1886; 29 N. W. Rep. 52.

26. ———. Foreclosure.—Where a mortgage or deed of trust is but an incident to the debt which it is given to secure, and can have no existence as an obligation or conveyance independently of the debt, but is merely an aid or instrumentality in the collection of the debt, a statute of limitations which bars the debt, bars the right to foreclose the mortgage also. It is not necessary that mortgages or deeds of trust should be named in the statute. (*Hyman v. Bayne*, 83 Ill. 253, and *Gridley v. Barnes*, 103 Ill. 216, followed.) *McMillan v. McCormick*, S. C. Ill. May 15, 1886. 4 West R. 210.

27. ———. Foreclosure—Parties—Adverse Claimant—Prior Fraudulent Conveyance.—Upon a petition to foreclose a mortgage the mortgagee cannot make an adverse claimant to the estate a party defendant for the purpose of trying such adverse claim, when there is no privity between the mortgagee and the claimant. The petition alleged that the mortgagor, prior to the execution of the mortgage, conveyed the premises to A., without consideration, to shield the property from attachment by the creditors of the mortgagor. Held, that the prior deed being good as between the parties by R. L. § 4155, could not be attacked by petition to foreclose such subsequent mortgage. *Kinsley v. Scott*, S. C. Vt. Aug. 7, 1886. 5 Atl. R. 390.

28. ———. Sale—Notice—Affidavit of Publication.—An affidavit of the publication of a notice of a mortgage sold in foreclosure proceedings, by advertisement, was made by appending to a copy of the notice, as originally published, a copy of a notice of adjournment, stating that "the foregoing sale is adjourned until the sixth day of October, 1864." The original notice designated September 29, 1864, for the sale. To these copies an affidavit was appended, stating that "the above notice of mortgage foreclosure sale" was printed for the period of six weeks, "the last publication being made on the twenty-eighth day of September, 1864; and that said notice of adjournment of said sale was printed and published in said paper on Wednesday, the fifth day of October, 1864." The sale was made on the sixth day of October. This affidavit, being received in evidence as proof of the publication, construed as showing the publication of the fifth day of October of only the notice of adjournment, and not of the original notice also; and, the notice of adjournment not containing all the essential requisites of a notice of sale, the publication so made was insufficient to authorize a sale. Such proof considered as overcoming any *prima facie* evidence of the regularity of the notice which may attach to the sheriff's certificate of a sale by virtue of chapter 112, Gen. Laws 1883. *Sanborn v. Potter*, S. C. Mich., July 15, 1886. 29 N. W. R. 64.

29. PARTNERSHIP—Dissolution by Death—Powers and Liability of Survivor.—On the dissolution of a partnership by the death of one of its members, the surviving partner is entitled to the exclusive right of possession of the partnership property, and the courts will not interfere with his management so long as he continues faithful to his trust;

but he holds the assets as a *quasi* trustee, first, for the partnership creditors, and afterwards for the personal representative of the deceased partner; and if he is guilty of waste, negligence, misconduct, or other violation of his trust, a court of equity will often intervene to afford relief. *Farley Spear & Co. v. Moog*, S. C. Ala. Dec. Term, 1885, -86.

QUERIES AND ANSWERS.*

[Correspondents are requested to draw up their answers in the form in which we print them, and not in the form of letters to the editor. They are also admonished to make their answers as brief as may be.—Ed.]

QUERIES.

21. A., a farmer bequeathed to his widow, B., a life estate in his land; at her death the land itself to go to C., his illegitimate nephew, no proviso empowering B. to sell the land if C. died intestate first. C. died 17 years before B., who executed a deed and sold it, though she had merely a life estate. Properly the land would escheat to the Government—if so, would the courts or President cause her deed to be cancelled and the estate sold for benefit of the Government? J. C. H.

QUERIES ANSWERED.

Query 50 [22 Cent. L. J. 576].—Please answer as soon as practicable through your LAW JOURNAL, the following query in view of Kentucky laws. The charter of the town B., gives to the officers thereof the power to pass ordinances; requiring the property owners along the streets of said town to curb and pave the side-walks in front of their property. The charter further provides that upon the failure of the property holder to so curb and pave, the town "may" have said curbing and paving done, and thereby obtain a lien for the cost of said pavement upon the property in front of which said curbing, etc. was erected. Query: If said town pass the ordinance aforesaid, directing A. B. & C. to curb and pave in front of their property, and C., living upon the same street with A. and B., but nearer to the out-skirts or limits of the town, in obedience to the ordinance, did curb and pave the side-walk in front of his property. Is C. entitled to a mandamus requiring the town to so curb and pave in front of the property of A. and B.? Give authorities. H. P. C.

Answer.—This matter is reached by a mandamus. *Rock v. Newark*, 33 N. J. L. 129. The town has no right to refuse the performance of the law against a party having an interest in such a performance. *Martin v. Mayor of Brooklyn*, 1 Hill, 645. An ordinance in force is as much a law as an act of the legislature, and the latter, they were obliged to carry out. *People v. Common Council of Brooklyn*, 22 Barb. 404. Where they had decided on the act, and parties had acted under that idea, they were compelled to continue their proceedings. In the matter of Beekman St., 20 John. 269. Mandamus will lie. M.

RECENT PUBLICATIONS.

FEDERAL DECISIONS.—Cases Argued and Determined in the Supreme, Circuit and District Courts of the United States. Comprising the opinions of those courts from the time of their organization to the present date, together with extracts from the opinions of the Court of Claims, and the Attorneys-General, and the opinions of general importance of the Territorial Courts. Arranged by William G. Myer,

author of an Index to the United States Supreme Court Reports; also indexes to the Reports of Illinois, Ohio, Iowa, Missouri and Tennessee, a digest of Texas Reports, and local works on Pleading and Practice. Vol. XV. EQUITY—ESTATES. St. Louis, Mo.: The Gilbert Book Company. 1886.

It is perfectly superfluous for us to add anything with reference to this volume to the commendation which we have so recently and so frequently bestowed upon its predecessors that have been so rapidly issued from the press by the indefatigable publishers. This volume is in all respects equal to the high standard of the general work, and that it is one of the most important of the whole series, is manifest from two words which appear on its title-page—Equity, Estates.

JETSAM AND FLOTSAM.

A LESSON IN TEMPERANCE.—Just as Justice Coldbath gave the fat man in a short coat thirty days for keeping a calf, three pigs, and a swarm of chickens in his front yard, a citizen in good clothes came into court. That is, his clothes were good what was left of them. They were torn in a dozen varieties of rent, and dabbled with mud and blood. His broken head was bandaged, his hat was crushed, his face disfigured. O, but old Justice Coldbath was mad. "Well, sir," he snarled, before the citizen could speak, "it's easy enough to see what's the matter with you!" The citizen drew a sigh that sounded like a November breeze, and shook his head despondingly. "Same old story," said the justice; "same old thing. You look like a respectable man now, don't you! You are respectable when you are fixed up, I dare say. Merchant, aren't you. Yes, I knew it. Church member, more'n likely? Yes, I thought so. Stand well in society, and never slipped up before? Yes, sir, I know you. I can pick out your case every time it comes before me. Whisky, eh? Liquor's the trouble. That's what plays the mischief with your respectable drinker, sir. Brings him to the gutter just as sure as it does the tramp. Now, sir, I'm going to reform you. I'm going to deal justly and harshly and mercifully with you for your own sake. I'll sock it to you, so that you'll never come here again. It's whisky, you say?" "Yes, sir," said the citizen, feebly; "whisky is the trouble, sir. But for whisky I wouldn't appear in this disgraceful, forlorn, painful position. But for whisky, I would be a sound, happy man, in good, clean clothes, and no headache. But for whisky—" "That'll do," said the justice, "I know the whole story, and am glad you realize your situation so keenly. Maybe your contrition will take twenty days and \$10 off your sentence, and maybe it won't. Now, then, how much whisky did you drink, and where did you get it?" "Me!" the citizen said, in a faint tone of infinite surprise, "I never touched a drop of intoxicating liquor in all my life. I am pastor of Asbury M. E. Church, and a drunken policeman assaulted me on the street half an hour ago and nearly clubbed me to pieces. I have just come to file information and get a warrant for his arrest." And old Justice Coldbath, who is never so happy as when delivering a temperance lecture from the bench to a battered inebriate, was so mad at having his lecture spoiled, that he tried the minister on three charges of conspiracy, malicious mischief, and contributory negligence, with intent to deceive and commit fraud, before he would let him go and then he tried to saddle the costs upon him.

The Central Law Journal.

ST. LOUIS, SEPTEMBER 17, 1886.

CURRENT EVENTS.

DIVORCE AFTER DEATH.—The English courts seem to have run this summer into a shoal of queer lawsuits. We noted, some weeks ago, the "Great Rat Case," in which, in our judgment, the rats were magnified out of all due proportion to the other *dramatis personæ*, and now two courts have successively tackled the problem whether a man may be divorced after his death. The London *Law Times* says:

"The law contains many subtleties and some fictions, but we are saved from the absurdity of divorcing a man after his death. Sir James Hannen decided that this could not be done, and the Court of Appeal have affirmed his decision in *Stanhope v. Stanhope*, 55 L. J. Rep. P. D. & A. 37, reported this August. Why anyone should wish a man to be divorced after his death, would seem a mystery, but in this instance the desire was practical enough."

The explanation is that the deceased held a life estate in £15,000, remainder to his wife for life, remainder to such persons as he might appoint by will. By his will he appointed his brother and sister. Before his death he had obtained, against his wife, a decree *nisi* of divorce, but under the statute, such decree could not become absolute until after the lapse of six months. Within that time he died, and the suit for divorce abated. Now, if the person, who had been his wife, was his widow, she was entitled to £15,000 for life, and his brother and sister to the remainder, under his appointment, after her death. If, however, she was not his wife when he died, nor of course his widow after his death, her life estate never took effect at all, nor did that of the brother and sister, which could only commence upon the termination of her life estate. Upon this theory at least, the executor proceeded in the interest, as he conceived, of the parties interested in the estate. He filed a petition asking that the divorce suit be revived, and that the decree *nisi* be made absolute, evidently

under the impression that the decree making the divorce absolute would relate back to the time at which the decree *nisi* was rendered, and that thereby the marriage relation was terminated within the lifetime of the husband, and that the legal consequence followed, that the life estate of the wife, and the dependent remainder of the brother and sister, were extinguished with it.

The court refused the application for a number of good reasons, the best of which is thus expressed by Lord Justice Bowen:

"In my opinion a man can no more be divorced after his death than he can be married or condemned to death. Marriage is a union for two lives, it can be dissolved either by death or by process of law. After it has been dissolved by one of these ways, it cannot be dissolved again—a knot which has been already untied cannot be untied again." In the embarrassment of reasons why the motion should not be granted, this way of putting the case seems the neatest.

PATENT LAW AND PATENT PRACTICE.—One of the dark corners of his profession, to the average practitioner, is the Patent Law of the United States. This subject has been so long turned over to specialists, and its practice so completely absorbed by them, that it is really no disparagement to even the best informed lawyers to say that they know very little about it. Nevertheless the subject is of such great interest to the people of the United States, that the character, terms and operation of the existing statutes regulating patents, and especially their exposition and administration by the courts, are worthy of much more attention than they have ever received from the profession or the general public.

In a recent issue of the *Albany Law Journal*, appears an article significantly entitled: "Shall the Patent Laws be Repealed?" Upon examination, however, it appears that the *gravamen* of the charge consists less in depreciation of the patent laws themselves, as a desirable and effective means of fostering enterprise, and stimulating genius, as in a very bitter denunciation of the methods in which those laws are administered in the Federal Courts.

From the article under consideration, it would appear that, in patent cases in Federal Courts, all the shameful abuses of the old English High Court of Chancery are reproduced in all their enormity. The delays are interminable and inexcusable, the costs and expenses are immense, and in the end, as Louis XIV. said, with reference to his contest with the emperor and his allies: "It is the last crown-piece that wins."

How all this may really be, we do not pretend to say. We tell the tale as it is told to us—and to all the world, in the pages of our contemporary, by a patent lawyer, over his own signature. We are strongly inclined to the opinion that there is a good foundation for these charges, and that this dark corner in Federal jurisprudence might well bear, not a little, but a good deal of illumination. The interests of the public, we are persuaded, would be greatly subserved by a thorough investigation of the whole subject of the patent laws, and especially of the procedure of the Federal Courts in their administration, followed by appropriate legislation. We are strengthened in this opinion by our knowledge of the methods of the Federal Courts, in the matter of receivers, and their arbitrary and unreasonable extension of the authority and functions of those officers. This matter has long been the subject of criticism in professional circles, and has been commented on with great severity by one of the most eminent and distinguished justices of the Supreme Court of the United States,¹ who portrays in the most masterly manner the abuses and injustice which has grown out of the prevalent perversion of the functions of a receiver.

It is not unreasonable to expect that a proper investigation will disclose the existence of wrongs, equally flagrant, in the administration of the Patent Laws, of unnecessary delays which operate a denial of justice, and costs and expenses which amount to confiscation.

The *Albany Law Journal*, commenting on its correspondent's communication, says:

"It is notorious that most poor inventors are cheated out of their rights by the oppression of capitalists, and the tediousness, in-

equality and expensiveness of the practice in the patent courts. We have no doubt, too, that some of the Federal judges carry on things with a high hand when the mood is on them. This comes of making them independent of the people whose servants they are. It is a wholesome thing to have a judge to know that he is liable to step down and out at a fixed time if he does not behave himself. A judicial tyrant is the worst sort."

We are hardly prepared to endorse the extreme and radical remedy for the evils of the the patent law procedure, which is suggested in the last three sentences of this extract. We are not as much addicted to iconoclasm as our contemporary, and hesitate to assail *a l'outrance*, and without appropriate preliminaries, so venerable and venerated an idol as the life-tenure of Federal judicial office. Milder measures are first in order, and, contrary to the philosophy of the spelling book fable, we would use tufts of grass first to dislodge the naughty boy from the apple-tree, before "trying what virtue there is in stones."

NOTES OF RECENT DECISIONS.

PLEDGE — COLLATERAL SECURITY — LEGAL TENDER. — The Supreme Judicial Court of Massachusetts recently decided a case of some interest,¹ illustrating the relation between the pledgor and pledgee of personal property as collateral security for the payment of a debt. Freeland, the plaintiff's testator, had borrowed, from the defendant, \$24,000, and deposited with it certain certificates of stock of the estimated value of \$28,000. Before the maturity of the note, Freeland died, and afterwards plaintiff, as his executor, offered to pay the note and demanded back the stock certificates. The defendant refused to deliver the certificates because they had been mislaid.

Time passed and nothing definite was done. The plaintiff, by the delay, lost the opportunity of selling the stock for \$28,000, which he could have done when he offered to

¹ Mr. Justice Miller, in *Barton v. Barbour*, 104 U. S. 337.

¹ *Cummock Extr. v. Institution for Savings, etc.*, July 3, 1886, 2 N. Eng. Rep. 538.

pay the note, and when finally the certificates were found and the plaintiff did pay the note, the stock had so far depreciated that he lost \$700 by the sale, that being the difference between the amount realized and that which he had been offered when he demanded the certificates and proposed to pay the note. He therefore sued for the \$700, the amount so lost, and set forth the foregoing facts in his declaration. The defendant demurred to the declaration on the ground that it did not state a sufficient cause of action. The court below sustained the demurrer, and the appellate court affirmed the judgment.

At first view of this matter, it would appear, not only that it was a case of hardship, but that both courts were in the wrong. A little consideration, however, will show that they were right. The defendant's carelessness in losing the certificates caused the loss to the plaintiff of the seven hundred dollars, but in order to fix its liability for the loss, it was necessary for the plaintiff to take the appropriate legal steps. A legal tender was necessary to stop interest, to preclude liability for costs, and to fix upon the defendant responsibility for consequences. A mere offer to pay is not a legal tender.² "A tender is a production and manual offer of the money, and regularly it should be counted down...,"³ To say, "your money is ready for you," or "the money is in my pocket," is not a tender. To fix the liability for consequences on the defendant, the tender of it should have been regularly made and averred in the declaration, and the want of such an averment was sufficient to sustain the demurrer.

The Massachusetts cases declare that a tender is necessary to enable the pledgor to maintain trover against the pledgee.⁴ The contract of pledge is collateral to the contract to pay the debt, the promise is to return the pledge when the debt is paid. Hence it is concluded by the court, that the payment (or, presumably, tender) of the amount, is a

condition precedent to the right of the pledgor to demand the pledge. In this respect the two contracts, one to pay and the other to return the pledge upon payment, differ from a bi-lateral executory contract of two parties promising mutually to do concurrent acts.⁵ In this latter case, all that can be required of either party, is, at the proper time and place, to declare his readiness to perform his part of the contract, and to demand a like readiness and performance from the other party.⁶ Such, however, as the court decided, was not the character of the obligations of the parties in the case under consideration.

LIBEL — LIBELLING A JUDGE — BRIBERY — PLEADING. — A recent case in the Supreme Court of Vermont⁷ presents the novel spectacle of a judge of a Supreme Court "suing for his character," in the vernacular, or in more technical language, bringing an action for damages for libel charging him with receiving bribes, and other like corruption in office. As the trial was not upon the merits, the end is not yet, and we will look with much interest for the *denouement* of the story. The case was heard upon demurrer to the declaration, and presents some points of pleading which we regard as worthy of chronicle. The demurrer was overruled, the cause remanded, and defendants permitted to plead on the usual terms.

The (alleged) libel charged, in effect, that Judge Royce, being judge, chief judge, and chancellor of the State, was at the same time a partner in the law business of his son, who practiced in his court and was the attorney of a notable railroad corporation, and divided with him the fees earned by both, the son in bringing and defending the suits, the father in deciding them to the satisfaction of the client.

The court held that it is not necessary

² Bakeman v. Pooler, 15 Wend. 637; Thomas v. Evans, 10 East. 101; Douglas v. Patrick, 3 Tenn. 683.

³ Bakeman v. Pooler, *supra*; Dickinson v. Shee, 4 Esp. N. P. 68; Brady v. Jones, 2 Dowl. & Ry. 306; Dunham v. Jackson, 6 Wend. 22.

⁴ Jarvis v. Rogers, 13 Mass. 105; Hacock v. Franklin, etc. Co., 114 Mass. 156; Hathaway v. Fall River, etc. Bank, 131 Mass. 14.

⁵ Cook v. Doggett, 2 Allen, 429; Talty v. Freedman's, etc. Bank, 93 U. S. 321; Smith v. Lewis, 26 Conn. 110; Adams v. Clark, 9 Cush. 215; Rawdon v. Johnson, 1 East, 208; Waterhouse v. Skinner, 2 Bos. & P. 447; Jackson v. Allaway, 1 Dowl. & Lowndes, 919; Boyd v. Lett, 1 C. B. 222.

⁶ Smith v. Lewis, *supra*.

⁷ Royce v. Maloney, S. C. Vt. July 15, 1886; 6 East. Rep. 459.

in a declaration stating a charge of receiving bribes, that the (alleged) briber should be described as a party to the record in the case in, and on account of which, the bribe is supposed and charged to have been given. It is sufficient if the briber had an interest in the case. The rule is general, that everything must be taken most strongly against the pleader, but it is not applicable to averments that are clear enough according to reasonable intendment and construction, though not worded with absolute precision. And Lord Ellenborough says:⁸ "Where matter is capable of different meanings, it does not appear to clash with any rule of construction, applied even to criminal proceedings, to construe it in the sense in which the pleader must be understood to have used it, supposing him to have intended his pleading to be consistent with itself."

Upon this principle, and construing the words of the declaration, the court finds sufficient certainty in the allegations, that the railroad corporation has had "large interests involved in litigation in various suits pending in the said courts, in which this plaintiff has presided as judge, as aforesaid, in Franklin county aforesaid, and participated as judge of said Supreme Court as aforesaid." Thence it follows that the court might well apply the charge of bribery as relating to those suits so pending in the courts in which the plaintiff had so presided and participated.

A further objection to the declaration under consideration is, that no time is alleged when the railroad corporation had interests involved in litigation. The court says that such an allegation is probably a matter of form, and the want of it, helped by the statute of Anne, unless assigned as special cause of demurrer.⁹ And in this connection the court further holds, that if several facts are stated in a continuous sentence, or in several sentences connected by the conjunction "and," and time is predicated of one of those facts, it will be applied to each and all of them.¹⁰

⁸ *Rex v. Stevens*, 5 East, 244, 256.

⁹ *Higgins v. Highfield*, 13 East, 407. See, also, *Bowdell v. Parsons*, 10 East, 359.

¹⁰ *Taylor v. Welsted*, Cro. Jac. 443; 1 Chitty Pl. 258.

INJUNCTION TO RESTRAIN A CREDITOR'S PROCEEDINGS IN A FOREIGN JURISDICTION.

- § 1. *In Personam*.
- § 2. English Chancery Court Foreclosing Mortgage in Foreign Jurisdiction.
- § 3. Comments of Lord Brougham.
- § 4. Same Continued.
- § 5. English Cases.
- § 6. Irish Courts.
- § 7. The Principles Relied upon by the English Courts.
- § 8. Massachusetts Cases.
- § 9. New York Cases.
- § 10. Georgia Cases.
- § 11. Other States.
- § 12. Conflict between Federal and State Courts.
- § 13. Garnishee Proceedings.
- § 14. Evading Exemption Laws.

In view of the close business relations existing between the citizens of different States of the Union, it often becomes a question whether a citizen of one State can be enjoined from proceeding against his fellow citizen in another State, or in a State to which they are both foreigners; and in all probability these questions will arise more frequently in the future than they have in the past.

§ 1. *In Personam*. — When granted, an injunction, operates *in personam*;— it simply prevents the person restrained doing a certain act, restrains his hand; and if he do the act prohibited, the court is usually powerless, and can only punish the one violating its decree by a contempt proceeding.¹ Courts also, acting upon the conscience of the person, often compel the defendant to perform a specified act concerning property situated outside of its jurisdiction; a notable instance of which, in the early history of this country, was the settlement of the dividing line between Pennsylvania and Maryland.²

§ 2. *English Chancery Court Foreclosing Mortgage in Foreign Jurisdictions*. — Proceeding upon the theory that the Court of Chancery could enforce obedience to its decrees when the person upon whom its hand was imposed was a resident of England, that court has foreclosed mortgages in the colonial possessions of that country, and enforced their payment. Thus a mortgage given upon land in the island of Sark was

¹ 3 Pom. Esq. Jur. § 1360.

² *Penn. v. Baltimore*, 1 Ves. L. 444.

foreclosed,³ also in the West Indies,⁴ and in other colonial possessions.⁵ In these cases the court proceeded upon the theory that it was acting in *personam* and not in *rem*, that the right to redeem was a mere personal one and not an estate in the technical legal sense.⁶

§ 3. *Comments of Lord Brougham.*—The cases in the Court of Chancery, of its power to act upon matters outside of England, is well reviewed by Lord Brougham in *Portarlington v. Soulby*.⁷ There the endorsee of a bill of exchange was enjoined from proceeding in the courts of Ireland. It was such a case that if the endorsee had proceeded in the English Courts he would have been enjoined, upon application, by the Court of Chancery. The bringing of the suit was regarded as contrary to good conscience. Lord Brougham used the following language: "Soon after the restoration, and when this, like every other branch of the court's jurisdiction, was, if not in its infancy, at least far from that maturity which it attained under the illustrious series of chancellors,—the Nottinghams and Macclesfields, the parents of equity—the point received a good deal of consideration in a case which came before Lord Clarendon, and which is reported shortly in Freeman's reports, and somewhat more fully in Chancery cases, under the name of *Lowe v. Baker*.⁸ In *Lowe v. Baker* it appears that only one of several parties who had begun proceedings in the Court of Leghorn was resident within the jurisdiction there, and the court allowed the subpoena to be served on him, and that this should be good service on the rest. So far, there seems to have been very little scruple in extending the jurisdiction. Lord Clarendon refused the injunction to restrain these proceedings at Leghorn, after advising with the other judges. But the report adds: "*Led quaere*, for all the bar was of another opinion; and it is said that, when the argument against issuing it was used, that this court

had no authority to bind a foreign court, the answer was given that the injunction was not directed to the foreign court, but to the party within the jurisdiction here. A very sound answer, as it appears to me; for the same argument might apply to a court within this country, which no order of this court ever effects to bind, our orders being only pointed at the parties, to restrain them from proceeding. Accordingly this case of *Lowe v. Baker*, has not been recognized or followed in later times."

§ 4. *Same Continued.*—"Two instances are mentioned in Mr. Hargraves' collection, of the jurisdiction being recognized; and in the case of *Wharton v. May*.⁹ In *Beauchamp v. Marquis of Huntley*,¹⁰ which underwent so much discussion, part of the decree was to restrain the defendant from entering up any judgment, or carrying on any action in what is called the Court of Great Session in Scotland; meaning, of course, the Court of Session. I have directed a search to be made for precedents, in case the jurisdiction had been exercised in any instances which have not been reported; and one has been found directly in point. It is the case of *Campbell v. Houlditch*, in 1820, where Lord Eldon ordered an injunction to restrain the defendant from further proceeding in an action which he had commenced before the Court of Sessions in Scotland. From the note which his Lordship himself wrote upon the petition, requiring a further affidavit, and from his refusing the injunction to the extent prayed, it is clear that he paid particular attention to it. This precedent, therefore, is of very high authority. In truth, nothing can be more unfounded than the doubts of the jurisdiction. That is grounded, like all other jurisdictions of the court, not upon any pretension to the exercise of judicial and administrative rights abroad, but on the circumstance of the person of the party, on whom this order is made, being within the power of the court. If the court can command him to bring home goods from abroad, or to assign chattel interests, or to convey real property locally situated abroad; if, for instance, as in *Penn v. Lord*

³ *Tellor v. Carteret*, 2 Vern. 449.

⁴ *Archer v. Preston*, 1 Eq. Abr. 133; *Lord Arglasse v. Muschamp*, 1 Vern. 75, 135; *Lord Kildare v. Eustace*, 1 Vern. 75, 135, 419.

⁵ *Paget v. Eade*, E. R. 18 Eq. 118. So in Connecticut a foreclosure of a mortgage on property partly in that and in an adjoining State was enforced. *Mead v. New York etc.*, R. R. Co. 45 Conn. 199.

⁶ *Jones Mort.* § 1444.

⁷ *Myl. & K.* 104.

⁸ *Freemon*, 125; s. c. 1 Ch. Cas. 67.

⁹ *Ves.* 71; See also *Kennedy v. Earl of Cassillis*, 2 Swanst. 318; *Busby v. Munday*, 5 Madd. 297; *Harrison v. Gurney*, 2 J. & W. 568.

¹⁰ *Jac.* 546.

Baltimore,¹¹ it can decree the performance of an agreement touching the boundary of a province in North America; or, as in *Teller v. Carteret*,¹² can foreclose a mortgage in the Isle of Sark, one of the channel islands; in precisely the like manner, it can restrain the party being within the limits of its jurisdiction, from doing anything abroad, whether the thing forbidden be a conveyance, or other act, *in pais*, as the instituting, or prosecution of an action in a foreign court."

§ 5. *English Cases*.—We have already given an example wherein the defendant was restrained from further prosecuting his cause of action in a foreign jurisdiction by the English Court of Chancery. Several more are here added. Thus, a creditor who had availed himself of a decree in England to procure relief against the assets of an estate, was enjoined from proceeding with a suit against the same estate in an Irish Court.¹³ So, where the parties had proceeded as far as the decree, and then proceedings were commenced in a foreign court, a stay was granted.¹⁴ So, on a bill to redeem under a mortgage, where all the parties were within the jurisdiction of the court, it decreed an inquiry as to the amount due, and restrained proceedings for the foreclosure of the mortgage in a foreign court on terms.¹⁵ So where a British creditor had fraudulently obtained a judgment in the British West Indies against his debtor, and on execution sold his debtor's real estate there, and became the purchaser under the decree, the sale was set aside by the court of Chancery for fraud. In this case all the interested persons were British subjects¹⁶ So, a suit in England to enforce the execution of trusts of a deed for the benefit of creditors was instituted, and a receiver for real estates in England and Ireland was appointed; and then some of the trustees filed a bill in Ireland for executing the trusts of the same deed, upon petition to the Court of Chancery they were restrained.¹⁷ So, where a bond for a

gaming debt was given in England and the obligee was proceeding in the Scottish courts to enforce the payment, and although he lived there, and owned real estate in Scotland, he was restrained by the English court; (1) because the English court knew the law applicable to the bond and the Scotch court could not know it except as a matter of evidence; (2) and because the remedy was more complete in England than in Scotland.¹⁸ So an injunction was granted, in a suit to administer the trusts of a will, to restrain proceedings in the foreign court of Demerara for the recovery of real estate, where the Dutch law was in force, subjected by the testator to the trusts of the will; though the rights claimed in such foreign court were especially cognizant by the Dutch law.¹⁹ So suit on a *post obit* bond in Scotland was restrained.²⁰ But where an incumbrance was placed upon immoveable property situated in a foreign country, and the creditor instituted legal proceedings in that country for the purpose of enforcing his rights, the English court refused to restrain him from prosecuting such proceedings, even where the mortgagor was a company in the course of winding up its affairs. It is to be remarked, however, that the person applying for the injunction could appear, without any unusual expence or inconvenience, to the proceedings abroad and be fully protected in his rights.²¹

§ 6. *Irish Courts*.—So likewise the Irish courts assert and claim the same power as the English courts claim in this respect. Thus where a suit was instituted in the Irish Court of Chancery, and suit was also instituted in the English Court of Chancery concerning the same subject matter, the plaintiff in the English suit was enjoined in Ireland from further proceeding in the English court without permission of the Master of the Rolls there to be obtained upon notice to the plaintiff in the Irish suit.²²

§ 7. *The Principles Relied upon by the English Courts*.—Of course the principles relied upon by the English Court of Chancery is to do equity between man and man; and that

¹¹ 1 Ves. Sen. 444.

¹² 2 Vern. 449.

¹³ *Beauchamp v. Lord Huntley*, Jac. 546.

¹⁴ *Wedderburn v. Wedderburn*, 4 Mylne & C. 535; s. c. 2 Beav. 206; *Graham v. Maxwell*, 1 Macn. & G. 71.

¹⁵ *Beckford v. Kemble*, 1 Sim. & Ster. 7.

¹⁶ *Cranstown v. Johnston*, 3 Ves. Jr. 170; s. c. 5 Ves. Jr. 276.

¹⁷ *Harrison v. Gurney*, 2 Jac. & W. 563.

¹⁸ *Busby v. Munday*, 5 Madd. 237.

¹⁹ *Bunbury v. Bunbury*, 3 Jur. 644; affirming s. c. 1 Beav. 318.

²⁰ *Wharton v. May*, 5 Ves. 27, 71.

²¹ *Moore v. Anglo-Italian Bank*, 10 Ch. Div. 681.

²² *Parnell v. Parnell*, 7 Ir. Ch. 323.

it will not allow the subjects of its own country, within its jurisdiction, or a foreigner within its jurisdiction, to make use of the process of foreign courts to obtain an unjust advantage. As the Master of the Rolls once said; "I lay down the rule as broad as this; this Court will not permit him [the party sought to be restrained] to avail himself of the law of any other country to do, what would be gross injustice."²³ In another case²⁴ it was held that the Court of Chancery would restrain proceedings in a foreign court upon the same principles it would restrain a person proceeding in the courts of England. So in another case it was said; "There is no doubt whatever of the jurisdiction of this court acting upon the person to prevent the party proceeding in a foreign court. It is not disputed; nor can it be done; it is constantly done; not interfering with the foreign court any more than this court interferes with the court of Queen's Bench, but acting upon the person, and prohibiting them from doing that which, under the circumstances, the court thinks they ought not to do."²⁵ If the matter can be more conveniently litigated in the foreign court, however, the injunction will be refused;²⁶ but if the suit abroad seems ill calculated to answer the ends of justice, the action will be restrained on reasonable terms.²⁷ And if litigation is pending in England where complete relief can be had, and a party then institutes proceedings abroad, the Court of Chancery considers that act as a vexatious harassing of the opposite party and will restrain his proceeding in the foreign court.²⁸ In one case it was said; "If circumstances are such as would make it the duty of the court to restrain a party from instituting proceedings in this country, they will also warrant it in restraining proceedings in a foreign court. But though they will justify such a course, yet they will not, as I apprehend, make it the duty of the court so to act, if from any course it appears likely to be more conducive to substantial justice that the

foreign proceedings should be left to take their course."²⁹

§ 8. *Massachusetts Courts.*—In Massachusetts, the doctrine of the English Court of Chancery is fully recognized. In a case before the Supreme Court it was sought to restrain a creditor residing there from proceeding against a resident debtor in the courts of Pennsylvania, in garnishment, on the ground that the creditor knew when he instituted the foreign suit that insolvent proceedings were about to be instituted against the debtor at his home. The object of the creditor in suing abroad was to obtain a preference. The case received much attention, and it was said that the "authority of this [the Supreme] court as a court of chancery, upon a proper case being made, to restrain persons within its jurisdiction from prosecuting suits either in the courts of this State or of other States, or foreign countries, is clear and indisputable. In the exercise of this power, courts of equity proceed, not upon any claim of right to interfere with or control the course of proceedings in other tribunals, or to prevent them from adjudicating on the rights of parties when drawn in controversy and duly prevented for their determination. But the jurisdiction is founded on the clear authority vested in courts of equity over persons within the limits of their jurisdiction *ad amenable* to process, to restrain them from doing acts which will work wrong and injury to others, and are therefore contrary to equity and good conscience. As the decree of the court in such cases is pointed solely at the party, and does not extend to the tribunal where the suit or proceeding is pending, it is wholly immaterial that the party is prosecuting his action in the courts of a foreign State or country. If the case stated in the bill is such as to render it the duty of the court to restrain a party from instituting or carrying on proceedings in a court in this State, it is bound in like manner to enjoin him from prosecuting a suit in a foreign court."³⁰ All that is necessary to sustain the jurisdiction in such cases

²³ *Cranstown v. Johnston*, 3 Ves. 170; s. c. Ves. 278; *S. P. Jackson v. Petrie*, 10 Ves. 184.

²⁴ *Lord Partarlington v. Soulby*, 3 Mylne & K. 104.

²⁵ *Bunbury v. Bunbury*, 3 Jur. 644.

²⁶ *Jones v. Geddes*, 1 Ph. 724; *Elliot v. Lord Minto*, *Madd. & Gel.* 16; *Kennedy v. Cassillie*, 8 Swanst. 813.

²⁷ *Carron Iron Co. v. Maclaren*, 5 H. L. Cas. 416, 478.

²⁸ *Id.*; See *Harrison v. Gurney*, 2 Jac. & W. 563; and *Beckford v. Kemble*, 1 Sim. & S. 7.

²⁹ *Carron Iron Co. v. Maclaren*, 5 H. L. Cas. 416.

³⁰ 2 Story on Eq. Secs. 899, 890; *Mackintosh v. Ogilvie*, 3 Swanst. 365 n. 4 T. R. 197 n.; *Carron Iron Co. v. Maclaren*, 5 H. L. Cas. 416, 445; *Maclaren v. Stainton*, 1b Beav. 286; *Massie v. Watts*, 6 Cranch. 158; *Briggs v. French*, 1 Sumn. 504; *Dobson v. Pearce*, 4 Duer. 142; s. c. 2 Kern. 156.

is, that the plaintiff should show a clear equity, and that the defendants should be subject to the authority and within the reach of the process of the court."³¹

§ 9. *New York Courts.*—The courts of New York recognize the power of a court of equity to restrain persons within their jurisdiction from proceeding, abroad, to enforce their claims, but require an extreme case to be presented before they will exercise it; and they also state that a violation of such an order would amount to a contempt.³² The general rule is that the courts will not interfere.³³ But where the defendant was proceeding abroad before an American consul, who had no jurisdiction of the action, prosecuting a case, the court stayed the plaintiff's hand.³⁴ So to prevent injustice and oppression the courts of that State grant relief. Thus where the defendant in an action brought in New York by his wife for a limited divorce, commenced an action in Connecticut against her for a separation and a decree relieving him from the obligation of supporting her, intending to bring it to trial in that State before his wife could obtain a trial in New York; and all the wife's witnesses resided in New Jersey, and she was peculiarly unable to defend the action brought by her husband in Connecticut, an injunction was granted at her request to stay the husband's further prosecuting the Connecticut action.³⁵ So where the plaintiffs had been burned out in Chicago's great fire, had thereby become indebted one million dollars, and had settled with their creditors at twenty five cents on the dollar; and afterwards, one of their creditors brought an action in Illinois, though resident in New York, as were also the debtors, alleging that the debtor plaintiffs had settled with some of their cred-

itors at more than twenty-five cents on the dollar, and it appeared that the suit was commenced for blackmailing purposes and to ruin the credit of the plaintiffs, a restraining order was granted to prevent the defendants prosecuting their Illinois suit.³⁶ So where New York parties proceeded against parties of the same State in Vermont, and it appeared that the suit would greatly injure the parties proceeded against, and that they could not in Vermont fully set up their defence, the parties plaintiff in Vermont were restrained in their foreign proceedings.³⁷

§ 10. *Georgia Cases.*—In Georgia the right to enjoin persons from proceeding in foreign courts is recognized. Thus where a creditor sued his debtor both in that State and in New York on the same claim and first obtained judgment in Georgia which was paid off, and fraudulently led his debtor to believe that the New York case would not be pressed to judgment, but it was in fact so done, the Georgia court restrained the creditor from further proceeding on the New York judgment. Both parties were residents of Georgia.³⁸ So where attorneys of that State were enjoined from proceeding in the Federal Court, and afterwards commenced a suit therein, they were punished for contempt of the State Court. They brought the suit on behalf of their foreign creditors.³⁹

§ 11. *Other States.*—In Vermont while the general powers of the courts in this respect is fully acknowledged, yet it is said that it will not be exercised unless there exists some peculiarly equitable ground for so doing, and the mere preference of the plaintiff to have the matter determined in his own State courts is not sufficient; and if the court cannot enforce its decree, it will refuse to intercede. Such a case arises where the defendant resides in the State where he has commenced proceedings, although service has been had upon him while transiently in Vermont, and he has no property within the State for a writ of sequestration to operate upon in case a decree re-

³¹ Dehan v. Foster, 4 Allen 545. The case afterwards came up and the defendants were allowed their costs in the foreign court up to the time of filing the bill for injunction in Massachusetts, but not after that time. s. c. Dehan v. Foster, 7 Allen, 57. For additional English cases, see *In re Boyse*, L. R. 15 Ch. D. 91; *Hope v. Carnegie*, L. R. 1 Ch. 320; *In re Chapman*, L. R. 15 Eq. 75; *Ostell v. LePage*, 2 De G. M. & G. 892.

³² *Erie R. W. Co. v. Ramsey*, 45 N. Y. 637, 648.

³³ *Williams v. Ayroult*, 81 Barb. 384; *Mead v. Meritt*, 2 Paige Ch. 402; *Burgess v. Smith*, 2 Barb. Ch. 276; *Bicknell v. Field*, 8 Paige, 140.

³⁴ *Dainese v. Allen*, 3 Abb. Pr. (N. S.) 212.

Kittle v. Kittle, 8 Daly, 72.

³⁵ *Claffin & Co v. Hamlin*, 62 How. Pr. 284.

³⁶ *Vail v. Knapp*, 49 Barb. 299. See *Hays v. Wood*, 4 Johns. Ch. 123.

³⁷ *Engel v. Scheuerman*, 40 Geo. 206; s. c. 2 Amer. Rep. 573; See *Lightfoot v. Planter's Banking Co.*, 55 Geo. 136.

³⁸ *Hines & Hobbs v. Rawson*, 40 Geo. 356; s. c., 2 Amer. Rep. 581.

straining him be entered, and he refuse to obey it.⁴⁰ In Illinois where it was sought to restrain several parties from proceeding in Colorado, but all of them were not before the court, and all were necessary parties, relief was refused; and it was added that after suits were commenced in one of the States their prosecution would not be controlled by the courts of another State.⁴¹ In this, however, the court, so far as the last statement is concerned, is clearly in error, if it is thereby meant that the courts of another State have no power to control the parties when within their jurisdiction so far as to forbid them prosecuting their cause of action abroad. But where the plaintiff and defendant were partners, and the defendant, by proceedings in the courts of another State obtained a dissolution of the partnership, in which proceedings it was stipulated that the plaintiff might carry on the business under the direction of a receiver, with the right to all products manufactured in business, the court restrained the defendants from unlawfully interfering by replevin suits with the sale of such manufactured products.⁴² So in New Hampshire the court said, speaking of the power to grant relief in a proper case, "we have no hesitation in holding that the court has jurisdiction;"⁴³ but if the judgment taken in another State is merely erroneous, and relief can be obtained by appeal; if the case is such that the court, where applied to, would not enjoin its enforcement if a domestic judgment, relief will be denied.⁴⁴ So in Michigan relief was refused generally, on the ground that if courts of one State should see fit to enjoin proceedings in another, that other might retaliate in like by enjoining proceedings in the first, and thus give rise to an endless conflict of jurisdiction.⁴⁵ But the reasoning loses its force when we recollect that such proceedings only proceed *in perso-*

nam and do not in any way touch the proceedings of the foreign court.

§ 12. *Conflict between Federal and State Courts.*—It is very clear that a State court cannot in any way interfere with proceedings in a Federal court,⁴⁶ but will let the party seeking relief apply in that court.⁴⁷ Nor will the Federal courts interfere with proceedings in a State court.⁴⁸ But there is no reason why the State courts, acting *in personam*, may not restrain a party from proceeding in a Federal court; and the same is true of the Federal courts.⁴⁹ The fact that the State courts have decided that a certain class of securities are void is not sufficient to restrain a creditor holding one of those not passed upon, of the same series, from resorting to the Federal courts to enforce it,⁵⁰ where they are held valid.

§ 13. *Garnishee Proceedings.*—As we have already seen, the Massachusetts' court enjoined one of its own citizens from proceeding in a foreign court to garnishee a debt owed to a resident of Massachusetts.⁵¹ The object of the Massachusetts' creditor was to obtain a preference over other creditors and thus avoid the effect of contemplated insolvency proceedings. This case is strongly supported by the opinion of Lord Hardwicke in *Mackintosh v. Ogilvie*.⁵² In that case the plaintiff was an assignee in bankruptcy; the defendant, a creditor, who, before the bankruptcy, went into Scotland and made "arrestments" of debt due to the bankrupt from persons resident there. Lord Hardwicke, in giving judgment, said it was "like a foreign attachment, by which this court will not suffer a creditor to gain a priority." An injunction was granted upon the ground that it was against equity for a creditor to evade the laws of his own country, and thereby obtain a preference to the injury of the other creditors.

⁴⁰ *Bank v. Portland, etc. R. R. Co.* 28 Vt. 470; See *Vermont etc. R. R. Co. v. Vermont Cent. R. R. Co.*, 46 Vt. 792.

⁴¹ *Harris v. Pullman*, 84 Ill. 20; s. c. 25 Amer. Rep. 416.

⁴² *Pindell v. Quinn*, 7 Ill. App. 656; *Great Falls etc. v. Worster*, 28 N. H. 470.

⁴³ *Metcalf v. Gilmore*, 59 N. H. 417; s. c. 47 Amer. Rep. 217.

⁴⁴ *Id.*

⁴⁵ *Carroll v. Farmer's & Merchant's Bank*, Harr. (Mich.) 197. This reasoning has been elsewhere used. See *Mead v. Merritt*, 2 Paige Ch. 402.

⁴⁶ *McKinn v. Voorhees*, 7 Cranch. 279; *Riggs v. Johnson Co.*, 6 Wall. 166; *U. S. v. Keokuk*, 6 Wall. 514; *Town of Thompson v. Norris*, 68 How. Pr. 418; s. c. 11 Abb. N. Cas. 163.

⁴⁷ *Coster v. Griswold*, 4 Ed. Ch. 364; *Schuyler v. Pellissier*, 3 Ed. Ch. 203.

⁴⁸ *Rogers v. Cincinnati*, 5 McLean 387.

⁴⁹ *Hines & Hobbs v. Rawson*, 40 Geo. 356; s. c. 2 Amer. Rep. 581.

⁵⁰ *Town of Venice v. Woodruff*, 62 N. Y. 462.

⁵¹ *Dehon v. Foster*, 4 Allen 545.

⁵² 4 T. R. 198 n, s. c. 3 Swanst. 365 n.

§ 14. *Evading Exemption Laws.*—It is no unusual thing for a creditor or inhabitant of a State, when he cannot collect his claim off his debtor who is a resident of the same State, because he takes refuge under the exemption laws of that State, to send his claim into another State and garnishee a debt due to his debtor. This is particularly the case where the debtor is working for a corporation having officers in several States, as a railroad corporation. Unless protected by an injunction, the debtor is at the mercy of his creditor.⁵³ This is particularly the case in Indiana, where great trunk lines run across the State, extending into States on both sides of it. To such an extent was it practiced that the Legislature made it a fineable offense to go into a foreign jurisdiction to garnishee the debtor's wages, or to sell or transfer it with that object in view.⁵⁴ But where a claim against a railroad employee was transferred to a citizen of Kentucky, and the wages of the employer were garnished in that State, and thereby he was deprived of his wages, exempt from attachment in Indiana, it was held that the debtor could not successfully sue the original holder of the claim because of his having made the assignment contrary to the statute, and thus hold him liable in damages for having deprived the debtor of his right of exemption.⁵⁵ But the Courts of Ohio in such a case, before the garnishee proceedings are finally decided (not afterward⁵⁶) will restrain the creditor, if within its jurisdiction, from proceeding in the foreign courts, and thus preserve for the debtor his property exempt by law in that State from seizure to pay the debt.⁵⁷ Yet the Supreme Court of Kansas has refused an injunction in such a case, and will not restrain the action solely on the ground, that the property attached is exempt;⁵⁸ while a judge of one of the Superior Courts of that State has evidently been of a different opinion and sustained

the application for an injunction.⁵⁹ In Maryland a creditor sent his claim to West Virginia and garnished his debtor's wages, which were exempt from garnishment in Maryland, where the debtor resided. The lower court refused an injunction to restrain the creditor's farther prosecuting his claim in West Virginia; but on appeal the decision was reversed and the power of the court to grant relief was held to be ample, and such a case made as called for its immediate exercise.⁶⁰ W. W. THORNTON.

Crawfordsville, Ind.

⁵³ *Wilkinson v. Colter*, 2 Kan. L. J. 202; See 21 Cent. L. J. 521. I have only a notice of this case. See *Missouri Pacific, etc. Co. v. Maltby*, 28 Cent. L. J. 154.

⁶⁰ *Keyser v. Rice*, 47 Md. 203; s. c. 28 Amer. Rep. 448.

ASSIGNMENT—INSOLVENCY—EQUITY— INJUNCTION—COMITY.

CUNNINGHAM v. BUTLER.*

Supreme Judicial Court of Massachusetts, May 11, 1886.

Assignment—Insolvency—Injunction to Restrain Creditor from Securing Assets in Foreign State.—This court has jurisdiction in equity to enjoin a citizen of this Commonwealth from prosecuting an attachment of personal property in another State, belonging to an insolvent debtor of this Commonwealth, which would prevent the same from coming to the hands of the assignee in insolvency. The fact that the action was commenced before the institution of proceedings in insolvency makes no difference, providing it was done with a knowledge that such proceedings were about to be instituted, and with a view of obtaining a preference.

Bill in equity by the assignee in insolvency of Daniel C. Bird of Brockton for an injunction to restrain the defendants from prosecuting a suit against Bird in New York. The case was reserved by a single justice upon agreed facts for the consideration of the full court. The facts appear in the opinion.

E. M. Johnson and M. R. Thomas, for plaintiffs. M. F. Dickinson, Jr., and H. R. Bailey, for defendants.

DEVENS, J., delivered the opinion of the court.

The case, as disclosed by the facts agreed and by the additional evidence submitted, is substantially as follows: Daniel C. Bird, a citizen and resident of Massachusetts, was in embarrassed circumstances and indebted to the defendants, also citizens and residents of Massachusetts. After

⁵³ The Ohio statute of Exemption of monthly wages is broad enough to cover the wages of a non-resident when sought to be garnished in that State.

⁵⁴ R. S. 1881 Sec. 2163.

⁵⁵ *Uppinghouse v. Mundel*, 2 N. E. Rep. 719, 108 Ind. 238.

⁵⁶ *Baltimore etc. R. R. Co. v. May*, 25 Ohio St. 347; See *Morgan v. Neville*, 74 Pa. St. 53.

⁵⁷ *Snook v. Snetzer*, 25 Ohio St. 516. See also answer to query, 6 Cent. L. J. 258.

⁵⁸ *Cole v. Young*, 24 Kan. 485.

*S. C., 5 Eastern Reporter, 725.

the suspension of payment by Bird, the defendants were informed by him, on the night of March 4 and 5, 1885, that a balance was due him from Aaron Claflin & Co., of New York. On March sixth, the defendants executed an assignment to Fayerweather, a resident of New York, of their claims against Bird, which assignment was made without consideration and without previous communication. On March 11 and 25, 1885, two actions were commenced in New York, in the name Fayerweather, on these claims against Bird as defendant, Claflin & Co. being summoned as garnishees. Between March thirteenth and May twentieth, there was various meeting of Bird's creditors, and a proposition on his part for a composition under the statute was filed by Bird, returnable May fourth. Stat of 1884, chap. 236. On May 20, 1885, this proposal was withdrawn; regular proceedings in insolvency were continued therein and, on June 1, 1885, the plaintiffs were duly appointed assignees of Bird in insolvency.

No judgment had at this time, nor had it at the commencement of this proceeding—or, so far as appears, has it since—been obtained in New York on the claims sued by Fayerweather. Without stating in detail the evidence, it is fairly proved that the defendants, with full knowledge that Bird was insolvent, anticipating that there might be proceedings in insolvency in this State, and intending to secure to themselves, to the exclusion of other creditors, of the avails of the debt owing to Bird by Claflin & Co., made the transfer of their claims to Fayerweather, and that the suits in New York, now carried on his name are subject to their control and conducted for their benefit. The attachment made in New York, by process of garnishment, are to be treated, so far as the defendants are concerned, as made by them.

In *Dehon v. Foster*, 4 Allen, 545, it was held that this court has jurisdiction in equity upon a proper case made to enjoin a citizen of this Commonwealth from availing himself of an attachment of personal property in another State, in an action against a debtor, who is insolvent under the laws of the Commonwealth, and thus preventing the same from coming to the hands of the assignee; and it is no objection that the action was commenced before the institution of proceedings in insolvency, if this was done with a knowledge that such proceedings were about to be instituted and with a view to obtain a preference. In the same case, 7 Allen, 57, it was held that the equitable right of the trustee was paramount, unless some valid claim or lien existed on the funds which, under the laws of the foreign State, would divert them from the assignees, if the defendants were compelled to abandon their attachment of them in the courts of that State.

If it be held that the facts in the case at bar as we find them to be, the argument of the defendants is principally directed to showing that the case of *Dehon v. Foster* was erroneously decided,

and that it should now be reconsidered and overruled. They contend that the provision of the Constitution of the United States, article 4 §§ 1 and 2, which enacts that "full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State," was not therein sufficiently considered, and that, as the attachment proceedings in New York, in the case at bar, are judicial proceedings by a court of competent jurisdiction, the plaintiffs are not entitled to relief, as the courts in that State are entitled to decide to whom the property found therein belongs.

They especially rely upon the cases of *Green v. Van Buskirk*, 5 Wall. 308; 7 id. 140; *Warner v. Jaffray*, 96 N. Y. 248; and *Lawrence v. Batcheller*, 131 Mass. 506, all of which have been decided since *Dehon v. Foster*. The case of *Green v. Van Buskirk* may be briefly stated as follows: A., B. and C. were residents and citizens of New York. A., being indebted to both B. and C., mortgaged certain personal chattels then in Illinois to B. Before the mortgage could be recorded in Illinois, or the property delivered there, one of which acts is essential by the laws of Illinois to the validity of the mortgage, as against third parties, although not by the laws of New York, C. took an attachment out from one of the courts of Illinois, a proceeding *in rem*, and under the laws of that State, in due form levied on and sold the property. B. did not make himself a party to this suit in attachment, although he had notice of it, and by the law of Illinois, a right to make defense to it, but after termination, brought suit in New York against C. for taking and converting the chattels; C. pleaded in bar the proceedings in attachment and the judgment obtained in Illinois. It was held in the Supreme Court of the United States, reversing the decision of the Supreme Court of New York, that in order that "the full faith and credit" required by the constitution should be given to the judicial proceedings in the State of Illinois, the judgment of the court there, that the personal property there situated, was subject to this process of attachment, and that the proceedings in attachment took precedence of the prior unrecorded mortgage from A. was binding elsewhere; that is, as the effect of the attachment, judgment, levy and sale was to protect B. if sued in Illinois for the property thus acquired, it would protect him when sued in the court of another State for the same transaction, if he justified in the same manner; that the fiction of law, that the domicile of the owner draws to it his personal estate, yields, whenever, for the purposes of justice, the actual situs of property should be examined; that a title acquired under the attachment laws of a State and held valid there would be held valid in any other State, even if all parties interested in the controversy were citizens of such other State; and thus as an attachment of personal property in Illinois would take precedence of an unrecorded mortgage, exe-

outed in another State, where record was necessary, it would do so, though the owner of the chattels, the attaching creditor and the mortgage creditor were all residents of such other State. But the case of *Dehon v. Foster* recognizes the law to be as held by the Supreme Court of the United States in *Green v. Van Buskirk*. "The case," says Chief Judge Bigelow, "proceeds on the ground that the defendants, if allowed to proceed with their action, will perfect the lien, which is now inchoate under their attachment, and will thereby establish a valid title to the property of the insolvent debtors under the laws of Pennsylvania." Holding this to be the law, it is decided that the act of the defendants, in causing the property of the insolvent debtors to be attached in a foreign jurisdiction, tends directly to defeat the operation of the insolvent law in its most essential features, to prevent a portion of the property of the debtors from coming to the assignees, to be equally distributed among their creditors, and to obtain a preference for themselves; that the defendants, being citizens of this State, are bound by its laws and cannot be permitted to do any acts to evade or counteract their operations the effect of which is to deprive other citizens of rights which those laws were intended to secure.

The case of *Lawrence v. Batcheller*, *ubi supra*, clearly recognizes the ground above stated as that upon which *Dehon v. Foster* proceeds, and in no way controverts it. That was a case in which the attaching creditor, who was a resident in this State, had proceeded to judgment in a foreign State, after proceedings in insolvency in this, and had actually collected the amount from funds in the hands of a trustee of the debtor, by virtue of attachment. He was here sued for the amount he had thus collected by the assignee in insolvency. It was there said, referring to the case of *Dehon v. Foster*, "because it was beyond the power of the court to call in question the validity of this lien, acquired under the laws of another State, it proceeded to enjoin the defendants, over whom the court had jurisdiction, from enforcing in another State their legal rights." It was further held that the defendant, having been permitted without interference to proceed to judgment, an action at law for the value of the property obtained would not lie against him by the assignee, as there were many rights in equity which courts of law did not recognize at all, for which reason defendants in equity were often enjoined from prosecuting actions at law.

The case of *Warner v. Jaffray*, 96 N. Y. 248, was as follows: A general assignment for the benefit of the creditors had been made, under the general assignment of New York—Laws of 1877—on March 1, 1881. It was not recorded in Pennsylvania until March 18, where it could only become operative by record, so as to affect any *bona fide* purchaser, creditor, etc. Previous to the eighteenth, the defendant had brought suit in Pennsylvania and attached property there. He

was himself a citizen of New York, as was the debtor and his assignee. It was held in a proceeding brought against the creditor in New York, that the lien he had acquired in Pennsylvania was saved from the operation of the assignment; that he had the same right to enforce payment of his claim out of the debtors property that a resident creditor in Pennsylvania had, and that he would not, by any order, be restrained from pursuing it. But in *Warner v. Jaffray*, the assignment was of an entirely different nature from that made in proceedings in insolvency such as is found in the case at bar. The property of the debtor was not taken for distribution by the law, but by his own voluntary act. The assignment did not operate on the claim of the debtor, or place them under any obligation to join into it. They were entirely free to act, could refuse to have any thing to do with it, could retain their claims and enforce them afterward against the debtor, or immediately against any property not covered by the assignment. The assignee was a trustee only to the extent that the creditors chose to accept him as such. As he violated no rights of other creditors, in pursuing any property not covered by the assignment, and was bound in no way thereby, he could not properly have been restrained from seeking his remedy wherever there was attachable property which the assignment did not reach.

The cases relied on by the defendants cannot, therefore, be deemed to diminish the authority of *Dehon v. Foster*. Nor can we see that there is injustice in holding that in a State, which has enacted a system for an equal distribution of the assets of an insolvent among his creditors, residents of that State, who are bound by the decree establishing the insolvency, should be restrained from seeking, in other States, assets which otherwise might reasonably be expected to come to his assignee.

While the claims of the residents of another State to property there situate might not be set aside or compelled to yield in such State to those of such assignee, yet it could properly be held that, where the pursuing creditors were not citizens of the State whose process was invoked, the courts thereof would not sustain their claim in preference to that of an assignee, obtaining title under the laws of another State, certainly if such title was previously acquired. *Burlock v. Taylor*, 16 Pick. 335; *Bentley v. Whittemore*, 4 C. E. Green, 462, *Sanderson v. Bradford*, 10 N. H. 265.

It has been decided in Pennsylvania that while claims of a receiver of a corporation, appointed by the courts of another State to property there situate, could not be recognized when they came in conflict with those of residents of Pennsylvania; yet that, where a receiver of a corporation had been appointed by a court of competent jurisdiction in another State, a creditor who resides in that State, and is bound by the decree of the court appointing this receiver, cannot, in an attachment execution, recover assets of the corpor-

ation which the receiver claims. *Bagby v. Atlantic, M. & O. R. R. Co.*, 86 Penn. St. 291.

In the case at bar it is true that the defendants had made their attachment, through Fayerweather in New York, before there had been an assignment in insolvency in this State actually executed; but this was done with the full knowledge on their part that the debtor Bird was embarrassed and had suspended payment, and necessarily with intent to avoid the effect of the agreement, so far as the property attached was concerned. As residents of this State, they cannot be allowed to this extent to defeat the operation of the assignment, and thus to obtain a preference over other creditors resident here. They are within the limits of the jurisdiction of this court and amenable to its process, and should be enjoined from prosecuting a suit the effect of which, if successful, will be to work a wrong and injury to other residents of the State.

Injunction accordingly.

NOTE—The general power of courts of equity to enjoin parties, resident within their jurisdictions, from instituting suits in foreign courts or further prosecuting suits already commenced, while formerly doubted, is now firmly established in England.¹

The weight of authority in America seems to favor the English doctrine, particularly as applied to proceedings in the courts of sister States, though the decisions of the various courts are not uniform.²

"In exercising this authority, courts proceed, not upon any claim of right to control or stay proceedings in the courts of another State or country, but upon the ground that the person upon whom the restraining order is made resides within the jurisdiction, and is in the power of the court issuing it. * * * They do not pretend to direct or control the foreign court, but, without regard to the situation of the subject matter of dispute, they consider the equities between the parties, and decree *in personam*, according to those equities, and enforce obedience to their decrees *in personam*."³

In *Massie v. Watts*, it was said by Marshall, C. J., that "In a case of fraud, or trust, or of contract, the jurisdiction of a court of equity is sustainable, wherever the person be found, although lands not within the jurisdiction of that court may be affected by the decree."⁴

¹ *McLaren v. Stainton*, 16 Beav. 379; *Cranstown v. Johnson*, 3 Vesey Jr. 183; *Mackintosh v. Ogilvie*, 4 T. R. 193; *Bushley v. Munday*, 5 Madd. R. 297; *Bunbury v. Bunbury*, 3 Jur. 648; *Beckford v. Kemble*, 1 Sim. & Stu. 7; *Harrison v. Gurney*, 2 Jac. & W. 568; *Bowler v. Orr*, 1 Y. & C. 464; *Portarlington v. Soulbey*, 3 Myl. & K. 104.

² *Snook v. Snetzer*, 35 Ohio St. 516; *Engel v. Scheuerman*, 40 Ga. 206; *Vail v. Knapp*, 49 Barb. 299; *Field v. Holbrook*, 3 Abb. Pr. R. 377; *Thompson v. Norris*, 11 Abb. (N. C.) 161; a. c., 68 How. Pr. R. 424; *Dehon v. Foster*, 4 Allen, 544; Id., 7 Allen, 67; *Bank v. E. & B. Rd. Co.*, 28 Vt. 470; *V. & C. Rd. Co. v. V. C. Rd. Co.*, 46 Vt. 792; *Pearce v. Olney*, 20 Conn. 543; *Hays v. Ward*, 4 Johns. Ch. 123; *Keyser v. Rice*, 47 Md. 203.

³ *Foster v. Vassall*, 3 Atkyns R. 589; *Toller v. Carteret*, 3 Vern. 494; *Snook v. Snetzer*, 35 Ohio St. 516; *Penn v. Ld. Baltimore*, 1 Ves. Sr. 444; *Portarlington v. Soulbey*, 2 M. & R. 104.

⁴ *Cranch*, 148; *Great Falls Mfg. Co. v. Worster*, 28 N. H. 462.

Probably few courts would refuse to enjoin a threatened suit in a foreign court, or the prosecution of a suit already begun in a foreign court in a case where the domestic court had previously acquired jurisdiction of the same cause, and was in a position to do justice between the parties, and the parties were amenable to its process.⁵

Where the foreign suit has been commenced prior to the seeking of the injunction or prior to the commencement of the action in aid of which the injunction is sought, the courts are not agreed as to whether the injunction should issue. It is fairly well settled, that the federal courts will not enjoin proceedings in a State court, whose jurisdiction has first attached, except in aid of bankruptcy proceedings, and that State courts will not enjoin parties from prosecuting a suit already instituted in a federal court.⁶

In *Peck v. Jenness* the court says: "It is a doctrine of law too long established to require a citation of authorities, that where a court has jurisdiction, it has a right to decide every question which occurs in the cause, and, whether the decision be correct or otherwise, its judgment till reversed is regarded as binding in every other court; and that where a jurisdiction of a court and the right of a plaintiff to prosecute his suit in it have once attached, that right cannot be arrested or taken away, by proceedings in another court. These rules have their foundation, not merely in comity, but on necessity. For if one may enjoin, the other may retort by injunction and the parties be without remedy; being liable to a process for contempt in one if they dare to proceed in the other. * * * The fact, therefore, that an injunction issues only to the parties before the court and not to the court, is no evasion of the difficulties that are the necessary result of an attempt to exercise that power over a party who is a litigant in another and independent forum."⁷

Some State courts apply the same rule to suits in the courts of sister States;⁸ while others entertain the contrary doctrine.⁹

Those courts which grant injunctions in cases where the jurisdiction of the foreign court has first attached, do so only when injustice is threatened,¹⁰ or the exemption laws of the domestic jurisdiction are sought to be evaded,¹¹ or the domestic court can do more complete justice between the parties,¹² or other special circumstances demand it;¹³ and where the foreign court, within whose jurisdiction the property in controversy is situated, is in a position to settle the equities between the parties, the injunction should be refused.¹⁴

⁵ *French v. Hay*, 22 Wal. 350; *Fisk v. N. P. Ry. Co.*, 10 Blatchf. 518; *High on Inj.*, § 110.

⁶ *Orton v. Smith*, 18 How. (U. S.) 263; *Diggs v. Walcott*, 4 Cranch, 179; *Campbell's Case*, 1 Abb. (U. S.) 183; *Rogers v. Cincinnati*, 5 McLean, 337; *Bank v. Skelton*, 2 Blatchf. 14; *Carroll v. Bank, Harring.* (Mich.) 197; *Schuyler v. Pellesier*, 3 Edw. Ch. 191; *Carter v. Griswold*, 4 Id. 364; *Chaffin v. St. Louis*, 4 Dill. 19; *Moore v. Holliday*, 4 Dill. 52.

⁷ 77 How. (U. S.) 612.

⁸ *Carroll v. Bank, Harring.* (Mich.) 197; *Harris v. Pullman*, 84 Ill. 20; *Mead v. Merritt*, 3 Paige, 403; *Bicknell v. Field*, 8 Id. 440; *Williams v. Aysault*, 31 Barb. 364.

⁹ *Snook v. Snetzer*, 35 Ohio St. 516; *Engel v. Scheuerman*, 40 Ga. 206; *Dehon v. Foster*, 4 Allen, 544; *Pearce v. Olney*, 20 Conn. 543.

¹⁰ *Engel v. Scheuerman*, 40 Ga. 206; *Pearce v. Olney*, 20 Conn. 543; *Cranston v. Johnson*, 3 Vesey Jr. 183.

¹¹ *Snook v. Snetzer*, *supra*; *Keyser v. Rice*, 47 Md. 203.

¹² *Bushley v. Munday*, 5 Madd. R. 297.

¹³ *Vail v. Knapp*, 49 Barb. 299; *Thompson v. Morris*, 11 Abb. (N. C.) 163.

¹⁴ *Harris v. Pullman*, 84 Ill. 20; *Kennedy v. Cassells*, 3 Swainston, 318; *Jones v. Gedder*, 1 Ph. 724; *McLaren v.*

That the judgment of the foreign court will probably be different from that which a domestic court might be expected to render is not, of itself, ground for injunction.¹⁵

Again, the injunction should not be allowed unless the parties are within the court's jurisdiction, or, at least, have property within such jurisdiction subject to sequestration.¹⁶

In the cases examined, where injunctions have been allowed to restrain attachment proceedings in foreign courts, instituted in contemplation of assignments for the benefit of creditors, the injunctions have issued to prevent creditors from obtaining unjust preferences;¹⁷ whether a party to a foreign attachment will be enjoined when the assignment contains preferences valid by the laws of the State where made, *quære*.

CHAS. A. ROBBINS,

Lincoln, Neb.

Stainton, 35 Eng. L. & Eq. 384; Moor v. Anglo-Italian Bank, 2 Oh. D. 681.

¹⁵ Bank v. R. & B. Bd. Co., 28 Vt. 470.

¹⁶ Bank v. R. & B. Bd. Co., *supra*.

¹⁷ Dehon v. Foster, 4 Allen, 544; Mackintosh v. Ogilvie, 4 T. R. 193.

CHARITIES—CHARITABLE USES—TRUST—WHAT CONSTITUTES—LEGACY—WHEN VOID FOR UNCERTAINTY—PRECATORY WORDS.

MAUGHT V. GETZENDANNER.*

Court of Appeals, Maryland, June 24, 1886.

Charities and Charitable Uses—Trust Void for Uncertainty.—A clause in a will bequeathing property to a person, "to use and appropriate for religious and charitable purposes and objects in such sums and in such manners as will, in his judgment, best promote the cause of Christ," creates a trust, but is void for uncertainty.

Appeal from circuit court, Frederick county. In equity.

C. V. S. Levy and M. G. Urner, for appellants; Wm. T. Maulsby, Jr., and J. E. R. Wood, for appellees.

MILLER, J., delivered the opinion of the court:

The decree *pro forma*, from which this appeal is taken, annuls the residuary clause in the will of George Richards. In this will, the testator, after giving a large number of pecuniary legacies to his relatives and next of kin, gives the sum of \$10 to the Reverend H. G. Bowers, and, immediately following this last legacy, is the clause in question, which reads as follows:

"I give and bequeath and devise unto the Reverend H. G. Bowers, of Jefferson, Maryland, all the rest and residue of my estate, and desire him to use and appropriate the same for such religious and charitable purposes and objects, and in such sums and in such manner, as will, in his judgment, best promote the cause of Christ."

The controversy is between the heirs at law and next of kin of the testator on the one side, and the Reverend Mr. Bowers on the other. The former contend that a trust was created by this clause of the will, and that such a trust is void, and therefore the property descends to them; while the latter insists that no trust is created, and that such a trust is void, and therefore the property descends to them; while the latter insists that no trust is created, and that he takes the property in his own right, or, if there be a trust, that it is valid and effective.

If there had been no decisions of the courts upon the subject, and this possession could be carried out in accordance with the intention of the testator, there would be very little difficulty in the case. He did not mean that this property should go to his heirs at law and next of kin; for, if he did, he would not have inserted this clause in his will. Neither did he intend that Mr. Bowers, a stranger to him in blood, should take the property for his own individual benefit. He gave him a legacy of \$10, and this is manifestly all the personal benefit he intended to bestow upon him. His intention undoubtedly was that this residue of his estate should be devoted to the "cause of Christ," and, in order to carry this into effect, he selected his friend, the Reverend Mr. Bowers, as his disbursing agent or trustee. He gives to this agent, the discretion to select the religious and charitable purposes upon which his bounty was to be bestowed, and the amount to be allotted to each, but gives him no discretion so to distribute it or not, as he pleased. He says to him, in effect: "I give you this property, not for your own benefit, but to use and appropriate it to the cause of Christ, leaving it to you to select what religious and charitable purposes and objects shall be the recipients of my bounty, as well as the sums which each shall receive, and you must make such selection and distribution among the objects selected as will, in your judgment, best promote that cause." This, as it appears to us, was the plain intention of the testator, and is the plain meaning of this clause. It is true, he does not use the term "in trust," but the language, "and I desire him to use and appropriate" the same for the purpose and in the manner specified, is just as effective, so far as his intention is concerned, to create a trust as if the proper technical term had been employed.

But by the decisions of the courts it has become the settled law of this State that such a trust is void, because it is too vague and indefinite to be carried into effect. The uniform course of our decisions is that a trust, to be upheld, must be of such a nature that the *cestuis que trust* are defined, and capable of enforcing its execution by proceedings in a court of chancery. This doctrine has been laid down in a series of adjudications, from Dashiell v. Attorney General, in 5 Harr. & J. 320, to Isaac v. Emory, in 64 Md. 333. The most prominent of the intermediate cases are Wil-

*S. C., 5 Atlantic Reporter, 471.

derman v. Mayor, etc. of Baltimore, 8 Md. 555; Needles v. Martin, 33 Md. 609; and Church, etc. v. Smith, 56 Md. 397. It requires no argument to show that, the trust in this will falls within the rule established by these decisions, and must therefore be held to be void. The consequence of this is that, if we are right in holding this to be a trust, the property goes to the heirs at law and next of kin.

But it has been strenuously argued that, where precatory words are used, the very fact that the objects or parties to be benefitted, or to be selected for that purpose, are uncertain, is conclusive that no trust is created, and in such case the donee takes the property absolutely. In other words, the contention is that no trust arises by force of any precatory words unless there is certainty in the object, as well as in the subject. This doctrine, no doubt, receives support from statements contained in some of the text-books, and is apparently sustained by some of the decisions; but we do not find that the authorities have laid it down as an inflexible rule applicable to all cases, and wholly irrespective of the intention of the testator or donor to create a trust. Lord Eldon, in the noted case of Morice v. Bishop of Durham, 10 Ves. 522, went no further than to say:

"Wherever the subject to be administered as trust property, and the objects for whose benefit it is to be administered, are to be found in a will not expressly creating a trust, the indefinite nature and *quantum* of the subject, and the indefinite nature of the objects, are always used by the courts as evidence that the mind of the testator was not to create a trust; and the difficulty that would be imposed upon the court to say what should be so applied, or to what objects, has been the foundation of the argument that no trust was intended."

On the other hand, Lord Chancellor Truro, in the case of Briggs v. Penny, 3 Macn. & G. 546, (decided in 1851,) deduces the principles from the then state of the authorities thus:

"I conceive the rule of construction to be that words accompanying a gift or bequest, expressive of confidence, or belief or desire or hope that a particular application will be made of such bequest, will be deemed to import a trust upon these conditions: First, that they are so used as to exclude all option or discretion in the party who is to act, as to his acting according to them or not; secondly, the subject must be certain; and, thirdly, the objects expressed must not be too vague or indefinite to be enforced."

And then, in reference to this third condition, he says:

"It is most important to observe that vagueness in the object will unquestionably furnish reason for holding that no trust was intended; yet this may be counterbalanced by other considerations which show that a trust was intended, while at the same time such trust is not sufficiently certain and definite to be valid and effectual; and it is not necessary to exclude the legatee from a ben-

eficial interest that there should be a valid or effectual trust. It is only necessary that it should clearly appear that a trust was intended. * * * Once establish that a trust was intended, and the legatee cannot take beneficially. If a testator gives upon trust, though he never adds a syllable to denote the objects of the trust, or though he declares the trust in such a way as not to exhaust the property, or though he declares it imperfectly or though the trusts are illegal, still in all these cases, as is well known, the legatee is excluded, and the next of kin take. But there is no peculiar effect in the word 'trust.' Other expressions may be equally indicative of a fiduciary intent, though not equally apt and clear."

He then refers to the fact that in the will before him; as in the will before us, another legacy had been given to the legatee, as clearly showing "that she was not intended to take the residue beneficially," and dismissed the appeal, which was taken from a decree passed by Vice-chancellor Sir Knight Bruce, whose opinion in the case is reported in 3 De Gex & S. 525.

So, in the more recent case of Bernard v. Minshull, Johns. Eng. Ch. 276, (decided by Vice-chancellor Sir Page Wood in 1859,) the maxim that a certain subject and a certain object are necessary in order to constitute a trust, where the words used are precatory only, is again examined and explained, and it was again held that, to constitute such a trust as shall exclude the donee to whom the precatory words are addressed, it is sufficient if it appears a trust was intended, although the object of such trust is uncertain and cannot be ascertained. The conclusion reached by this learned judge was that, although the certainty of both subject and object may clearly indicate the existence of a trust, the converse of the proposition is by no means true; and that, however uncertain may be the objects of the testator's bounty, if it clearly appear that such objects were intended by him to have the benefit of the gift, it will exclude the donee, and create a trust.

And, as strongly sustaining the same proposition, reference may be made to the antecedent cases of Ommanney v. Butcher, 1 Turn. & R. 260; Ellis v. Selby, 1 Mylne & C. 286; Stubbs v. Sargson, 3 Mylne & C. 513; and Corporation of Gloucester v. Osborn, 1 H. L. Cas. 272.

It is also to be remarked that the distinction between this class of cases, and others in which precatory words have been held not to create a trust, is recognized in 1 Jarm. Wills, (4th Amer. ed. 693, where the learned author says:

"It is to be observed that in all these cases the consequence of holding the expressions to be too vague for the creation of a trust was that the devisee or legatee retained the property for his or her own benefit; and in this respect these cases stand distinguished from those in which there was considered to be sufficient indication of the testator's intention to create a trust, though the objects of it were uncertain—a state of things which,

of course, lets in the claim of the heir or next of kin to the beneficial ownership. In such cases there is no uncertainty as to the intention to create a trust, but merely as to the objects. In the other class of cases it is uncertain whether any trust is intended to be created."

In this country, also, adjudications are to be found in which the same doctrine is approved. Even in the case of *Pennock's Estate*, 20 Pa. St. 26, where the court decided that the old Roman and English doctrine, that precatory words will be sufficient to convert a devise or bequest into a trust, was not part of the common law of Pennsylvania, they yet held that such words may amount to a declaration of trust when it appears from other parts of the will that the testator intended not to commit the estate to the devisee or legatee, or the ultimate disposition of it to his kindness, justice, or discretion. The case of *Ingram v. Fraley*, 29 Ga. 553, is directly in point. There the decision in *Briggs v. Penny* was approved and followed, and it was held that a trust was created by precatory words, though not sufficiently declared, and that the legatee did not take the estate beneficially, but as trustee for the next of kin.

In short, our examination of the authorities, both English and American, have led us to the same conclusions that were reached by the commentators to Hill, *Trustees*, (4th Amer. Ed.) 116, and which are also cited with approval in *Perry, Trusts*, § 114, note 4. Among the rules there laid down as fairly deducible from the adjudged cases are these: (1) Discretionary expressions which leave the application or non-application of the subject of the devise to the objects contemplated by the testator entirely to the caprice of the devisee, will prevent a trust from attaching, but a mere discretion in regard to the method of application of the subject, or the selection of the object, will not be inconsistent with a trust; (2) precatory words will not be construed to confer an absolute gift on the first taker, merely because of failure or uncertainty in the object or subject of the devise; and (3) failure or uncertainty will be an element to guide the court in construing words of doubtful significance adversely to a trust.

But our own decision in *Taylor v. Plaine*, 39 Md. 58, if not conclusive, goes very far to settle the question now before us. In that case a devise of property, real and personal, to certain named parties, "to be disposed of according to their verbal directions, or the directions of either of them," was held to be upon trust; and, as the terms of the trust had not been declared in the will, a trust arose by operation of law in favor of the heirs and personal representatives of the testator. Several passages in the opinion in that case have a direct application to this. After stating that no positive rule can be laid down which shall determine in all cases what terms or expressions will carry a beneficial interest, or what will create a trust, the court say:

"The words 'trust' and 'trustees' have, it is true, a defined and technical meaning, and are more generally as well as more properly used, but it is well settled that there is no magic in particular words, and any language which satisfactorily indicates an intention to stamp upon the devise the character of a trust will be sufficient."

Again after comparing the several provisions of the will with each other, they say:

"We think it may be fairly inferred that the testator did not design to give to these donees, who were neither his heirs nor next of kin, but strangers in blood, a beneficial interest in the property, but that they should take it in trust."

The trust failed for uncertainty in the objects, no *cestuis que trust* being named, and the property was adjudged to belong to the heirs and next of kin.

If, after the bequest and devise to Mr. Bowers, the words "in trust" had been used, conceded, and all the authorities show, he would have taken no beneficial interest whatever, by reason of the failure of the trust for uncertainty in its objects. But other words plainly indicating an intention to create a trust are used, and it is manifest from the whole will that the testator never intended to give him this property in his own right and for his own use. We have given our reading of this clause, and we think no one can read this will, or hear it read, without saying at once that the testator never intended to make an absolute gift of the residue of his estate to Mr. Bowers, or to give him any beneficial interest therein. Can, then, the omission of the words "in trust," coupled with the fact that the law, as laid down by the courts, declares that the testator's intentions are too vague and indefinite to be carried into effect, work an absolute gift of the property to one whom he never intended should be recipient of such a gift? A result like this could only be attained by disregarding intention, and relying upon some arbitrary, inflexible, and technical rule of construction which has no foundation in reason; and we have shown that no such rule has been sanctioned by any controlling weight of authority.

The practical effect of the decree appealed from is to give this property to the heirs at law and next of kin of the testator, and we affirm it.

NOTE.—The case presents two questions, first, whether the language used in the will creates a trust at all, and secondly, whether, if it does, the trust so created, is valid and operative, or too remote and consequently void. That the words used are "precatory" and therefore within the general rule on that subject, there can be no doubt. In the words of Lord Eldon:¹ "The cases upon words of recommendation have, I take it, now settled this rule; whether the terms are those of recommendation, or precatory, or expressing hope, or that the testator has no doubt, if the objects with respect to whom such terms are used are certain,

¹ *u v. Compton*, 6 Ves. 380.

and the subjects of the property given are also certain, the words are considered imperative and create a trust." And in a later case Lord Eldon reiterates this exposition of the law on the subject.² And almost any form of words expressing a wish, hope, desire, expectation, have been held to be precatory words, and to authorize a trust. Lord Thurlow said:³ "If the intention is clear, what was to be given, and to whom, I should think the words '*not doubting*' would be strong enough." He held however, that a devise to a wife "*not doubting* that she will give what may be left to my grand-children," was not sufficiently certain to raise a trust.

There are two certainties necessary or no words howsoever precatory can raise a trust; a certainty as to what is to be given, and a certainty as to whom. The point in the case last cited was that the wife had the power to spend as much of the estate as she chose and leave as little as she chose. In another case however,⁴ the same words, "*not doubting* but that my wife will give it (a copyhold estate) to and amongst my children" were used and the trust sustained, because both the property and the beneficiaries were certain.

A trust, however, will not be created if such a construction is inconsistent with any positive provision of the will.⁵ And this limitation may be added to the uncertainties of the subject and the object of the gift. Sir R. P. Arden, Master of the Rolls in 1795,⁶ states the rule thus: "Whenever any one gives property and points out the object, the property, and the way in which it shall go, that does create a trust, unless he shows clearly that his desire expressed, is to be controlled by the party; and that he shall have an option to defeat it."

These words, it will be observed, tend to limit still further the operation of precatory words in creating a trust, but have been generally approved and adopted by English judges as embodying the true doctrine. They are cited and commended by Lord Lyndhurst,⁷ by Lord Cottenham, and by Chief Baron Richards, although with some qualification by the latter,⁸ and by many of the later English judges and Chancellors. Indeed the rule as stated by Lord Alvanley, (then Sir R. P. Arden), is the established law of England, and has been so held from 1702 down to 1869 in an unbroken line of adjudged cases.⁹

In the United States the rule has generally been accepted, though the tendency of late years has been to

apply it much more gingerly than formerly. In Indiana it is recognized as law, though not clearly applicable to the facts,¹⁰ in Massachusetts there is a similar recognition of the general principle.¹¹ So also, in Vermont,¹² and in Tennessee,¹³ and in Maryland,¹⁴ and in Georgia,¹⁵ in Florida,¹⁶ in Mississippi,¹⁷ in Connecticut,¹⁸ and in New Hampshire.¹⁹

In Pennsylvania after having, in 1845, recognized the rule in a well considered case,²⁰ and in another in 1850,²¹ re-affirmed the ruling with reference to the same will, and the same property, the Supreme Court in 1853, still treating the same will, overrules both these cases and says: "We may now add that we know of no American cases in which the antiquated English rule has been adopted."²²

The objection to the view of precatory and hortatory words as creating a trust, is not confined to Pennsylvania nor to this side of the Atlantic. Lord Eldon, although an authority on the other side, says: "This sort of trust is generally a surprise on the intention; but it is too late to correct that."²³ And Vice-Chancellor Sir Anthony Hart said:²⁴ "The first case that construed words of recommendation into a command, made a will for the testator, for every one knows the distinction between them."

In America there is a like current of opposition among legal thinkers. Judge Story says: "— In more modern times a strong disposition has been indicated not to extend this doctrine of recommendatory trusts; but as far as the authorities will allow, to give to the words of a will their natural and ordinary sense, unless it is clear that they are designed to be used in a peremptory sense."²⁵

Judge Redfield goes even further than Judge Story in his opposition to the rule under consideration. He says:²⁶ "This," (meaning that nothing obligatory is meant,) "we think is what is *always* intended by testators, in the use of these hortatory expressions in their wills." We are strongly inclined to the same opinion, although the word "*always*" may be a trifle too sweeping. Every person competent to make a will at all, knows the difference between words of command and words of entreaty, and may fairly be presumed to know his own mind when he makes his will, and to say in it what he means. We fully concur with Vice Chancellor, Sir Anthony Hart in his remark that: "The first case that construed words of recommendation into a command made a will for the testator."²⁷ And we think we may safely add that far more than half of the cases that have followed the ruling have done the same thing.

² Dashwood v. Peyton, 18 Ves. 41. See also Malin v. Keighley, 2 Ves. 333; Harland v. Trigg, 1 Bro. Ch. R. 142; Wynne v. Hauk, 1 Bro. Ch. R. 179; Brown v. Higgs, 4 Ves. 709; s. c., 5 Ves. 495; s. c., 8 Ves. 561; Tibbetts v. Tibbetts, Jacob R. 317.

³ Wynne v. Hawkins, 1 Bro. Ch. 179.

⁴ Massey v. Sherman, Amb. 590.

⁵ Shaw v. Lawless, 5 Clark & F. 129.

⁶ Malin v. Keighley, 2 Ves. Jr. 333, 335.

⁷ Knight v. Boughton, 11 Cl. & F. 513, 531.

⁸ Hennege v. Lord Andover, 10 Price, 230, 264.

⁹ Eades v. England, 2 Vern. 466 (1702); Harding v. Glynn, 1 Atk. 469 (1739); Pierson v. Garnett, 2 Bro. C. C. 38, 225 (1786); Paul v. Compton, 8 Ves. 375 (1803); Cary v. Cary, 3 Sch. & Lef. 173, 159 (1804); Forbes v. Ball, 3 Meriv. 457 (1817); Wright v. Atkins, 1 Turn & Russ. 143 (1823); Wood v. Cox, 1 Keen, 317 (1836); Shaw v. Lawless, 5 Clark & Fin. 129 (1839); Knight v. Boughton, 11 Clark & Fin. 513 (1844); Williams v. Williams, 1 Sim. (N. S.) 358 (1851); Briggs v. Penny, 3 McN. & G. 546 (1851); Benser v. Kinnear, 3 Giff. 195 (1860); Shovelton v. Shovelton, 52 Beav. 143 (1863); Irvine v. Sullivan, L. R. 8 Eq. 673 (1869); McCormick v. Grogan, L. R. 4 H. L. 82.

¹⁰ Reed v. Reed, 20 Ind. 313.

¹¹ Warner v. Bates, 98 Mass. 271.

¹² Van Amee v. Jackson, 35 Vt. 174.

¹³ Anderson v. McCullough, 3 Head, 614.

¹⁴ Negroes v. Pummer, 17 Md. 165; Tolson v. Tolson, 10 Gill & J. 159.

¹⁵ Ingram v. Fraley, 29 Ga. 553.

¹⁶ Lines v. Darden, 5 Fla. 51.

¹⁷ Lucas v. Lockhart, 10 Sm. & M. 466.

¹⁸ Bull v. Bull, 8 Conn. 47; Harper v. Phelps, 21 Conn. 257.

¹⁹ Erickson v. Willard, 1 N. H. 217.

²⁰ Coates' Appeal, 2 Penn. St. 129.

²¹ McKonkey's Appeal, 13 Penn. St. 253.

²² Pennock's Estate, 20 Penn. St. 268.

²³ Wright v. Atkins, 1 Ves & Beames, 313, 315.

²⁴ Sale v. Moore, 1 Sim. (1827) 534, 540.

²⁵ 2 Story Eq. Juris., § 1069.

²⁶ 1 Redfield on Wills, 718.

²⁷ Sale v. Moore, *supra*.

The other question considered in the principal case, whether, if a trust be raised by precatory words, it can be held void for uncertainty without holding that the bequest is absolute, and that the trust was not raised at all, is so fully and ably treated in the principal case that we abstain from any comment upon it.

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STATUTE OF FRAUDS—INSTRUCTIONS TO AGENT MEMORANDUM.

HASTINGS v. WEBER.*

Supreme Judicial Court of Massachusetts, July 2, 1886.

1. *Statute of Frauds — Memorandum — Lease — Agent — Telegram.*—In an action of contract for breach of an agreement to take a lease, it appeared that the defendants' agent wrote to the defendants a letter containing a description of the premises, and stating the annual rent for a term of five years; the questions of the letter being whether the premises and amount of rent were satisfactory to the defendant, but the letter did not state or refer to the particular terms or conditions of a lease. The defendants, in answer, sent the following telegram: "If basement included at four thousand, secure five years' lease." A letter sent by the agent to the defendants on the day the telegram was received by him stated that the lease at \$4,000 included the basement, and that he would close the matter the next day. The agent had no authority to accept a lease. *Held*, that there was not a sufficient memorandum in writing to satisfy the statute of frauds; *also held*, that letters written by the defendants subsequently, referring to an incomplete lease, had no bearing on the question.

2. ———. *Instructions to Agent—Disclosure to Third Person.*—Where a principal gives instructions in writing to his agent relating to the leasing of real estate, and the instructions do not include an authority to contract, the disclosure of the instructions to the other party cannot convert them into a memorandum of contract sufficient to satisfy the statute of frauds.

This was an action of contract for breach of an agreement to take a lease. The defense relied on was the statute of frauds. Hearing in the superior court, before Bacon, J., upon facts which appear in the opinion, who ruled that there was not sufficient evidence of any written memorandum of the contract to satisfy the statute of frauds, and directed a verdict for the defendants. The letter of January 3d, referred to in the opinion, was written by the defendants' agent to the defendants after the receipt of the telegram mentioned, and stated that the lease at \$4,000 per annum included the basement, and that he, the agent, would close the matter the next day.

A. E. Pillsbury, for plaintiff; C. J. Noyes, for defendant.

ALLEN, J. delivered the opinion of the court.

*S. C., 7 N. East R., 846.

The declaration alleges a contract with the defendants by which the plaintiff agreed to let to them certain premises for the term of five years from the first day of February, 1883, at the yearly rent of \$4,000, and the defendants agreed that they would hire the premises, and execute and accept thereof for such term at said rent, and would pay the rent of \$4,000 a year during said term.

There was no written contract, and the plaintiff relied upon a verbal contract between herself and the agent of the defendants; and the only question presented by the exceptions is whether there is a sufficient memorandum, in writing, of the contract to satisfy the statute of frauds. The memorandum must be found, if anywhere, in the letters of the defendants' agent to them of January 2d and 3d, and in the telegram of the defendants to their agent of January 3d. There is no evidence that the agent had any authority to sign a memorandum, and the only paper signed by the defendants is the telegram. This was sent in answer to the letter of January 2d, and before the letter of January 3d was received by the defendants. It is contended that it is so connected with the letter of January 2d as to incorporate that into itself, and make the letter and telegram together a memorandum signed by the defendant. Assuming, without deciding, that such is the correct construction of the two papers, we think they do not constitute a memorandum of the contract declared on, or of any contract. It is clearly not a memorandum of a completed contract, and the most that can be claimed is that it constitutes an offer by the defendants to the plaintiff, the subsequent verbal acceptance of which by the plaintiff gave it effect as the contract of the defendants. If we could adopt the assumption upon which this argument must rest, and hold that the telegram must be taken to include the letter of January 2d, and that the presentation of this telegram to the plaintiff on January 3d was in legal effect the exhibition of the letter and telegram to the plaintiff by the defendant through their agent, the principal question, and the only one we need consider, would be presented: Does the telegram import a promise by the defendant to the plaintiff to accept a lease described in it and the letter

The correspondence is not between the parties to the supposed contract, but between one of the parties and his own agent, and it is to be construed accordingly. The agent was directed to look for a store for the defendants, and to negotiate for a lease of it. He had no authority, unless from the telegram, to accept a lease, or to make a contract, or to determine any of the terms of a lease or of a contract. His letter informed the defendants that he had been looking at the store of the plaintiff, contained a description of the premises, and stated the annual rent asked for a term of five years, as information to the defendants as the basis of further instructions. The question of the letter was whether the premises and the amount of rent were satisfactory to the defendants. It did not refer to

the particular terms or conditions of a lease; such as, when the term should commence; when the rent should be payable; what alterations should be made in the premises, or what condition they should be put in by the owner; what alterations might be allowed to be made by the defendants; what rights the defendants should have as to underletting, and other particulars which might enter into the lease. The answer was, with brevity of correspondence, by telegraph: "If basement included at four thousand, secure five years' lease." This was obviously intended only as instructions to the agent that, if the rent would be of the amount stated, he should continue his negotiations, and procure a lease, the only contract contemplated, to be submitted to the defendants for their acceptance and execution.

The instructions in the telegram do not exclude but accord with, other instructions, as to the contents of the lease that may have been given by the defendants to their agent; and, as between the parties to the correspondence, they contain in legal effect the additional words, "according to instructions which have been or may be given." Instructions to the agent referring only to the particulars mentioned in the letter to which they were in reply cannot be construed as including a promise or offer to the plaintiff to accept a lease containing only those particulars. The plaintiff had no right to so treat it; and that she did not, in fact, so regard it, appears from her declaration, which alleges that the term was to commence on February 1, and not immediately, as would be implied from the writings; and also from the evidence that she understood that the defendants were not to have the power or underleasing, which could not have been inferred from the writings. Whether a correspondence between one party to a verbal contract, and his agent, before the completion of the contract, can, under any circumstances, constitute a memorandum of the contract, we need not consider. The correspondence in this case shows only instructions for an agent, not including authority to contract, and the disclosure of the instructions to the other party cannot convert them into a memorandum of contract.

The letters subsequent to January 3d, and the lease signed by some of the defendants, but not accepted or delivered, refer to the incomplete contract of a lease, and have no bearing upon the question whether the defendants had agreed to execute the lease, unless as showing that they did not consider themselves under any contract to do so, and cannot go to make up a memorandum of such a contract.

Judgment on the verdict.

WEEKLY DIGEST OF RECENT CASES.

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1. AGENCY.—*Principal and Agent—Unauthorized Act—Ratification—Assumpsit—Trove and Conversion.*—Where goods are purchased by A. in the name of B., and on his credit, but without his authority, B. is not liable; and because the goods were shipped in his name, and a bill of them sent to him, it is not a ratification of the unauthorized act when he did not have knowledge that the goods were purchased upon his credit, or that they were not paid for by A., although B. did not notify the plaintiff, when he received the invoice, that the act of A. was not authorized by him. When the plaintiff's property has been wrongfully taken or appropriated, and converted into money or its equivalent, he may waive the tort, and recover in *assumpsit*; but it must appear that the defendant has actually received money to the use of the plaintiff, or that which he considers its equivalent; as a promissory note or money demand. *Saville v. Welch*, S. C. Vt., August 13, 1896; 5 Atl. R. 491.

2. BANKING.—*Draft taken for Collection—Insolvency of Banker.*—The proceeds of a draft received by a banker for collection, will not pass into his assigned estate; the owner of the draft may require payment out of that estate, as against creditors, though no part of it can be shown to be composed of the proceeds of the draft. That the owner of a draft delivered to a banker for collection has proved his claim against the banker's assigned estate, will not deprive him of his right to claim the amount of the draft out of the estate as against creditors. *McLeod v. Evans*, S. C. Wis., May 15, 1896; 22 Rep. 221.

3. BETTERMENTS.—*"Supposed Legal Title."*—One occupying land under a deed which gives him a remainder in fee on condition that he furnishes support for the life tenant there, does not hold the premises under a "supposed legal title," within the statute relating to betterments. *Walker v. Walker*, S. C. N. H., July 3, 1786; 6 East. Rep. 425.

4. CHANCERY PRACTICE.—*Accounts and Reports—Judicial Sales—Trust Deeds.*—When commissioner's report, based upon accounts of long standing and great confusion, is confirmed by lower court it will not be disturbed in the appellate court unless error is apparent. In selling real estate under trust deeds or mortgages, courts of chancery will adopt the terms agreed upon by the parties to such deeds. *Pairo v. Bethell*, 75 Va. 325. *Simpson v. Bishop*, S. C. App. Va., June, 1896; 10 Va. Law Journal, 543.

5. **CONFLICT OF LAWS.**—*Jurisdiction—Legacy Charged on Land.*—No court, State or Federal, can confer title nor reach nor sell land situated in a State other than where the court is held. *Williams v. Nichol*, S. C. Ark., July 8, 1886, 1 S. W. Rep. 243.
6. **CONTRACT.**—*Sale—Fraud—Sheriff's Interpleader—Change of Title to Personal Property, Unaccompanied by Change of Possession.*—Property sold on the faith of misrepresentations of fact on the part of the vendee, as to his financial condition, cannot be taken in execution by creditors of the vendee, and may be recovered by the vendor, in a feigned issue, fraud having vitiated the sale. By contract between A., a Pennsylvania tanner, and B., a Boston leather dealer, A. was to buy raw hides, deliver them to B. at the tannery in Pennsylvania, cause them to be marked with a private mark as B.'s property, send bills thereof to B. at Boston, tan the hides for him and then send them to Boston for sale. B. was to pay to A., "as compensation for said tanning, such sums as should equal the proceeds of the sales of said leather, after deducting therefrom the said purchase price of the hides and skins from which the leather was made; also, five per cent. on the gross amount of the sales, freight on the leather, interest at the rate of seven per cent. per annum, and all premiums for insuring the hides;" A. to be liable for all losses. The parties were not to be partners, and the hides were, in every state, to belong exclusively to B: *Held*, that as to third persons, B. was merely a lender of money, and not a purchaser of the hides, and, therefore, could not hold them as against A.'s execution creditors. *Ensign v. Hoffield*, S. C. Penn., April 28, 1886; 28 Weekly Notes of Cases, 106.
7. **CRIMINAL LAW.**—*Larceny and Receiving Stolen Goods—Indictment—Verdict—Instructions—Evidence—Error.*—An indictment framed in two counts, one for larceny, and the other for receiving stolen property, will support a general verdict. On the trial of such an indictment, it is improper to instruct the jury that, if they find the accused guilty, they must specify on which count their indictment is based. It is not a reversible error to instruct the jury that the unexplained possession of recently stolen property is evidence of guilt. *Cook v. State*, S. C. Tenn., June 10, 1886; 1 S. W. Rep., 254.
8. ———. *Reasonable Doubt—Instructions—Subject of Statute Embraced in Title.*—Where the charge to the jury states, among other things, "that the rule requiring the jury to be satisfied of the defendant's guilt beyond a reasonable doubt, in order to warrant a conviction, does not require that the jury should be satisfied beyond a reasonable doubt of each link in the chain of circumstances relied on to establish the defendant's guilt," the language used is inaccurate, and the metaphor calculated to mislead the jury; for while the court doubtlessly intended to announce the proposition that it was not necessary for the State to have proven beyond a reasonable doubt every circumstance offered in evidence, and tending to establish the ultimate facts on which a conviction depended, yet there was great danger of the jury applying the figure to the ultimate and essential facts necessary to conviction. It is no answer that other parts of the same instruction stated correctly the law on the subject of reasonable doubt. The judgment must be reversed. Where the title of an act clearly expresses one general subject, the addition of subdivisions thereof does not necessarily vitiate the whole title. *Clair v. People*, S. C. Colo., April, 1886, 8 Crim. Law Mag., 184.
9. **DAMAGES.**—*Eminent Domain—Interest.*—The proper rule to follow to measure the amount of damages a land-owner would be entitled to by reason of the running of a railroad through his premises, is to ascertain what price the property would have brought either at public or private sale before the construction of the railroad, and what it would bring after such construction, the difference being the amount of the damage. In order to arrive at the increase or shrinkage in the market value, there must be a just and fair comparison of the special advantages and the actual disadvantages resulting from the opening and operating of the road and the construction of its works. The damages found bear interest from the time of the taking. *Setzler v. Pennsylvania, etc. Co.*, S. C. Penn., March 1, 1886.
10. **DEED.**—*Release—Construction.*—Parties cannot be permitted to vary or change the meaning of the plain, unambitious language used in a written instrument; hence, where a deed says: "All right, title, interest, claim and demand whatsoever, which I, the said releasor, have, or ought to have, in or to a certain tract of land," etc., it is a release which conveys whatever interest the releasor has in the property, and its effect is not destroyed by the statement in the deed that the premises had been theretofore mortgaged to grantor. Whether the grantor in the quitclaim deed intended to release the right to reversion or not, he has in fact done so, and the law will afford him no relief. The condition is irrevocably gone, and plaintiff's title is complete. Grantor subsequently, at the time of his death, had no interest in the property, and there was nothing on which the deed from his administrator could operate. *Hoyt v. Ketchum*, S. C. Conn., June, 1886; 2 N. Eng. Rep. 557.
11. **DOWER.**—The widow of a deceased mortgagee, who had a dower interest in the premises which she had not released, but which had not been set out to her, cannot convey any part of the premises to a third person to hold as against the administrator of the mortgagee. *Plummer v. Doughty*, S. C. Me., August 6, 1886; 6 East. Rep. 451.
12. **EMINENT DOMAIN—Contributory Negligence.**—Acquisition of land for the purposes of a railroad does not embarrass the right of the owner of adjoining lands not taken in the freest use of them in any lawful business, nor expose him to be charged with contributive negligence if his property of an inflammable nature, necessarily and carefully used in the course of such business, is set afire by sparks from a defective or unskillfully managed locomotive. *Kalbfeisch v. Long Island, etc. Co.*, N. Y. Ct. App. June 1, 1886; 3 Cent. Rep. 662.
13. **EVIDENCE—Parol—Written Instrument.**—Evidence that after the time of executing a written contract the parties agreed upon a modification of it, is admissible; but proof of a subsequent conversation between them, in which one of them stated, orally, his understanding of the contract differently from its written terms, and the other did not dissent from his statement, does not amount to such subsequent modification, and is not admissible. *Corse v. Peck*, N. Y. Ct. App., June 1, 1886; 3 Cent. Rep. 611.

14. —. *Written Not Variable by Parol—Corporations—Transfer of Stock.*—The intestate died owning a benefit certificate in a mutual insurance corporation, made payable to his personal representative. The by-laws permitted assignment prescribing the formalities. In a contest for the proceeds of the policy between the representative and some of the heirs: *Held*, that parol evidence of an assignment was inadmissible, and that the formalities of the assignment must be strictly followed, the same being intended for the protection of the association. *Elliott v. Wheabee*, S. C. N. C. February, 1886; So. Atl. Rep.

15. EXECUTOR AND ADMINISTRATOR—*Mortgages—Foreclosure—Bonds for Maintenance—Surviving Widow—Demand.*—An administrator of a deceased mortgagee may maintain a suit to foreclose a mortgage, given the husband to secure a bond for maintenance of the husband and wife, though the breach did not occur till after the death of the mortgagee. In such suit it is not necessary to show that the surviving widow had made a demand on the administrator of the deceased mortgagor for support out of the mortgaged estate. *Plummer v. Doughty*, S. C. Me. August 6, 1886; 6 East. Rep. 451.

16. FRAUD—*Fraudulent Representations*—The purchase of stock representing property is a purchase of the property itself. A false and fraudulent representation, as to property of a corporation, of material facts which necessarily affect the value of the shares of stock therein, constitutes a cause of action against a party who induces another, by means of such fraudulent misrepresentation, to purchase such shares. It is not material to such cause of action that the purchase price or money advanced on the faith of the representation be paid to the party making it for his individual benefit. Although the plaintiff is present and examines the property he has a right to rely upon the representation of the defendant as to its extent and boundary, and is not bound to examine the title when defendant professes to know all about it. *Scoenck v. Naylor*, N. Y. Ct. App. June 1, 1886; 3 Cent. Rep. 665.

17. —. *Statute of Frauds.*—In an action for procuring credit to be given to another by false representations of pecuniary responsibility, oral representation of assurances are properly excluded; and where no part of the written statement of the party obtaining the goods on credit was untrue, there was not sufficient evidence of a conversion on the part of either defendant. *Bates v. Youngerman*, S. J. C. Mass. June 29, 1886; 2 N. Eng. Rep. 514.

18. GIFT—*Legacy—Remoteness.*—A gift over to persons ascertainable with certainty within the allowed time, with no contingency or uncertainty as to who should finally take, is valid; and where the contingency is one that happened, the validity of the devise would not be affected by the consideration that another contingency might be too remote. So there is no objection, on the ground of remoteness, to a gift to unborn children for life, and then to an ascertained person, provided the vesting of the estate in the latter is not postponed too long. *Seaver v. Fitzgerald*, S. Jud. Ct. Mass. March 31, 1886; 2 N. Eng. Rep. 511.

19. GUARANTY—*Commercial Law—Protest—Collateral Security.*—Writing upon a note, "For value

received we guarantee the within note until paid," is an absolute and unqualified contract by each signer of the guaranty to pay if the maker does not. Upon maturity, it is the duty of the guarantors to go to the holder and pay the note, and this without demand or notice. Under such circumstances, no party to the note is released from liability thereon, by reason of any omission to act on the part of the holder. Where, upon taking, as collateral, notes indorsed by makers of a joint and several principal note, the holder gives a receipt stating that there is to be "no release from the joint and several note, all are to be held:" the holder assumes no obligation to demand payment, notify indorser, or bring suit on the collateral notes; but is only bound not to act in intentional bad faith, nor to hinder the pledgors in enforcing payment. Where the indorsers of such collateral notes have knowledge, power and opportunity to enforce them against the maker, it is their duty to do so and to protect themselves from loss through delay of the holder to proceed against the maker at maturity; otherwise the negligence of the holder becomes their own and they cannot set off the amount so lost against their liability on the principal note made by them. *City, etc. Bank v. Hopson*, S. C. Conn. May 31, 1886; 2 N. Eng. Rep. 556.

20. INSURANCE—*Life Insurance—Beneficiaries in Mutual Insurance Company.*—A clause in the charter of a mutual insurance company, that the purpose is in part for the "relief of widows and orphans by voluntary contributions," does not mean that the benefit necessarily enures to the widow and orphans. The representative is entitled to recover, in the absence of a valid assignment under the by-laws, for purposes of administration. *Donald v. Benton*, 4 Dev. & Bat. 435; *Etheridge v. Fallin*, 72 N. C., 213; *Wilson v. Sandifer*, 76 N. C., 347; *Baker v. The Railroad*, 91 N. C., 308; *Rogers v. Chestnut*, 92 N. C., 81, cited and approved.) *Elliott v. Wheabee*, S. C. N. C. February, 1886; S. Atl. Rep.

21. MALICIOUS PROSECUTION—*Pleading—Damages—How Alleged—Aided by Verdict.*—A general allegation of damages will admit proof as to damages necessarily resulting from the injury complained of, and which are implied by law. The plaintiff should, however, allege specifically what actual and also what exemplary damages he claims; and, if he fails to do so, a special demurrer will be sustained. In such cases, if the defendant fails to raise the question by demurrer, and the issue of fact is passed upon by the court or jury, the defective pleading is cured by verdict, and defendant is precluded from revising it on appeal. *Moehring v. Hall*, S. C. Tex. June 1, 1886; 1 S. W. Rep. 258.

22. MISTAKE—*Fraud.*—Whether a party was honestly mistaken as to a boundary line, or whether his representations as to it were fraudulently made with knowledge of their falsity, is a question of fact for the jury. *Schwenk v. Naylor*, N. Y. Ct. App. June 1, 1886; 3 Cent. Rep. 665.

23. MORTGAGES—*Debt—Evidence of Debt.*—A mortgage secures the debt, not the note, bond, or other evidence of it. No change in the form of the evidence, or the mode or time of payment—neither a judgment at law on the note or bond, merging the original evidence of indebtedness, nor a recognition of record taken in lieu of the note or bond—nothing short of actual payment or express re-

lease of the debt will operate to discharge the mortgage. This principle is illustrated in the decisions of this court cited in the opinion. The transfer of a debt secured by a mortgage carries with it the security, without any formal assignment or delivery of the latter. *Stimpson v. Bishop*, S. C. App. Va. June, 1886; 10 Va. Law Journal, 548.

24. **NEGLIGENCE—Municipal Corporation—Grade of Street.**—Whilst a lot owner can recover in trespass for the throwing of dirt on his premises by the city authorities in making a street, he cannot sue in damages on the case for the throwing of dirt on the premises by reason of the elevation of the roadway; a change of grade. *Kehrer v. City of Richmond*, S. Ct. App. Va. April 22, 1886; 22 Rep. 219.

25. **PARTITION—Co-Tenant—Improvements—Tenant by Curtesy.**—A., the husband of B., one of the several co-tenants, made valuable and permanent improvements upon a portion of the said land. A bill for partition having been filed, and partition decreed among the parties according to their interests, held, (1) that A., being tenant by curtesy initiate, was not, in making the improvements, a mere stranger or volunteer; (2) that, as the improvements were such as were reasonably necessary for the proper enjoyment of the land, the portion of the land so improved should be awarded to the heirs of B., without accounting to the others interested for any portion of the same. It seems that improvements would inure to the benefit of all the co-tenants where one co-tenant undertakes to improve the whole estate, as by erecting a building covering the whole of a city lot. *Kelsey's Appeal*, S. C. Penn. May 31, 1886; 5 Atl. Rep. 447.

26. **PARTNERSHIP—Levy on Partnership Property—Title Acquired Thereby.**—When an execution or attachment against an individual partner is levied on the partnership property, the purchaser at the sale under the levy acquires only the partner's interest in the assets which may remain after the payment of the partnership debts, and which can only be ascertained by an account in equity. "In other words, the effects of a partnership cannot be taken by attachment or execution to satisfy a creditor of one of the partners, except to the extent of his interest in the effects after settlement of the partnership debts. He thus purchases a mere right in equity to call for an account, and thus to entitle himself to the interest of the partner in the property which may be ascertained to exist upon a settlement—which may be something or nothing. *Warren v. Taylor*, 60 Ala. 218; *Andrews v. Keith*, 34 Ala. 722; *Daniels v. Owens*, 70 Ala. 297; *Parsons on Part.* (3rd ed. *359, *351); *Collyer on Part.* (Wood's ed.) 187, note; "Story Eq. Jur. § 677;" *Farley, Spear, & Co. v. Moog*, S. C. Ala., Dec. Term, 1885-86.

27. **PAYMENT—Evidence of—Promissory Note.**—Where "received in full" is written across the face of a note, the natural inference is that the satisfaction of the note took effect from the date of the latest credit recorded on the back of the note, or because of some additional payment contemporaneously made, and that money paid later by the maker to the payee was applied, not to the receipted note, but to another note between the same parties, on which a balance was due. *Chapman v. Smoot*, Md. Ct. App. June 21, 1886; 5 Atl. Rep., 462.

28. **PLEADING—Every pleading must proceed upon some single definite theory, which is to be determined from the general scope and character of the pleading.** *Bank of Indianapolis v. Root*, S. C. Ind. June 26, 1886; 8 N. East. Rep. 105.

29. **Account Filed as Exhibit—Uncertainties Cured—Set-Off and Counter-Claim—When it May be Replied to a Set-Off.**—Where a copy of an account, which is the foundation of a pleading, is properly filed therewith as an exhibit or bill of particulars, it will cure uncertainties therein. A set-off may be pleaded by the plaintiff to a set-off by the defendant, if it existed at the time of the defendant's set-off was pleaded, although it may not have existed at the time of the commencement of the original action, *Blount v. Rick*, S. C. Ind., June 26, 1886; 8 N. East. Rep. 108.

30. **PLEDGE AND COLLATERAL SECURITY—Contract—Reduction of Debt—Right to Withdraw Collaterals.**—Where collaterals are given under a contract that the pledgor, in the event of a reduction of the indebtedness by him, shall be entitled to select from the securities pledged an amount equal to the reduction, it is sufficient if the reduction is made in part by rents from property voluntarily mortgaged for such debt, or from the sale thereof; and one to whom he has transferred a part of such securities, less than the amount of such reduction, is entitled to hold the same as against the pledgee, even though no valuable consideration was given therefor. *Bank of Indianapolis v. Root*, S. C. Ind., June 26, 1886, 8 N. East. Rep. 105.

31. **PRACTICE.**—It is not ground for exception that instructions to the jury are not given in the identical language of a request by a party. *Walker v. Walker*, S. C. N. H., July 3, 1816; 6 East. Rep. 426.

32. **SALE—Mutual Assent—Partner Offering "To Give or Take"—Acceptance—Conditions.**—An offer by one partner to give a certain sum for the other partner's interest in the firm, or to sell his own interest for the same sum, concluding with the words, "the party purchasing to give sufficient security for the payment of company indebtedness, and for purchase price," which offer was accepted by the other partner, "to sell on the terms mentioned;" Held, not to be a complete sale, and that the first offer was only one of the steps leading to a sale, which contemplated that parties should meet, and complete transaction. *Gates v. Nelles*, S. C. Mich., July 15, 1886; 29 N. W. Rep., 78.

33. **TITLE TO LAND—Actual Possession of Another—Breach of Peace.**—A person who has, or thinks he has, a title to land which is in the actual possession of another, cannot lawfully take possession without the consent of the holder, even though he commit no breach of the peace. The recent authorities sustaining this position are: *Turnley v. Hanna*, 67 Ala. 101; *Mason v. Hawes*, 52 Conn. 12; S. C., 52 Amer. Rep. 552. *Morris v. Robinson*, S. C. Ala., December Term, 1885-1886.

34. **TROVER—Conversion—Lien.**—One who has the lawful possession of the personal property of another, does not necessarily have a lien on it for the expense incurred in getting such possession; and his unlawful retention of it, claiming such a lien, in defiance of the owner's right of possession, is a conversion. *Nutter v. Varney*, S. C. N. H., July 30, 1886, 5 Atl. Rep. 457.

35. **TRUST.**—*Execution for Collection of Funds—Injunction.*—Trusts are peculiarly within the province of a court of equity, and an injunction will be awarded on the application of a trustee to restrain his *cestui que trust* from issuing execution for the collection of trust funds on a judgment in his name. *Reeser's Appeal*, S. C. Penn., May 31, 1886, 5 Atl. Rep. 445.

36. ———. *Mortgage—Foreclosure—Purchase by Plaintiff—Agreement to Reconvey.*—An arrangement was made, by the attorney of both parties, in an endeavor to perfect a title, by letter, to the effect that a foreclosure sale was to take place in due and lawful form, and that if the plaintiff, or any one for her, became purchaser, she should go into possession as such, but that at any time within one year "after taking title" she should reconvey to defendant upon being paid the mortgage debt, interest, etc. Held, that plaintiff was entitled to a deed from the referee, and is not liable to account as mortgagee in possession, since she is in as purchaser. *Belter v. Lyon*, Ct. of App. N. Y., June 8, 1886; 7 N. East. Rep., 821.

37. ———. *Removal of Trustee.*—Equity has power to remove a trustee for breach or neglect of duty, anything showing a lack of capacity, fidelity, or honesty; but not for any mere error of judgment, or mistake as to the true construction of the will under which he acts. *Williams v. Nichol*, S. C. Ark., July 3, 1886; 1 S. W. Rep., 243.

38. **WARRANTY.**—*Of Title.*—A disputed and doubtful equitable title is not, as a compliance with a warranty or representation, equivalent to a clear and undisputed legal title; and damages may be recovered for the substitution of the one for the other. *Schwenk v. Naylor*, N. Y. Ct. App., June 1, 1886; 3 Cent. Rep., 665.

39. **WAYS.**—*Laying Out—Curative Statute—Legalizing Construction of Gravel Road—Injunction—When it will not Lie—Gravel Road Assessment—Curative Act.*—There being a general law authorizing county boards to lay out and construct gravel roads, and the board of commissioners of Wells county having attempted to act under such law, but committed an irregularity in taking the initial steps at a special, instead of a regular session, the act of April 11, 1885 (Acts 1885, p. 178), legalizing their action in constructing such road, is constitutional. The fact that a party assessed for the construction of a gravel road obtains an injunction before a legalizing act is passed, will not avail another person assessed, but not a party to the former action, in a suit for an injunction brought after the curative act is passed. *Johnson v. Wells Co.*, S. C. Ind., June 15, 1886, 8 N. East. Rep., 1.

40. **WILL.**—*Devise—Heirs—Construction.*—Where the language of a will is, "all my other property, either in money, stocks, bonds, goods, vessels, real estate, or whatever it may be, is to be received in trust for the heirs of my children," followed by provisions for giving the income or life estate to his wife and children, it manifests a desire to have all the property finally go in the same direction. In such a devise the word "heirs" should receive a strict construction, and in case of the death of one of testator's children, his equal proportion of the trust fund should be paid to the heirs at law of such deceased child. *Fabens v. Fabens*, S. J. C. Mass., March 31, 1886; 2 N. Eng., 380.

41. ———. *Legacy Charged on Land—Devisee's Liability—Conflict of Laws—Equity will Enforce*

Liability.—Where a legacy is charged upon land, the courts of the State where the land is situate have exclusive jurisdiction to protect the legatee. Where land is charged with the payment of a legacy, the acceptance of such land by the devisee makes him personally liable for the payment of such legacy, even though it be greater in amount than the value of the land devised. In such a case equity will enforce payment of the legacy by sale of the land, and at the same time compel the devisee to make up the deficiency, if any. *Williams v. Nichol*, S. C. Ark., July 3, 1886; 1 S. W. Rep., 243.

QUERIES AND ANSWERS.*

[Correspondents are requested to draw up their answers in the form in which we print them, and not in the form of letters to the editor. They are also admonished to make their answers as brief as may be.—Ed.]

QUERIES.

22. M. is indebted to one of the ice dealers of Youngstown, Ohio, on a bill contracted three years ago; he is irresponsible and unable to pay, being the head and support of a family and entitled to certain exemptions. For the purpose of compelling him and other delinquents to pay old bills, all of the ice dealers of said place entered into a written agreement in the spring of this year, to boycott all persons indebted to any one of them. In pursuance of said agreement, M. was notified that if he did not pay by a certain day that he would be placed upon the "black list," and the ice market closed against him. Being unable to pay he did not comply, and all ice dealers refused to sell him, though tendered the cash for the ice upon delivery. He then made arrangements with a neighbor to buy more than he wanted, and in that way obtained ice for a short time, and until the dealers found that out, when they refused to sell any more to the neighbor. So that, in fact, he has been absolutely unable to obtain any ice during the season. Has he a cause of action at common law? K. & H.

QUERIES ANSWERED.

Query 39. [22 Cent. L. J. 335].—A., a married man, in 1878 conveys property without his wife's signature. In 1881 A. is divorced from his wife. By the decree both parties are restored to all their property rights obtained during marriage. Can A.'s wife, after the divorce, set up and claim dower in the property sold by the husband during marriage without her joining. Quote authorities. X. Y. Z.

Answer.—This query is somewhat ambiguous. Property rights obtained during marriage cannot be "restored" by a decree of divorce, since, prior to the divorce, the marriage existed, and in law the rights existed. A dower right does not arise till the death of the husband, and it cannot arise unless the woman was the wife of the deceased at the time of his death. *Chenoweth v. Chenoweth*, 14 Ind. 2; 2 Bishop on Mar. & Div., § 706. A divorce *a vinculo* always barred dower at common law. 4 Kent Com., 54. If the State statute changes the common law and gives a divorced woman a dower interest, then, of course, she is entitled to a dower interest in the real estate sold by him without her joining. *Forrest v. Forrest*, 6 Duer, 103. S. S. M.

RECENT PUBLICATIONS.

THE LAWS OF THE INDIANA TERRITORY. 1801-1806, inclusive. Paoli, Ind.: Throop & Clark. 1886.

INDIANA HISTORICAL SOCIETY PAMPHLETS. The Laws and Courts of Northwest and Indiana Territories. By Daniel Walte Howe. Indianapolis: The Bowen-Merrill Co., Publishers. 1886.

We are in receipt of the foregoing works, the former a volume of over 200 pages, in regular law-book style, the latter a pamphlet of twenty-five pages, both printed under the auspices of the Indiana Historical Society. The object of the publication of these volumes, the preservation of the early records of the State, is most praiseworthy, and the Historical Society of Indiana deserves, and will doubtless receive, the thanks of the citizens of the State, and of those who shall come after them, for thus preserving the memorials of the early and trying days of their ancestors.

THE CHURCH AND THE CIVIL LAW.—A Manual of Ecclesiastical Law—With an Appendix of Forms. By Charles B. Howell, L. L. B. Author of "Michigan Nisi Prius Cases etc. Detroit, Chas. B. Howell, 1886.

This is a handsome little volume which we think will prove very useful to persons connected with the management of the secular concerns of Churches, and those acting professionally for such persons. As different as the church and the law are in so many respects, there are many points in their respective orbits in which they may and often do come into contact, and this work is designed especially to inform persons connected in any way with the church of all the points in which religious bodies are likely to be affected, beneficially, injuriously, or indifferently by the ordinary civil law of the land. The subject is one of the great and increasing importance. As the author justly observes in his preface. "The temporalities of the churches in this country are fast increasing in value, and those interested cannot be too careful in preserving their titles inviolate." The only regret we can feel about this book, is that the author has confined himself so closely to Michigan and has not taken in other States as well. As it is however, the book is well executed and will no doubt prove very useful.

JETSAM AND FLOTSAM.

BRINGING A JURY TO TIME.—"Bailliff," said an Arkansas judge one day last week to the officer in charge of the jury, "will you please inform the jury that there will be a horse-race in Merrick's pasture at 3 o'clock?" The jury had been out for forty-eight hours, but in less than thirty minutes they came into court with a verdict.

CONGRESS has very properly sat down on "contract labor," by prohibiting the use of convicts or aliens on any Government work. Now, let the States arrange for the same thing, and it will be settled completely.

AN EXTREME REMEDY.—We have lately seen it suggested that "an effectual temperance measure, which ought to be adopted by the United States, by each of the States, and by every legislative body, would be to make a single overt exhibition of drunkenness a crime, which, if by a judge, should instantly expel him from the bench; if by an executive official should secure his instant dismissal; if by a congress-

man or member of a State legislature, should subject him to immediate expulsion; and if by a lawyer, should disbar him from the courts." "Let the galled jade wince, our withers are unwrung." We are not a bit afraid, being, in this respect, as immaculate as the ideal husband, of whom it was said by an old woman, that he "doesn't drink no sperets and isn't hard on his clothes." However, for the sake of our professional brethren who are less ironclad, we protest against this proposition as harsh and cruel. We can recall no case in any of the books in which a "plain drunk" was ever visited with so heavy a penalty, except in Shakespeare, (where you can find almost anything), the case of Cassio, who lost his office by "putting an enemy into his mouth to steal away his brains." We always were sorry for Cassio, regarding him as the victim of misplaced confidence in the strength of his head, and the purity of his liquor, as well as of a too rigorous military discipline. If such a rule were enforced in these days it would deplete our army list with a rapidity that could not be even approximated by a "bloody war and a sickly season."

DIAGNOSIS OF DRUNKENNESS.—The following article from the London *Lancet* is given space here because of the high authority of that journal, and because it is a strong illustration of the fact that appearances are often deceptive:

"There is reason to fear that mistakes are not unfrequently made, even by skilled observers, in the recognition of drunkenness, by what may be called "apparent intoxication." The unsteady gait, the congested face and neck, the vacant eye, with drooping lid, and even the spirituous breath of apparent intoxication, may one and all be the effects of disease or disturbance of function, which has no necessary connection with the abuse of alcohol in any form. A melancholy instance of blundering in respect to this matter may be cited from the life of the late Colonel Herbing, who was accused of intemperance during his field service at Tonquin, but happily acquitted. Professor Peter, who had opportunities of studying the case of this recently deceased officer shortly before his death, elicited that he was suffering from a malady of some years' standing, which produced cerebral anemia with such giddiness that he could scarcely sit on his horse. Similar cases are by no means uncommon, and while it is more than ever necessary to denounce the practice of permitting police officers to determine whether a man or woman is drunk or the victim of disease, it is requisite to go much further than this, and to call the special attention of skilled practitioners in medicine to the possibility of being mistaken by erroneous impressions on this subject. Not only will anemia of the brain, however induced, cause giddiness, but certain forms of defective dissimilation will bring about the same results, together with symptoms still more deceptive."

The article from the *Lancet* is defective in that it fails to point out to the unprofessional, the true, scientific criteria of inebriety. It seems that the "unsteady gait, the congested face and neck, the vacant eye with drooping lid, and even the spirituous breath, may consist with sobriety, and the question remains, how is anybody to know when a man is drunk? If a staggering, red-faced, vacant-eyed, alcoholic-smelling man, is not drunk, who is drunk? The old rule was, that a man was sober as long as he could see a hole in a ladder; the more stringent rule was that he must be able to walk a chalk line. Now it would seem that all signs fail, and, common as drunkenness is, even police courts must not convict without the warrant of a surgical expert.

The Central Law Journal.

ST. LOUIS, SEPTEMBER 24, 1886.

CURRENT EVENTS.

IS MARRIAGE A CONTRACT?—Nobody can "say an undisputed thing in such a solemn way," as judges of courts of high degree. And it may be added, that the superb confidence with which they often enunciate propositions manifestly disputable will sometimes mislead even the very elect of the law. We are led into this line of remark by having observed, in the report of the *cause celebre* of *Morduant v. Moncrieffe*,¹ a *dictum* of one of the judges to this effect: "Marriage is not, as it is often popularly called, a contract. If it were, it could, according to every principle of the laws of contracts, be rescinded by mutual consent, but it cannot. There is a contract before marriage, which is a contract to marry, but marriage is the fulfillment of the contract which is then satisfied and ended, and there is no further contract. Marriage imposes a *status* which was by the law, before the statute, fixed on the persons forever."

In this extract, and we say it with appropriate deference, there are, in our opinion, two errors. It is not true that "according to every principle of the laws of contracts," a contract, not of marriage, may be rescinded by mutual consent, or in other words, that rescindability by mutual consent is of the essence of a contract. If that were true, contracts might be rescinded by mutual consent even after the rights of third persons had become involved. The true theory of the rescission of contracts is, as we conceive, that parties competent to contract once, can contract a second, third, or fourth time, as often indeed as they choose, and as long as they continue competent. And as long as they hold the control of the subject matter of the first contract, they can do with it as they please. In other words, the rescission of a contract is a new contract with the parties reversed, and the terms so adjusted as to restore perfectly the antecedent *status*.

The learned judge says; "Marriage is not,

as it is often popularly called, a contract." That it is not a mere popular and vulgar error to call marriage a contract is manifest from the following remark of Judge Story, who says:² "Marriage is treated by all civilized nations as a peculiar and favored contract." It is not, as the learned judge assumes, merely the fulfillment of the antecedent contract to marry, but a new and momentous contract, and the very words of the marriage service of the Church of England, and of every other church, indicates its nature beyond all controversy. There is the essential "meeting of minds," each party, in consideration of the correlative promises and undertakings of the other, promises and undertakes thereafter to do and perform certain succinctly stated things, and the contract is complete. Public policy appends to it the quality of irrevocability, and all churches concur in bestowing upon it their benediction.

Marriage is therefore primarily a contract; it has, and must needs have, all the essential elements of a contract, the competency of parties, the *consensus*, or meeting of minds, the reciprocal consideration. Judge Story says: "I have, throughout, treated marriage as a contract in the common sense of the word, because that is the light in which it is ordinarily viewed by jurists, domestic as well as foreign."³ Besides being intrinsically and essentially a contract, marriage is a good deal more; it is, as Judge Story says, "an institution of society," as the learned Judge puts it, it is "a *status*," it is the Holy Estate of Matrimony, as the clergy reverently call it, and according to the Roman Catholic Church it is a sacrament.

It may be proper to add, that in the case of *Morduant v. Moncrieffe*,⁴ the question whether marriage is a contract was not the issue involved, which was whether, under the Divorce Statute of England, proceedings for a divorce could be instituted and prosecuted against an insane wife on account of alleged antecedent adultery. The case was one of the saddest in judicial history. Lady Morduant, upon the return of her husband from a pleasure excursion, informed him that, dur-

² Story's Conf. of Laws, § 108.

³ Story Conf. Laws, § 108, u.

⁴ *Supra*.

¹ 43 L. J. H. of L. Prob. and Matri. 49.

ing his absence, she had been guilty of adultery with several, named, titled personages. Soon afterwards, and before the institution of proceedings for divorce, it became manifest that she was insane, and it was a matter of great doubt, at the time, whether her insanity did not, in legal phrase, "relate back to," and include her confession, whether there was any truth whatever in it, and whether the wreck of her good name was not the result of incipient insanity.

CRIMINAL LAW REFORM.—The New York *Nation*, of the 16th inst., publishes a communication from a Kentucky correspondent entitled, "Agitation against Murder," protesting against the laxity with which the law is administered in cases of murder and other crimes of violence. The writer lays the blame less upon "a mawkish sentiment in favor of the unhappy prisoner, or a barbarous sympathy with his crime," than upon the influence over legislation, of "lawyers who practice in the criminal courts," and in a less degree upon the undue leniency and over caution in trial and appellate courts, and the too merciful exercise of the pardoning power of the executive. We think that the *Nation's* correspondent ascribes too much influence in this matter to criminal court lawyers, indeed, we doubt whether such influence is really exerted to any appreciable extent. The other causes to which he attributes the evil, certainly exist, and are sufficient of themselves to account for it. There can be no doubt that the tardiness and uncertainty of justice, especially in cases of those whom the *Nation's* correspondent denominates "genteel criminals," is a shame and a scandal to our courts and demands a thorough and speedy remedy. Time was, within a hundred years past, when criminal law deserved the reproach of excessive severity. Men, women, even children were hanged for petty larceny, even for stealing a loaf of bread. The dreadful list of capital crimes included not less than a hundred offenses.

In these latter, more merciful days, we have changed all that, but the pendulum has swung too far in the other direction. The reform now needed is not, as in the

days of Romilly, on the side of mercy, but on that of justice. We want, not more severity perhaps, but more certainty and more expedition in the punishment of crime. In the old times, as now, the "genteel prisoner" escaped scatheless. "Genteel" people slaughtered each other in duels, with even more impunity than they now do in the modern street-fight. The evil is undeniable, what is the remedy?

The *Nation's* correspondent suggests the organization of a "National Association for Criminal Law Reform;" that from it should proceed projects of reform, to be laid before the State legislatures, and before Congress. Six subjects are suggested on which reform is deemed essential:

"1. The mode of empanelling juries, and particularly the admission of 'bystanders,' and the challenge for having 'formed or expressed an opinion.'

2. The continuance of causes on the mere demand of the accused, based on his own affidavit.

3. The definition of insanity, as an excuse for crime; the proof of such provocation as adultery, seduction, etc.

4. The definition of self-defense in cases of homicide.

5. The allowance of new trials and writs of errors or appeals.

6. The pardoning power; its restriction or regulation.

On the first point, it is hardly necessary to say that special caution is necessary, lest in changing the mode of selecting jurors, the substantial benefits of the time-honored right of trial by jury be diminished, or imperilled. We think, however, that with due care, great improvements may be made on the present system. The subject of continuances will bear a deal of very thorough reformation. Under the existing practice, a regular system of obtaining continuances may be, and often is, framed by astute lawyers, somewhat like the *infallible* combination of the gambler, but unlike that combination, it will *always win*. Before the battle of the Boyne, King William said to Schomberg, his favorite general: "The enemy is advancing upon us." "That is as he pleases," replied the veteran. "He will give us battle to-morrow," added the King. "That will be as we please," replied the

strategist. So, under the loose practice in most of the States, the experienced criminal lawyer can, at his pleasure, try or continue until all dangerous witnesses have been removed by death or expatriation.

The *ex post facto* insanity, tolerated by criminal courts, has long been a reproach to the administration of the law. A man may go through his youth, deep into middle age, with a head, according to the judgment of all his friends and acquaintances, as level as a mill pond, but if, even late in life, he commits a gross crime, he is adjudged, by the court, to be, and to have been from his youth upward, a crank of the very craziest description. This subject, however, is rather too large and too tough to be disposed of at the end of an article, and we can only add that we cannot see much hope of reforming the abuses connected with it without a thorough revision and reorganization of the whole system of expert evidence. Whatever else the doctors may be, they are certainly, and always, dissentaneous, two of them can hardly ever agree, and with half a dozen as expert witnesses, it will be a very clear case if one of them does not furnish a loop upon which to hang the much disiderated reasonable doubt. For want of space we must defer, to a more convenient season, what we have to say as to self defense, new trials and pardons.

NOTES OF RECENT DECISIONS.

HABEAS CORPUS—ESCAPE—TERM OF IMPRISONMENT.—In Delaware a case of the first impression in that State, and in some respects equally unprecedented elsewhere, has recently been decided upon an application for discharge from imprisonment made upon *habeas corpus*. It seems that Frank McCoy, a noted malefactor was, a number of years ago, sentenced to imprisonment in the county jail, for a term of ten years. After suffering a portion of his imprisonment he made his escape, and remained at large for nine years, seven month and ten days. Having been recaptured, he was consigned to jail to serve out his term of ten years. He sued out a writ of *habeas corpus* and asked to be discharged upon the ground that his term of imprisonment had expired by lapse of time.

Without more, there seems to be no difficulty in denying the prayer of his petition, and remanding him to jail. But it seems that, in Delaware, the statute prescribes that when a defendant is convicted and sentenced to imprisonment, the sentence must designate not only the day when the imprisonment shall begin, but also the day on which it shall terminate. McCoy's sentence was in conformity with the statute; it designated the day on which, regularly, he would be entitled to demand his liberation. That day was past, and the question for the judge, upon hearing the petition was, what effect, if any, should be given to the clause of the statute which required that the day of liberation should be designated, and what it meant, if anything.

As already stated, there can be no doubt that when there is no time fixed for the termination of the imprisonment, the convict may be required to serve out the full time for which he was sentenced, although, during the time, he was illegally at liberty, the term of years for which he was sentenced may have expired.¹ The time fixed for executing a sentence, or for the commencement of its execution, is not one of its essential elements, and strictly speaking, is not a part of the sentence at all.² But when the statute requires, as in this case, that the sentence *shall* designate the beginning and the end of the term of imprisonment, the case is not so clear. It always requires a little *nerve* to so construe a penal statute as to decide, in effect, that it practically means nothing at all, so far at least as the case under consideration is concerned. In this case, unlike the Kansas case, the designation of the time when the punishment shall end, *does* form a part of the sentence, and was included in it in obedience to an express statutory enactment.

It is true, as the court sets forth in its opinion, that the modern tendency is to construe penal statutes less strictly than in former time, when capital punishment followed every conviction, yet we are strongly inclined to think that it is too free a construction to say that the provision in question means just nothing at all, or what amounts to the same thing, that it was prescribed as a

¹ *Ex parte Clifford*, 29 Ind. 101; See also, *Hollon v. Hopkins*, 21 Kans. 638.

² *Hollon v. Hopkins*, *supra*.

"rule of mathematical convenience, as a matter of descriptive detail."

The court in this case remanded the prisoner to jail, where he will suffer the prescribed punishment; justice will be satisfied, and the result is not absurd. If the decision had been otherwise, the result would have been absurd, as it would have released a notorious malefactor, because he was adroit as a jail-breaker, and expert as a fugitive from justice. The absurdity is properly chargeable to the legislature of Delaware, in incorporating so useless and mischievous a provision in its criminal code.

SALE—WARRANTY—BREACH—ORAL TESTIMONY TO VARY WRITING—CAVEAT EMPTOR.—In a recent case the Maryland Court of Appeals found it necessary to reiterate the well known doctrine that oral testimony cannot be admitted to vary the terms of a written contract.³

The proof offered was a conversation between the parties on the day before the writing of the first of the two letters which constituted the written contract.

The attempt seems to have been made to secure the admission of the testimony on the ground that the conversation having been referred to in both letters was a part of the contract. The court however said: "It is in vain to reduce a contract to writing, if you may afterward refer to all that passed, by parol."⁴

It seems that the contract related to coal sold for the use of the glass-works the description specified was "fine and the run of the mine." The complaint was that the coal was inferior, and that the plaintiff was thereby damaged. On this subject and the doctrine of *caveat emptor*.

The court says: "It will be perceived that that by the terms of the contract there is no express warranty with respect to the quality of the coal. In England the older decisions enunciate the general principle that the seller is not liable for defects of any kind in the thing sold, unless there is an express warran-

ty or fraud on the part of the seller. A sound price is not tantamount to a warranty of the quality of the thing sold.⁵ In *Hall v. Conder*,⁶ it is said 'the law is quite firmly established that, on the sale of a known ascertained article, there is no implied warranty of its quality.' It is true that in some cases there may be what is termed *falsa demonstratio*, as in the sale of goods by samples; and it has been held that under a contract to supply goods of a specified description which the buyer has had no opportunity of inspecting, the goods must not only, in fact, correspond to the specific description, but must be salable or merchantable under that description. But no such case is presented by this record. The contract was for Keystone coal, fine and the run of the mine, and the plaintiff's evidence shows that it received coal, corresponding to this particular description. The contract specifies Keystone coal, 'fine and the run of the mine,' and there is nothing else in its terms to indicate the quality contracted for. When delivered at the place designated, the plaintiff certainly had ample opportunity to ascertain the quality by an inspection. There is, therefore, no foundation for an implied warranty and the authority of *Jones v. Just*,⁷ is inapplicable to the case presented by this record.

It is true that at least in two of the States the doctrine of the civil law, that a sale for a sound price implies a warranty of the thing sold, was at one time recognized and adopted.⁸

But in most of the States this doctrine has been repudiated. In *Seixas v. Woods*,⁹ Kent, J., adopting the language of Sir Edward Coke, says that 'by the civil law every man is bound to warrant the thing he selleth, albeit there be no express warranty; but the common law bindeth him not, unless there be a warranty in deed or law.' And in a later case the same court decided that "there is no implied warranty in a general sale, that the quality shall be equal to the price."¹⁰ In *Mixer v. Coburn*,¹¹ Chief Justice Shaw says:

⁵ *Harvey v. Young*, Yelv. 21; *Parkinson v. Lee*, 2 East. 322.

⁶ 2 C. B. (N. S.) 40.

⁷ L. R., 3 Q. B. 197.

⁸ *Bailey v. Nichols*, 2 Root, 407; *Whiteford v. McLeod*, 2 Bay, 380.

⁹ 2 Caines, 48.

¹⁰ *Hart v. Wright*, 17 Wend. 269.

¹¹ 11 Metc. 561.

³ *Warren Glass Works v. Keyston Coal Co.*, 6 East. Rep. 562.

⁴ *Pickering v. Dorsen*, 4 Taunt. 784; *Gardner v. Gray*, 4 Camp. 144.

'The defendant contends that there was an implied warranty on the sale, that the goods were merchantable and sound. But we think this position cannot be maintained. The rule of the common law is well established, that upon a sale of goods, if there is no express warranty of the quality of the goods sold, and no actual fraud, the maxim *caveat emptor* applies, and the goods are at the risk of the buyer.

The citation of authorities supplied by the decisions in other States would seem to be unnecessary, as in *Barnard v. Kellogg*,¹² the Supreme Court of the United States says: 'Of such universal acceptance is the doctrine *caveat emptor* in this country that the courts of all the States in the Union where the common law prevails, with one exception, sanction it.' "

And the court disposes of the question in the following words: 'The rule *caveat emptor* has always received the sanction of the courts of this State.'¹³

And in one of the latest cases in which this question was presented, the court said: 'The law is well settled that when a known, described and defined article is ordered even of a manufacturer, although it is stated to be required by the purchaser for a particular purpose, and if the known, described and defined thing be actually supplied, there is no implied warranty that it shall answer the particular purpose intended by the buyer; in such case the purchaser takes upon himself the risk of its effecting its purpose.' "¹⁴

¹² 10 Wall. 383.

¹³ *Hyatt v. Boyle*, 5 G. & J. 120; *Gunther & Rodenwell v. Atwell*, 19 Md. 171; *Rice v. Forsyth*, 41 id. 404.

¹⁴ *Rasin & Co. v. Conley*, 58 Md. 65.

THE LIABILITY OF A MARRIED WOMAN FOR IMPROVEMENTS TO HER SEPARATE REAL ESTATE.

1. *Her Liability for Improvements in General.*—The enabling statutes, in force in most of the States, have gone far to emancipate married women from the disabilities and restraints imposed upon them by the rigorous doctrines of the common law. In some jurisdictions this process of enfranchisement has been carried to the extent of giving them

full liberty to contract, to hold and convey property, and to sue and be sued, the same as if *sole*. In others, their powers in these respects are still bounded by defined limits. But it is now generally held that a married woman, owning separate real property in her own right, may make valid contracts for work and labor to be performed, or materials to be furnished, in and about the repair and improvement of such property, and that debts contracted in this manner will constitute either a valid obligation at law or an equitable charge upon the land, according to the practice in the particular State.¹ But in Pennsylvania it is held that in order to charge a married woman for work done upon her separate estate, it must appear that the work was *necessary* for its improvement or preservation.² And, indeed, in any State where the power to bind her property for such purposes, is drawn by implication from the statute, rather than granted by its express terms, it may well be a question how far a wife can contract for extensive and costly improvements or additions to her realty, which are merely designed to enhance its convenience or contribute to its ornamentation, instead of being necessary to its enjoyment or repair. Such is the diversity of the statutes relating to married women, that no universal rule can be established. In Vermont it is provided by statute that the products of the real estate of a married woman may be attached or levied upon for labor or materials furnished upon, or for the cultivation or improvement of such estate.³ It is also held that her contract for the services of counsel to protect her rights in real estate claimed by her as her separate property is binding, and that the sum falling due from her under such contract may be made a charge on the land.⁴ In Indiana, a married woman has whatever power is incident to a complete holding and full enjoyment of her separate real estate, but with

¹ *Owen v. Cawley*, 36 N. Y. 600; *Dickerman v. Abrahams*, 21 Barb. 551; *Colvin v. Currier*, 22 Barb. 371; *Butler v. Robertson*, 11 Tex. 142; *Ferry v. Hammonds*, 47 Cal. 32; *Cookson v. Toole*, 59 Ill. 515; *Perkins v. Baker*, 38 Tex. 45; *Moore v. McMillen*, 23 Ind. 78; *Succession of Penny*, 14 La. An. 194; *Machir v. Burroughs*, 14 Ohio St. 519; *Lippincott v. Hopkins*, 57 Pa. St. 328; *Lippincott v. Leeds*, 77 Pa. St. 420.

² *Needham v. Woolens*, 14 Weekly Notes, 525.

³ R. L. Vt., § 2324; *Ackley v. Fish*, 16 Reporter, 220.

⁴ *Major v. Symmes*, 19 Ind. 117.

a restriction upon her power to encumber or alienate the same; when, therefore, an improvement upon her estate is necessary and proper for a full and complete enjoyment of such estate, she can charge her separate property with debts created in making the improvement.⁵

2. *Husband's Power in this Regard.*—It is settled beyond all question that the courts will not recognize any right in a husband to charge the separate real estate of his wife by his contracts for its improvement against (or without) her consent; he has no more authority to do so than a mere stranger would have.⁶ And it seems that a wife's merely joining with her husband in a promissory note given for labor and material bestowed upon her real property cannot create a charge upon the land.⁷ It is sometimes stated that a wife may be bound by the acts of her husband, in reference to her separate property, when they are performed by her authority and approved by her.⁸ And in one case, where a husband gave his individual notes for the value of improvements made upon his wife's separate estate, which he held in charge and trust, and the wife assented to and acknowledged the improvements and the debts, and the husband became insolvent, it was held, in equity, that the separate estate of the wife was liable for the debts, and that the creditors of the husband were entitled to the same equity which he would have had, had he paid the debts.⁹ And we find it decided that evidence that the work was done with her knowledge, may warrant the jury in finding that she agreed to pay for it, although it raises no such presumption of law as will authorize the judge to direct a verdict for the plaintiff.¹⁰ But the better rule seems to be, that the express contract of the wife is necessary in order to bind her property. And the mere fact that she had knowledge of the use, in the improvement of her separate estate, of building materials which had been contracted for by her husband, will not render her liable in

assumpsit on the husband's contract.¹¹ It will be sufficient, however, if the husband's agency to contract in her behalf and to charge her estate is clearly shown, or if some fraud imputable to her has induced the plaintiff to part with value.¹² In Pennsylvania a further limitation is imposed, viz.: that a married woman is not liable for a debt contracted for the avowed purpose of improving her separate estate, unless it is shown that the money was in fact applied to that object.¹³ And although a debt contracted in this manner, and for this purpose, will constitute an equitable charge upon her separate estate, yet a judgment given by her for such debt is null and void; it was so at common law, and the rule has not been changed by the enabling acts.¹⁴

3. *Liability to Mechanic's Liens.*—It is held in several of the States that a mechanic's lien can be created in the usual manner, notwithstanding the owner of the property is a married woman, if the labor and materials are furnished at her request, for the improvement of her individual estate, or upon her husband's request, with her consent, and by her express authority.¹⁵ And it is said that even without the enabling statutes she would be able thus to subject her property to mechanic's liens.¹⁶ But in certain other States this power is rigorously denied; and it is held that no contract or agreement for materials, or work and labor, upon a building, can be entered into with a married woman, so as to enable a mechanic to enforce a lien upon the building for the materials found and work and labor done.¹⁷ Because, as stated in these States, her ability to contract in reference to her separate estate must be strictly confined to the objects and the manner prescribed by the statute, and if the statute is silent as to

¹¹ *Wagner v. Henderson*, 3 Pennyhacker (Pa.) 248.

¹² *Ainsley v. Mead*, 3 Lans. 116.

¹³ *Heugh v. Jones*, 32 Pa. St. 482.

¹⁴ *Brunner's Appeal*, 47 Pa. St. 67. Nor can she bind herself by a bond for money borrowed to be applied, and which was applied, to the improvement of her separate real estate. *Vandyke v. Wells*, 103 Pa. St. 49.

¹⁵ *Greenleaf v. Beebe*, 80 Ill. 520; *Littlejohn v. Mill-irons*, 7 Ind. 125; *Tucker v. Gest*, 46 Mo. 339; *Husted v. Mathes*, 77 N. Y. 388; *Hauptman v. Catlin*, 20 N. Y. 247; *Lloyd v. Hibbs*, 81 Pa. St. 306.

¹⁶ *Hauptman v. Catlin*, 20 N. Y. 247.

¹⁷ *Rogers v. Phillips*, 8 Eng. 366; *Selph v. Howland*, 23 Miss. 264; *Gray v. Pope*, 35 Miss. 116; *O'Neil v. Percival*, 20 Fla. 937. And see *Kirby v. Tead*, 13 Met. 149.

⁵ *Lindley v. Cross*, 31 Ind. 106.

⁶ *Johnson v. Tutewiler*, 35 Ind. 353; *Hughes v. Peters*, 1 Cold. (Tenn.) 67; *Barto's Appeal*, 55 Pa. St. 386.

⁷ *Johnson v. Tutewiler*, 35 Ind. 353. But see *Marsh v. Alford*, 5 Bush, 392.

⁸ *Baker v. Roberts*, 14 Ind. 552.

⁹ *Smith v. Poythress*, 12 Fla. 92.

¹⁰ *Westgate v. Munroe*, 100 Mass. 227.

mechanic's liens, it is not in her power to do anything which will give rise to one.

But even where such a lien on a married woman's property is allowed, its validity and regularity are closely scrutinized, and the law still extends its jealous care to the protection of the wife's interests. For example, the rule established in Pennsylvania is as follows: To charge the separate property of a married woman with a mechanic's lien for work and labor done or materials furnished, it must be alleged in the claim and proved on the trial, that the work and labor or materials were necessary for the reasonable improvement or repair of such separate estate, and substantially that they were so applied, and that the same was done and furnished by her authority and consent.¹⁸ For the divestiture of a wife's title under a mechanic's lien depends (in that State at least) on what appears on the record, not on *proof* that she consented to the contract; and hence if the claim of lien does not set out all things necessary to bind the wife's estate, it is void and cannot be helped by extrinsic evidence.¹⁹ In Rhode Island it is now necessary that the contract or request of a married woman, for the performance of work upon her estate, should be *in writing*, in order to subject her property to the lien of a mechanic;²⁰ this is a new rule introduced by the revised statutes of that State.²¹

4. *Husband has no Power to raise mechanic's Lien.* It is certain that a mechanic's lien cannot be created upon the separate real estate of a married woman, for work done or materials furnished in erecting improvements thereon, under a contract with her husband, against her wish, or without her implied assent.²² As remarked by Adams, J., in a recent Iowa decision: "We know of no rule by which a wife's premises can be charged with a lien for improvements erected thereon by an improvident husband against her protest. Possibly, if the lumber had been bought in

her name, and she knew it, or had reason to suspect it, she should have expressly notified the plaintiffs that she repudiated the assumed agency. But it was not bought in her name. The husband bought it ostensibly for himself, as he had a right to do. The plaintiffs extended credit to him alone, and took his note, as was their right, whatever he might wish to do with the lumber, and we think their remedy must be confined to a personal judgment against him, as the court held. It is claimed that they ought to have a lien at least against the addition [built with the lumber in question,] and have a right to go upon the premises and detach and remove it, but it appears to us otherwise. The lien could attach only upon the husband's interest. But the moment the improvement was made it became an integral part of the entire structure, the title to which was in the wife. He had seen fit to make it for her benefit, and the lumber which he had owned as a chattel, he had transferred to her by the act by which he made it a part of her realty."²³ But it appears that in Alabama, by statute, the husband may contract for the erection or repair of buildings situated on lands forming part of the wife's separate estate, and the lien of a mechanic or material-man for work done or material furnished in the erection of such buildings attaches to the property, without the participation of the wife in the making of the contract.²⁴

It seems reasonable to hold, however, that the wife's estate will be bound by a mechanic's lien for work or materials engaged by the husband alone, if the latter acts with her knowledge and consent, and if she so bears herself with reference to the work as to show that she approves it and intends to become responsible for it. And we find a number of cases taking this view.²⁵ So where a building is erected on land belonging to a married woman in her separate right, upon a contract made by her husband, with her full knowledge and assent, and she does not disclose her interest, or take steps to prevent the building, she will be estopped to set up her

¹⁸ *Einstein v. Jamison*, 95 Pa. St. 408.

¹⁹ *Lloyd v. Hibbs*, 81 Pa. St. 306; *Schriffer v. Saum*, 81 Pa. St. 385.

²⁰ *Briggs v. Titus*, 7 R. I. 441.

²¹ *Bliss v. Patten*, 5 R. I. 377; *Rev. Stat. R. I.*, c. 150, § 1.

²² *Spinning v. Blackburn*, 18 Ohio St. 181; *Johnson v. Parker*, 27 N. J. L. 239; *Garnett v. Berry*, 8 Mo. App. 197; *Esslinger v. Huebner*, 22 Wis. 632; *Dearie v. Martin*, 78 Pa. St. 55.

²³ *Getty v. Framel* (S. C. Iowa, October, 1885), 21 Reporter, 80.

²⁴ *Exp. Schmidt*, 62 Ala. 252; *Ala. Code*, 1876, § 3440.

²⁵ *Collins v. Megraw*, 47 Mo. 495; *Burdick v. Moon*, 24 Iowa, 418; *Forrester v. Preston*, 2 Pittsb. 298; *Schwartz v. Saunders*, 46 Ill. 18.

right in defense to an action to enforce a mechanic's lien for work done under the contract.²⁶ A more stringent rule obtains in Indiana. It is there held that a wife may have full knowledge that her husband is about building a house upon her land, and she may consent thereto and approve thereof, but that does not bind her property, nor give the builder a right to acquire a lien upon it; a fair test whether a wife has done such acts as will bind her property, or enable a mechanic or material-man to acquire a lien thereon, would be to inquire whether the acts done by her would bind her personally if she were free from coverture.²⁷ By the laws of Kentucky the estate of a married woman will be liable for necessities furnished to her or her family when the indebtedness is evidenced by writing signed by her and her husband; and a note executed jointly by husband and wife in payment for lumber used in repairing their house, which belonged to the wife, is sufficient "evidence in writing" to support a mechanic's lien on the house.²⁸ A similar requirement exists, as we have already seen, in Rhode Island.²⁹

Where a building is erected, or improvements made, on the wife's separate property, under a contract with the husband which is invalid as against her, there seems to be authority for holding that the builder's lien may nevertheless attach to the husband's life interest or tenancy by the curtesy in the land.³⁰ Thus it is said: "A mechanic's lien in many respects resembles a mortgage. Neither will affect the rights of the wife unless she so co-operates with her husband as to bind her estate. But so far as the interest of the husband extends, it will be as much bound in the one case as in the other."³¹

Where husband and wife jointly contract for building a house on her land, a mechanic's lien will be valid against the property.³²

5. *Claim of Husband's Creditors against Improvements Made by Him.*—It is a general

rule that if a husband expends time and money in improving his wife's individual estate, but has no agreement with her, through trustees or otherwise, that his labor and means so used shall vest in him any interest in such estate, or entitle him to any claim against or compensation from her property, he gains no right or title thereto which his general creditors can reach by attachment or by the aid of a court of equity.³³ For example, where a lot of land, with a log house upon it, was granted to the wife by her mother, and the husband, at his own expense, but with materials furnished mostly from the estate of the mother, made repairs, requisite to render the premises habitable, it was held that a judgment creditor of the husband had no claim for the satisfaction of his judgment upon such improvements.³⁴ However, if the husband is in embarrassed circumstances, his money expended in improving his wife's estate may amount to a gift to the wife in fraud of his creditors, and they might thus far make the wife's estate liable to pay their demands; but this can never be true of his mere personal labor.³⁵

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²⁶ Webster v. Hildreth, 33 Vt. 457; White v. Hildreth, 32 Vt. 265; Corning v. Fowler, 24 Iowa, 584; Hoot v. Sorrell, 11 Ala. 386.

²⁷ Robinson v. Huffman, 15 B. Mon. 80.

²⁸ Hoot v. Sorrell, 11 Ala. 386.

NEGLIGENCE—DEFECTIVE MACHINERY— DAMAGES—PLEADING—CONTRIBUTORY NEGLIGENCE.

WOODWARD IRON COMPANY v. JONES.

Supreme Court of Alabama.

1. *Notice of Defect in Machinery to Employer—Contributory Negligence.* When a workman or servant gives notice to his employer of a defect in the machinery which he is required to use, and, relying on the employer's promise to have the defect remedied, continues in the service, he is not guilty of contributory negligence, "at least until a reasonable time elapses within which to make the repairs."

2. *Action for Damages—Averment of Complaint.*—In an action to recover damages on account of injuries afterwards sustained, it is not necessary to aver in the complaint that the employer had had reasonable time to remedy the defect after the notice was given.

3. *Contributory Negligence—Facts which will Sustain Defense of.*—When the plaintiff was working in the shaft of a coal mine, through which ran two railroad tracks, over which cars descended and brought

²⁶ Schwartz v. Saunders, 46 Ill. 18.

²⁷ Capp v. Stewart, 38 Ind. 479.

²⁸ Marsh v. Alford, 5 Bush, 392.

²⁹ Cameron v. McCullough, 11 R. I. 173; Briggs v. Titus, 7 R. I. 441.

³⁰ Flannery v. Rohrmayer, 46 Conn. 538; Fitch v. Baker, 23 Conn. 569; Washburn v. Burns, 34 N. J. L. 18.

³¹ Fitch v. Baker, 23 Conn. 569.

³² Greenough v. Wigginton, 2 Greene (Iowa), 435.

up coal, the motive power being supplied by a stationary steam-engine above ground; and had charge of a switch at a resting place along the line of the shaft, where descending cars could be turned off or placed back on the track, and of an adjacent "sump" in which the water was accumulated, and from which it was pumped to the surface by an engine; and while standing on track, repairing the water pipe which had become clogged, was struck by a descending car, which he did not see or hear until too late, on account of the noise and steam in the shaft, the steam having escaped from a defective joint in the pipe, to which he had called the attention of the superintendent two days before held, that the plaintiff knowing that the empty car was above, and having neglected to have the switch turned by his assistant, whom he had sent up to that point for another purpose, and being cognizant of the noise and steam which filled the shaft, was guilty of contributory negligence, and was not entitled to recover, although the general order was that a descending car should not be stopped at the switch until a full car was ready to be carried back.

Appeal from Birmingham City Court.

Tried before Hon. H. A. Sharpe.

Hewitt, Walker & Porter, counsel for appellants;
Smith & Love, for defendants.

The opinion of the court states the facts of the case.

STONE, C. J. delivered the opinion of the court.

The Woodward Iron Company, appellant in this cause, was engaged in mining coal, as one line of its business. The coal was reached by a shaft sunk in the earth; and extending down the shaft were two lines of railroad track, over which cars descended and brought up the coal. The cars were moved up and down the tracks by a steam engine which was above ground, and stationary. The force was applied to the cars by means of an iron rope. The cars were let down empty, and drawn back loaded. There were rents, or stopping points along the line of the shaft, styled in the testimony "lifts," and at these "lifts" there were switches on the track, by which the descending cars could be turned off, or placed back on the track. These switches were so arranged and distributed up and down the shaft, as to be connected with the rooms or excavations, from which the coal was mined. There were also along the line of the shaft what are in mining phrases, called "sumps"—rude wells or cisterns, in which the water in the mine was trained to collect; and from which it was pumped out of the mine by the steam engine which moved the cars in the shaft. One, Harrison, was the superintendent of the entire works, representing and performing the functions of the Iron Company, and Jones was an employe and laborer, under his direction. *Corcoran v. Holbrook*, 59 N. Y. 517; *Ford v. Fitchburg R. R. Co.*, 110 Mass. 240. The first "lift" or rest on the line of the shaft, and first switch, were about seventy-five yards below the surface, or entrance, to the shaft. Above this switch, and near the entrance, was the first pump. Below the switch, some seventy-five feet, was a "sump," near the line of the track. A steam-pipe extended down the shaft, through

which the hot steam passed from the engine. The business assigned to Jones was to superintend the switch, attach and detach cars, superintend the pump, and the cistern or "sump," in which the water collected. He had an assistant, a colored man, under his control; but he was under the control of Harrison, the superintendent.

The present suit is for the recovery of damages of the Woodward Iron Company, for an injury alleged to have been suffered through the negligence of Harrison, its superintendent. The averment of the complaint on which the right of action is based is in the following language: "The plaintiff, being then and there, on, to-wit, the 10th day of March, 1884, a servant of the defendant, engaged in keeping said pumps in operation, and in attaching loaded cars to the train operated in said mines as aforesaid, was engaged in relieving the water pipes of said pumps of mud that had accumulated therein, and was obstructing the passage of water therein; and while so engaged at the place where he was obliged to do said work, was stricken by one of defendant's cars operating in said mine as aforesaid, and badly bruised and injured; and at the time plaintiff was stricken as aforesaid, he did not see the said car, and was unable to see and get out of the way of the same, in consequence of the steam that had accumulated in said tunnel or slope between him and the said cars. And the plaintiff avers that said steam had escaped from said steam-pipe at a joint thereof, and that he had called the attention of the defendant to said joint, and that the same was out of repair, and the defendant had promised the plaintiff to have the same repaired at night when the said mines were not being operated, but negligently omitted to do so; and relying on the promise of the defendant, the plaintiff thereafter continued to perform his duties as aforesaid, and was injured as aforesaid." There was a demurrer to the complaint, assigning, among others, the ground that "there is no allegation that the defendant had had time to repair the same from said notice prior to the alleged injury." The court overruled the demurrer.

The demurrer raises the question squarely, what change, if any, is wrought in the status of the parties, by a notice given to the employer of a defect in the machinery, and his promise to have the same remedied. If the employe, after such notice and promise, remain in the service, is this an implied agreement on his part to take the risk on himself, or is the effect to continue or revive the liability of the employer, and to absolve the employes from the imputation of contributory negligence, springing out of the continued service? The authorities are overwhelmingly in favor of the latter of these propositions, at least, until a reasonable time elapses within which to make the repairs. Waiting such reasonable time, it would seem, if the repairs are not made, the employe should quit the service, if perilous; and failing to do so, is it illogical to presume he agrees to in-

cur the risk? And would he not thereby be guilty of proximate contributory negligence. We propound these inquiries, with no intention of answering them, as this phase of the question is not raised by this record. Our purpose is to prevent a misinterpretation of our ruling. *Beach Con. Neg.* § 140; *Holmes v. Clark*, 6 Hurlst. & Nor., 340, S. C. Ib. 937; *Snow v. H. R. R. Co.* 8 Allen, 441; *Patterson v. P. & C. R. R. Co.* 76 Penn. St. 389; S. C. 18 Amer. Rep. 412; *Kroy v. Chicago, R. I. & P. R. R. Co.* 32 Iowa, 357; *Greenleaf v. Dub. & S. C. R. R. Co.* 33 Ib. 52; 2 *Thompson Neg.* 1010; *Buzzel v. L. Manfg. Co.*, 48 Me. 113.

The city court did not err in overruling the demurrer.

We have stated above that the only negligence with which the defendant is charged was the failure to repair the defective joint in the steam-pipe. The accident and consequent injury occurred about two days after the superintendent was notified of the defective joint. The testimony most favorable to plaintiff—his own testimony—shows the following state of facts at, and immediately preceding the injury: Plaintiff Jones, with his colored assistant were at their post at the first lift and switch, and together went down to the sump. They found the sump full of water and overflowing—the nozzle of the hose connected with the pump above being so choked with mud, that the pump lifted no water. Plaintiff immediately set to work to clear the pipe of mud, and was thus engaged twenty or thirty minutes when the descending car struck him. Plaintiff while so engaged was standing on the track of the railroad, and must so stand to do the work. He knew that a car was above him, and was liable to come down at any moment. He knew the switch at the first lift was not turned, and if the car came down, it would follow, without obstruction, the line of the track on which he was standing until it reached him. While engaged in removing the mud from the nozzle of the hose, he sent his colored assistant up to the switch, but gave him no instructions to turn the switch, nor to intercept the descending car, unless there was a loaded car at the lift to be attached. The superintendent's instructions were that a descending empty car was not to be stopped by turning the switch, unless there was at the time and place a loaded car to be drawn to the surface. There was no loaded car at the place. One in the shaft or slope could ordinarily hear a descending car for a distance of seventy-five yards, and by the light of his miner's lamp, could see it seventy-five feet before it reached him. At the time of the accident there was such a noise in the shaft, not made by plaintiff, that he could not hear the approaching car; and the shaft was so choked with the escaped steam that he could not see the car until it got within three feet of him; but he did not know this until the car struck him. The record discloses no proof that the persons operating the engine, or any others except plaintiff and his assistant knew that anything was disordered at

the sump, or that plaintiff was away from his post at the switch. And there is no proof that plaintiff gave any directions, or took any precautions to have himself notified of the approaching car. Plaintiff had been employed about the mine for some months, and in his present line of duty for three weeks. The defense made was that the plaintiff had, by his own negligence, contributed proximately to the injury he complained of.

In *Central, etc. Co. v. Letcher*, 69 Ala. 106, this court, quoting from the language of *Black, C. J.*, in *R. R. Co. v. Aspell*, 23 Penn. St. 147, said: "It has been a rule of law from time immemorial, and it is not likely to be changed in all time to come, that there can be no recovery for an injury caused by the mutual default of both parties. When, it can be shown that it would not have happened except for the culpable negligence of the party injured, concurring with that of the other party, no action can be maintained." So, in *Gothard v. Alabama, etc. R. Co.*, 67 Ala. 114, this court said: "When contributory negligence is relied on as a defense to an action for damages, it is not essential that the plaintiff should have been the cause of the injury; for if his negligence contributed proximately to an injury which he could have avoided by the use of ordinary care or diligence, he cannot recover." In *Gonzales v. New York, etc. R. Co.*, 38 N. Y. 440, it was said to be "the duty of the injured party, who knew a train was just due, to look in the direction from which it should come, before attempting to cross the railroad track, and that if he omitted to do so, he was guilty of negligence which precluded a recovery." In *Houston, etc. R. Co. v. Fowler*, 56 Tex. 452; s. c., 8 Amer. & Eng. R. Cas. 504, it is said: "If the employee had the opportunity to observe the degree of danger attending the performance of the service, damages cannot be recovered of the company on the ground that the latter knew the danger, and the former did not." When a servant is employed upon work which, equally with the knowledge of the master and the servant, is of a dangerous nature, the master is not liable for the consequences of an accident occurring to the servant in the course of that employment, unless there be negligence on the part of the master, and the absence of rashness on the part of the servant."

In *Whart. Neg.*, § 221, it is said to be the rule in this country "that a servant does not, by remaining in his master's employ, with knowledge of defects in machinery he is obliged to use, assume the risks attendant on the use of such machinery, if he has notified the employer of such defects, or protested against them, in such a way as to induce a confidence that they will be remedied. The only ground on which this exception can be justified is, that in the ordinary course of events the employee, supposing the employer would right matters, would remain in the employer's service, and that it would be reasonable to expect such continuance. But this reasoning does not apply

to cases where the employee sees that the defect has not been remedied, and yet exposes himself to it. In such case, on the principles heretofore announced, the employer's liability, in this form of action, ceases. He may be liable for breach of promise; but the casual connection between his negligence and the injury, is broken by the intermediate voluntary assumption of the risk by the employee." *Whar. Neg.*, §§ 323, 324; *Beach. Contr. Neg.*, §§ 64, 140; *Wood Master & Servant*, § 538; *Cooley on Torts*, 674; *Daniels v. Clegg*, 28 Mich. 33; *Tanner v. Louisville, etc. R. Co.*, 60 Ala. 621; *Cook v. Central R. Co. & B. Co.*, 67 Ala. 538; *Haley v. Earle*, 30 N. Y. 208.

Contributory negligence, like negligence itself, is a question for the jury, when the testimony is indeterminate, and anything is left to be inferred by the jury. It is a question of law, however, when the facts are clearly made known, and the course which common prudence dictates can be readily discerned. *H. & C. R. R. Co. v. Copeland*, 61 Ala. 376; *Cook v. Central, etc. R. Co.*, 67 Ala. 552; *Alabama, etc. R. Co. v. Hawk*, 72 Ala. 112; *Fernandez v. Sacramento Ry. Co.*, 52 Cal. 45; *Flynn v. Kansas City, etc. R. Co.*, 47 Amer. Rep. 99; s. c., 98 Mo. 193; *Hough v. R. Co.*, 100 U. S. 213; *Union Pacific R. Co. v. Fray*, 13 Amer. & Eng. R. Co., 158; s. c., — Kan. —; *McGrath v. New York, etc. R. Co.*, 18 Amer. & Eng. R. Cas. 5; *G. H., etc. Ry. v. Dran*, 46 Amer. Rep. 261; s. c., 59 Tex. 10.

- We need not deny, and do not decide the question that, under the facts of this case, negligence on the part of Harrison, the superintendent, would be negligence of the Woodward Iron Company, and dealt with as such. *Ford v. Fitchburg R. Co.*, 110 Mass. 240; *Corcoran v. Holbrook*, 59 N. Y. 517; *Crutchfield v. R. & D. R. E. Co.*, 98 N. C. 300. According to plaintiff's testimony—and we are discussing this case as shown in his testimony alone—it is probable that there was negligence in permitting the defective joint in the steam-pipe to remain out of repair for two days after being notified of it. The real question presented is whether there was proximate contributory negligence on the part of plaintiff. Carried to its extreme tension, the testimony fixes negligence on the corporation only in its failure to repair the leaky joint in the steam-pipe. It not being shown that the persons above the surface, and about the engine, had any notice that the sump was out of order, or that Jones was away from the switch, or in any place of danger, no fault or negligence can be predicated of the single act of letting the empty car down the slope. Was there negligence on the part of Jones, the plaintiff? We think there was. He knew the car was above, and was liable to descend at any moment. He knew the switch was so set, that the car would descend to him on the very track he was standing on. He knew steam was escaping from the steam-pipe, and must he not have known the shaft was being choked with it? Having with him his miner's

lamp, by the light of which he was working, is it possible he would fail to observe the accumulation of steam or smoke, and consequent obscuration of his vision? If the noise was so great that he could not hear the approaching car, should he not have adopted some measure to avoid or avert the impending danger?

We are not, and could not, be supposed to be cognizant of the details and wants of the service plaintiff was engaged in. Conceding that to relieve the nozzle of the hose of the mud accumulated in it, it was necessary that he should stand on the track of the railroad, this does not relieve him of the imputation of negligence in being there at the time he was injured. It would seem impossible for him to have been ignorant that the shaft was so filled with steam as to prevent his seeing the approaching car, situated as he was, and working by the light of his miner's lamp. He certainly could have abstained from standing on the railroad track, until danger was passed, by the empty car passing down, or he could have placed his negro assistant above him, to give him notice of the approaching car. And, notwithstanding his orders were not to stop a descending car, unless there was a loaded one ready to be carried back, he certainly would have felt authorized to disregard such order and stop the car, if the work at the sump was so pressing that it could not be delayed until the car passed below. Viewed in any light, the plaintiff was guilty of negligence, which contributed proximately to the injury.

Applying the foregoing principles, charge number five of those asked by defendant ought to have been given. Charge numbered two should also have been given, if it were not that one clause in hypothesis has no evidence to support it. That clause is, "If you believe from the evidence in this case that the plaintiff turned the switch," etc. There is no evidence tending to show who turned the switch. This, even though immaterial, would justify its refusal. *Martin v. Brown*, 75 Ala. 443; *M. & E. Ry. Co. v. Kolb*, 73 Ala. 396.

Reversed and remanded.

NOTE.—A master is not bound to adopt the safest method of working.¹ The employer is also not bound to employ the latest improvements in machinery to secure the servant's safety.² In an action for injuries resulting from defects in machinery, it must be shown that the master had knowledge, or by the exercise of reasonable care and diligence should have known, of the defect, before a recovery can be had.³ Where a master has expressly promised to repair a defect in the machinery used by the servant, he may recover for an injury caused thereby, within such a period of time after the promise as would be reasonable to al-

¹ *Naylor v. C. N. W. Ry. Co.*, 11 N. W. Rep. 24.

² *Gildersleeve v. R. R. Co.*, 1 Reporter, 184; *Smith v. R. R. Co.*, 8 Reporter, 367.

³ *Ballou v. O. & N. W. Ry. Co.*, 11 N. W. Rep. 559; *Atchison T. & S. F. Ry. Co. v. Ledbetter*, 8 Pac. Rep. 411.

low for its performance.⁴ It was held by the Supreme Court in the case of *Kansas Pac. Ry. Co. v. Peavey*,⁵ that if an employe knows that another employe is incompetent or habitually negligent, or that the material with which he works is incompetent, and he continues his work without objection, and without being induced by his employer to believe that a change will be made, that he will be deemed to have assumed the risk of such incompetency, negligence, or defects, and cannot recover for an injury resulting therefrom.⁶

Where a pile of lumber that was originally properly constructed became dangerous afterwards by reason of the cutting of cross-strips, and by reason of such defect fell upon and injured a workman, he must prove that the employer, through some responsible officer or agent, had actual notice of the defect, or that it had existed so long that he should have discovered it in the exercise of reasonable care.⁷ The general rule in actions for damages arising from negligence, is that the defendant's negligence makes him liable unless the plaintiff has done something to contribute to the accident. If he has, then he cannot recover.⁸ It is the duty of one approaching upon a railway crossing to stop and look and listen for approaching trains, and a failure to do so is negligence.⁹ The same degree of care is required for an employe engaged in his duty upon the track as for a person crossing the track.¹⁰ And crossing or standing on a track without looking and listening for approaching trains, although the railroad company was negligent in operating the trains, has been held contributory negligence.¹¹ Although there are defects in the machinery tools, appliances, or structures furnished by an employer, or the dangers of the occupation are unusual, still if the employe knew of the defects in the machinery or of the dangers to be encountered and continued in the employment, he will be regarded as assuming the dangers arising from such defects or dangers, and cannot recover for injuries arising therefrom.¹² An employer is not liable for an injury sustained by an employee, where his own negligence or want or ordinary care contributes materially to the injury.¹³ Where the injury arose from an uncovered ditch, the fact that the servant had been employed for several months in a place where the defect was plainly visible, raises a presumption that he assumed the risk.¹⁴ Where a servant, knowing the hazard of the employment as the business is conducted, is injured while engaged therein, he cannot recover merely on the ground that there was a safer way of conducting the business, the adoption of which would have prevented the injury.¹⁵ Evidence held to justify submis-

sion of question of negligence of defendant, and contributory negligence of plaintiff is a question for the jury.¹⁶ Whether the servant knew of the danger is a question for the jury.¹⁷

It is for the servant to show, not merely that the place was unsafe, and that he was injured thereby, but that he himself was in the exercise of due care.¹⁸ In order to enable the plaintiff to recover he must prove that he has not been careless, negligent or rash.¹⁹ And the burden is upon the plaintiff to establish negligence, or personal fault on the master's part and his own care.²⁰

The employer is not liable to a servant for any injury resulting from the negligence, of a fellow-servant in the same line or department of employment.²¹ But the current of decisions and the weight of authority is to the effect that where the employer uses due diligence in selecting competent and trustworthy servants, and furnishes them with suitable tools and means with which to perform the services for which they were employed, he is not answerable in damages to one of them for injuries resulting from or caused by the negligence of a fellow-servant in the same service.²²

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¹⁶ *Phillips v. Ch. M. St. P. Ry. Co.*, 25 N. W. Rep. 544; *Vollmer v. Berens*, 50 Wis. 496; *Randall v. N. T. Co.*, 54 Wis. 147; *Predeaux v. The City of Mineral Point*, 43 Wis. 524.

¹⁷ *Thompson v. C. M. & St. P. Ry. Co.*, 14 Fed. Rep. 504.

¹⁸ *Taylor v. Carew Manufacturing Co.*, 22 Cent. Law J. 135.

¹⁹ *Wharton on Neg.* 317.

²⁰ *Donaldson v. M. M. R. R. Co.*, 18 Iowa, 281; *McMellen v. R. R. Co.*, 20 Barb. (N. Y.) 449; *Wood's Law on "Master and Servant,"* p. 734.

²¹ *Buckley v. Goule & Curry Silver Min. Co.*, 14 Fed. Rep. 833; *Johnson v. Armour*, 18 Fed. Rep. 490; *Hart v. Peters*, 13 N. W. Rep. 219.

²² *Farwell v. Boston etc., R. Corp.* 4 Metc. 49; *Smith v. Lowell Manuf'g Co.*, 124 Mass. 114; *Moseley v. Chamberlain*, 18 Wis. 700; *Chamberlain v. Milwaukee etc., R. Co.*, 11 Wis. 238; *Cooper v. Milwaukee etc., Ry. Co.*, 22 Wis. Rep. 668.

CORPORATION — MUNICIPAL CORPORATION—COLLATERAL ATTACK—ESTOPPEL—FRAUD—CONSTRUCTIVE FRAUD.

TOWN OF SEARCY v. YARNELL.*

Supreme Court of Arkansas, July 3, 1886.

1. *Corporation—Validity of Organization—Who may Attack.*—The validity of the organization of an acting corporation cannot be questioned in any collateral proceedings, but only in direct proceedings, for that purpose, countenanced by the sovereignty.

2. *Municipal Corporation—Estoppel.*—The law of estoppel applies to a municipal corporation precisely as it does to a natural person, in all things pertaining to the proprietary rights of such corporation.

3. *Constructive Fraud.*—A municipal corporation which assents to the sale of its proprietary interests, accepts, converts, and retains the consideration, and silently permits the vendee to better and improve what he has bought, is thereby precluded from afterwards questioning the validity of the sale.

*S. C. 1 S. W. Rep. 319.

⁴ *Parody v. Ch. M. & St. P. Ry. Co.*, 15 Fed. Rep. 205; *Hough v. Texas & P. Ry. Co.* 100 U. S. 213.

⁵ 8 Pac. Rep. 780.

⁶ *Davis v. Detroit & Milwaukee R. R. Co.*, 20 Mich. 105; *S. C.* 4 Am. Rep. 364; *Mad River and Lake Erie R. R. Co. v. Barber*, 5 Ohio St. 541; *Wright v. N. Y. C. R. R.*, 25 N. Y. 566; *Frazier v. Pa. R. R. Co.*, 38 Pa. St. 104.

⁷ *Baldwin v. St. Louis & N. Ry. Co.*, 25 N. W. Rep. 918.

⁸ *Haley v. Earle* 30 N. Y. 208.

⁹ *Penn. R. R. Co. v. Weber*, 18 Am. Rep. 407; *Gonzales v. N. Y. & Harlem R. R. Co.*, 38 N. Y. 440.

¹⁰ *Roll v. N. C. Ry. Co.*, 10 Hun. 496.

¹¹ *C. B. & Q. Ry. Co. v. Van Petten*, 64 Ill. 510; *Allyn v. Ry. Co.*, 105 Mass. 77; *Morse v. Ry. Co.*, 65 Barb. 490; *Ry. Co. v. Bell*, 70 Ill. 109.

¹² *Deering on Negligence* § 201; *Naylor v. Chicago etc. Ry. Co.*, 53 Wis. 661.

¹³ *Deering on Negligence* § 210.

¹⁴ *De Forest v. Jewett*, 19 Hun. 509; *Aldrich v. Midland etc. Co.*, 20 S. C. 559.

¹⁵ *Stafford v. Chicago, B. & G. R. Co.*, 2 N. E. Rep. 185.

Appeal from White Circuit Court, Chancery.

Bill in equity, by a municipal corporation, to rescind a sale made by it of its proprietary interest in a railroad corporation of which it was the controlling stockholder.

Clark & Williams and *W. R. Coody*, for appellants; *F. W. Compton* (with whom are *Cypert & Rices*.) for appellee.

BURN, S. J., delivered the opinion of the court.

In 1871, when the Cairo & Fulton (now St. Louis Iron Mountain & Southern) Railway was being located through this State, various efforts were made by the citizens of the town of Searcy, in White county, to induce the railroad people to diverge from the contemplated route, so as to touch their town; and, all these efforts proving fruitless, on the twenty-first July, 1871, some of them, nine in number, signed articles of association, and caused the same to be filed in the office of the secretary of State, they having subscribed the necessary amount of stock, named their directors, their commissioners to open subscription books, and done other things required by law entitling them to file the same. They thus became a railroad corporation, under existing laws, and immediately caused books of subscription to be opened, and a survey of their contemplated tap or branch road to be made; locating the same so as to have its western terminus at the town of Searcy, and its eastern terminus or junction with the Cairo & Fulton Railway at a point they named "Kensett," a short and immaterial distance from the point named in the charter or articles of association. The full amount of stock was subscribed, and the principal portion, amounting to \$20,000, was taken and subscribed by the town of Searcy in its corporate capacity, after the will of her citizens qualified to vote was taken by means of an election, in itself regular; and to pay the same, the bonds of the town were issued, sold, and subsequently redeemed by money raised by taxation. Except a small amount expended for surveys, no other money was ever paid for stock subscriptions except that paid by the town. Thus, under its corporate name of "The Searcy Branch Railroad Company," this corporation proceeded to build, according to the provisions of its charter and by-laws, a wooden tramway from Searcy to the Cairo & Fulton road, at Kensett, and did complete and put the same in operation, employing the requisite number of coaches, drawn by horse-power, at an expenditure of about \$18,000.

Notwithstanding the fact that none of the stockholders except the town had paid anything for their stock, the affairs of the company continued to be managed by the directors named in the charter, except two, who early became lessees of the road; their places being filled by the advice and consent of the town, the only *bona fide* stockholder. The revenues derived from the annual lease of the road, amounting to about \$1,500, less an amount expended on repairs, continued to be paid over to the town by the company. In the

early part of the year 1877, owing to rapid and increasing decay of the timbers used for the superstructure, and the usual wear and tear of other portions of the road and property, it began to appear to the directors and the citizens of Searcy that very soon the expenses of repairing would absorb, and ultimately more than absorb, the rents and profits of the road. The greater portion of that year was spent in efforts to dispose of the road in a manner that would save the town and the company from loss, and yet serve its original purpose, and finally it was proposed to sell it on certain terms named; and, failing to effect a sale after repeated efforts, the appellee, then one of the board of directors of the road, proposed to purchase the road on the terms previously named, with some immaterial modifications, if his brother, another one of the appellees, would unite with him in the purchase. After consulting with his brother, and finding him willing to make the purchase, W. A. Yarnell resigned his place as one of the directors, and purchased the road from the other directors for the sum of \$500 in cash, and for the further consideration that they (the Yarnells) should extend the road to West Point, at the head of navigation on Little Red river,—a point about four or five miles east of Kensett,—making the whole line about twice as long as originally established between Searcy and Kensett; and to equip the whole line with iron rails, and proper coaches drawn by steam-power; and to keep the same in operation perpetually; a maximum rate of charges from freight and passengers being fixed in the contract of sale. A deed was made by the president, by direction of the company, to the Yarnells.

The Yarnells, having extended the road, and done other things in accordance with their contract, associated with themselves the other appellees, presumably to make the requisite number of persons, and then filed articles of association in the office of the secretary of State, and thereby became a railroad corporation under the name of the "Searcy & West Point Railroad Company," and at the institution of this suit were thus owning and operating the road, having expended almost \$30,000 in the extension and equipment of the same under the conditions of their contract on purchase. The corporate authorities of the town of Searcy instituted this action in September, 1882, to annul the sale of the road to the Yarnells, raising sundry issues of law affecting the validity of the sale and transfer of the road, and setting up the foregoing facts in support of its complaint; denying that the town ever assented to the sale; and alleging that W. A. Yarnell, by reason of his position and influence, gained an undue advantage over the town; and that the town was powerless to assert her rights until she did so.

There is little controversy as to the facts in this case. The controversy is mainly upon the effect of admitted facts, and the question of law appli-

cable thereto. The appellant denies that the town of Searcy, as the sole stockholder, assented to and authorized the sale; but we think it is fairly established that she did, and we apprehend that the denial is more upon the admissibility, than upon the directness and strength, of the evidence adduced. It goes without controversy that up to the time when the town of Searcy became a stockholder in the railroad company every act had been done by the incorporators, stockholders, and managers required by law to acquire corporate rights and powers; and it will scarcely be contended that the railroad company up to that time could not have lawfully entered upon private property, against the will of the owner, for the purpose of making the necessary surveys and location of its road; and that it could have procured, by judicial sentence, a condemnation of private property for its right of way. It had become in other words, a railroad corporation under the laws of this State, clothed with all the powers conferred by law upon such. This being so, all conditions precedent having been performed by the incorporators, it is simply out of all precedent for the appellant, in a collateral proceeding like this, or in any other proceeding, to attempt to show that the corporation was a nullity by showing that certain conditions subsequent had not been complied with.

The existence of a corporation once formed can only be called in question by a direct proceeding, and that, too, at the suit of the sovereign power,—the State. Nor are the breaches of conditions subsequent alleged by the appellant—such as a failure of stockholders to pay up their subscriptions, the failure to hold elections to elect directors, and breaches of similar character—sufficient grounds for the destruction of a corporate existence, even at the suit of the State, where the by-laws, and, of course, where the law, provides that the directors named in the charter shall serve until their successors are elected and qualified as provided by the laws of this State. *Mansf. Dig. § 5420; Com. v. Cullen, 13 Pa. St. 133; Cahill v. Kalamazoo Mut. Ins. Co., 2 Doug. (Mich.) 124.* Moreover, the town of Searcy having dealt with Searcy Branch Railroad Company as an ostensible corporation, whereby rights became vested, cannot be heard to plead its want of corporate character. *Oregonian Ry. Co. v. Oregon Ry. & Nav. Co., 20 Amer. & Eng. R. Cas. 523; S. C. 23 Fed. Rep. 232.*

Presumably, to make the point that the railroad corporation had ceased to exist by abandonment, and consequently that the town of Searcy—the sole stockholder with paid up stock—was also the sole and exclusive owner of the railroad, the appellant's counsel contend in argument that her subscription to the capital stock of the railroad company, the issuance of her bonds, and the levy and collection of taxes to redeem the same, were acts expressly authorized by an act of the general assembly approved July 23, 1868; admitting at the same time that the laws providing for the car-

rying of such power into effect were wanting, unless the analogous laws applying to counties be called into requisition, which they say was done in this case. It is difficult to see the point in this argument. Whether the town of Searcy was expressly authorized to take stock or not is a question, it seems to us, that has little to do with the town's sole ownership of the road. At all events, the act approved July 23, 1868, was repealed by a subsequent act, once published in the digest of Arkansas, and more recently copied in *Gantt's Digest*, beginning at § 3194, and including § 3202. The indisputable fact is that there never was a time in Arkansas, since the adoption of the general incorporation laws, when railroad corporate rights could be possessed and exercised by one sole owner. There must be at least five owners or there is no franchise to own. Nor does it mend the matter to say that a corporation stockholder in another corporation is, of itself, composed of many individuals, for, as a stockholder, it is but one person.

The next question in order is whether the sale to W. A. Yarnell and brother was void *per se*, because of his being one of the directors of the company until the negotiations between himself and other directors were already pending, and during which he resigned, (the sole purpose of his resignation being to place himself in a position to make the purchase,) or was it only voidable. There is and there should be a distinction between the case of a sale to a sole trustee and the case of a sale to one of several trustees. Even in the case of one trustee selling the property of his *cestui que trust* to himself, the rule seems to be that such a sale is voidable; that is, void or not, according to the circumstances of the case. Thus, in *3 Wait. Act. & Def. 468*, cited by the appellant's counsel in their brief, it is said: "But although a trustee cannot purchase of himself, he may, under special circumstances, buy from the *cestui que trust*, if the latter is *sui juris*." If it be true that the town of Searcy, as the owner of a majority of the stock in the railroad company, advised, assented to, or afterwards, by her acts, ratified, the sale of the road to W. A. Yarnell, one of the directors of the company, and if the town of Searcy was at the time *sui juris*, could it be said that the sale was void under the rule quoted above? Again, in *Pickett v. School-district No. 1, 25 Wis. 551*, also quoted by appellant's counsel, it was held that the contracts of directors made with one of their number are voidable in equity; meaning, of course, that they are not absolutely void. There may be isolated cases where sales of trust property by a trustee to himself have been treated as void absolutely, but the weight of authority is decidedly in support of the rule by which such sales generally are treated as voidable only, especially in equity.

It is contended by appellant that she had no power to dispose of her corporation property, and for that reason the sale of her interest, whatever it was, to the Yarnells, was null and void. A

municipal corporation may be the owner of two classes of property: One class includes all property essential to, or even convenient for, the proper exercise of municipal functions and corporate powers; the other class includes all property held for general convenience, pleasure, or profit. It is needless to inquire into the extent of the rights and powers which a municipal corporation has in, and over property of the first-named of these classes. It may well be admitted that such an inquiry would involve grave doubts. But the Searcy Branch Railroad, and all its property and franchises, belonged to the second class, and our inquiry is solely as to that.

In *Bailey v. Mayor, etc.*, 3 Hill, 531, it was held that "a municipal corporation, when in the exercise of franchises and the prosecution of works for its emolument or advantage, and in which the State in its sovereign capacity has no interest, is answerable as a private corporation, although such works may also be in the nature of 'great enterprises for the public good;' and 'powers granted exclusively for public purposes belong to the corporation in its public, political, or municipal character.'" "Powers granted for private advantages, though the public may also derive benefit therefrom, are to be regarded as exercised by the municipality as a private corporation;" and "municipal corporations, in their private character as owners or occupiers of property, are regarded as individuals." We quote from the syllabus of the case, which seems to be a correct epitome of the opinion. The same distinction is made, and the same rule announced, in *Lloyd v. Mayor, etc.*, 5 N. Y. 369.

Again, if the power to dispose of her property was nowhere expressly granted to the town of Searcy, it is equally true that it was nowhere expressly granted to the town of Searcy, it is equally true that it was nowhere expressly withheld, and such disposal nowhere prohibited. The question, therefore, is merely a question of a bare want of power. The contract of sale being otherwise fair and lawful, both parties having performed their respective parts, the plea of *ultra vires* cannot and ought not, in equity and good conscience, to avail anything. See *Hitchcock v. Galveston*, 96 U. S. 341, and *National Bank v. Matthews*, 98 U. S. 621.

Again, it is contended that the company, even by a vote, or assent of stockholders otherwise expressed, could not sell the road with the franchise. It is true that not even a majority of the stockholders in number or amount, or both, can sell the property of the company against the wishes of the minority, and thus defeat the object for which the corporation was formed; and it may be true that the franchise may not be sold at all, and yet the directors, by unanimous vote of the stockholders, can sell all the other property of the corporation, under the theory that one may at all times sell his own; and thus the incorporators may denude themselves of all power and ability

to exercise the right of the franchise, and they cannot avoid the consequences of their acts by setting up the inalienable character of the franchise right. The State alone has such an interest in that as will enable her to sue for its recovery back to herself, not to the appellant.

Again, the mere vehicle of conveyance of title to the road from the company to the Yarnells is objected to as not being in conformity to the laws of the State, insuring perpetual succession in incorporators. This objection is not good, because, the stockholders having unanimously parted with all they could part with, there is no one left to claim the succession, and consequently no one left who is in a situation to be heard on such a plea. Besides, the objection is a weak one in the minds of appellant's counsel. Why not treat the deed in this case as an equitable assignment of the stock, as suggested by appellant's counsel? It is that, if nothing more. Moreover, if there were no other objection to the sale than the mere shape of the instrument by which the title was sought to be transmitted from the company to the Yarnells, this court, on proper application, in furtherance of justice and right, would compel the transfer to be made in proper form, under the rule that what should have been done the court will compel to be done.

We have thus disposed of the merely legal objections to the sale. Some of these would be unavailable as objections in any case, and all of them are unavailable when relied on by one occupying the relative position of the appellant in this case.

The facts of the case may be disposed of more briefly. Granting, for the sake of argument, that his fiduciary relation did not cease by reason of his resignation as one of the directors of the company, and yet the evidence in the case fails to sustain the charge that William A. Yarnell, while in his trust relation, and by reason of the same, so managed, or assisted in managing, the affairs of the company as to compel a sale of the road, and to himself and to his advantage. All the testimony adduced tends to show that the wooden tramway, in obedience to natural laws, at the end of four or five years from its construction, was so rapidly going into total decay that early in the year 1877 the company, the town council, the citizens of Searcy, and all persons interested, plainly saw that some disposition of the road must be made other than renting or leasing it, as had been the practice. Under the then existing laws the town of Searcy, as a corporation, was powerless to render pecuniary aid, or grant relief in any way. All seemed to regard a sale of the road as the only way out of the difficulty—the only remedy against the impending ruin. A sale was sought, by various methods, to be made, to all who might desire to purchase, and finally, when no one else would undertake it, the Yarnells made the purchase upon substantially the same terms as had been repeatedly offered to all others.

The original object of the town was to secure

connection with the Cairo & Fulton Railroad, for her citizens' profit and convenience; and in the prosecution of this object, and to gain an end so desirable, the town had expended about \$18,000. In the course of time, the keeping up the road began to promise a greater outlay than the town was able to make. Her management and control of it, always awkward, inconvenient, and embarrassing, had now become impracticable. The usual fears of monopolizing demands on the part of the Cairo & Fulton road began to seize the minds of the people, begetting the idea of extending the tap road to West Point, the head of steamboat navigation on Red River, so as to destroy or prevent the apprehended monopoly. A sale of the road was not only desired, but was inevitable. To carry out the original design, keep up a connection between the town and the Cairo & Fulton road, to substitute steam for horse power, and to extend the connection to West Point, in answer to the demands of the citizens, and by the payment of \$500 in addition, the Yarnells became the purchasers of the road, and the evidence goes to show literally complied with their obligations; and, in doing so, expended about the sum of \$30,000. This, certainly, was not such a want of consideration—such an inadequate consideration—as will cast a shadow of suspicion upon their dealings; certainly not such as would invalidate the sale.

Finally, the town of Searcy, having authorized and made the sale through her acknowledged agents; having stood by and seen, without warning or objection, the appellees expend their time, labor, and means in carrying out their part of the contract; and having waited for a period of nearly five years in apparent acquiescence, when at length the affairs of the road, perhaps under the judicious management of her enterprising citizens, the appellees, had assumed the air of thrift and property,—instituted this action to recover back from them that which she had sold to them, and for which they had paid her such a price. It is not the odious plea of the statute of limitations that is interposed against the appellant's claim. It is a plea of estoppel,—a plea that has for its object the assertion of the principle that one is not to be permitted to profit by his own wrong, or to possess himself, as his own, of the proceeds of another's labor, which he has caused him to expend.

The appellant waited until she was no longer able to put the appellees *in statu quo*, if, indeed, she ever was; and, worse still, she does not even offer to do so. There is not equity in a bill which seeks, and does not offer, to do equity; nor is there equity in the case of a complainant who deliberately waits until he is no longer able to do equity; nor is there equity in the case of a complainant who deliberately waits until he is no longer able to do equity, and then brings his suit, demanding equity. Such is the nature of the case under consideration, as it appears to us.

The decree of the White county circuit court in chancery is therefore affirmed, at the costs of the appellant.

COMMERCIAL LAW — NEGOTIABLE PAPER —NOTICE OF PROTEST — WHEN QUESTION OF LAW—PARTNERSHIP — ASSIGNMENT.

BANK OF AMERICA v. FAYETTE SHAW.*

Supreme Judicial Court of Massachusetts, July 3, 1886.

1. When notice of protest has been actually received in due time by an indorser, the question is, whether due diligence in giving notice has been shown; and this, when the facts are all found, is a question of law.

2. Notice may be given at the place of residence or the place of business; and when the place of business is not the place of domicile, notice at the place of residence is sufficient.

3. Notice should be sent to the place where the party to be notified will be most likely to receive it; and reasonable diligence must be shown in ascertaining where that place is.

4. When the indorser of a note is a partnership, notice to one partner is notice to all; and where they reside at different places, distant from the place where the business is carried on, notice should be made at their place of business.

5. Where the firm has made an assignment to a trustee in trust for the benefit of its creditors, who occupies its place of business; and leaves an agent who had charge of the management of its affairs, and the resident partner has absconded and concealed himself to avoid arrest on civil process; notice upon him at his place of business, in charge of his trustee is sufficient.

FIELD, J. delivered the opinion of the court.

The report in this case raises the question of the sufficiency of the notice given to F. Shaw & Bros. indorsers of certain promissory notes, that the makers had on demand refused payment. The report finds that Fayette Shaw and Brackley Shaw constituted the firm of F. Shaw & Bros.; that no service of the writ was made upon Brackley Shaw, who was out of the Commonwealth; that Fayette Shaw, who alone was served with process and alone defended the suit, before the notes matured "had left the country to avoid liability to arrest upon civil process," and was at the maturity of the notes in hiding in Canada; and only "Mr. Morse, one confidential friend, and Mr. Shaw's immediate family knew of his address at that time." "Before he left Boston" for Canada, he "left his address with Mr. Morse, his counsel there (in Boston), who had charge of his business and

*S. C. 2 New England Reporter, 572.

his affairs, and it was understood between them that Mr. Morse should send him anything relating to his affairs that he deemed important. It was also understood that everything that was addressed to him or to F. Shaw & Bros., at No. 268 Purchase street should be turned over to Mr. Morse."

"At the time the plaintiff's notes became due, defendants had no place of business in Boston or elsewhere in this Commonwealth, but their sign remained over the door at No. 268 Purchase street and Wyman, their assignee, was there in the performance of his duties, under the instruments of assignment." F. Shaw and Bros. had done business at No. 268 Purchase street, in Boston, until they became insolvent and assigned their property to Wyman by instruments, copies of which are annexed to the report. "A notice of protest in proper form upon each of the plaintiff's notes was duly sent to 268 Purchase street, addressed to F. Shaw & Bros., but these notices were not sent from there to the defendant or his counsel, and the defendant had no knowledge of them, and no other notice was given him or Brackley Shaw of the dishonor of the notes."

"Soon after the defendant went (to Canada) said Morse was informed by Mr. Wyman that notices of protest for F. Shaw & Bros., were pouring in by the hundred, and he told Mr. Wyman, in substance, that he need not do anything with them, and said Morse never saw any of them, nor sent the defendant any communication regarding them, although he was in constant correspondence with him about his business affairs."

It is also found that, for several years prior to the indorsement of the notes, Fayette Shaw had his domicile in Newton, in this State, "and it has remained there ever since." "The plaintiff knew of the defendants' insolvency and of the assignments to Wyman before the notes became due, but it had no knowledge that the defendants ceased to have a place of business at No. 268 Purchase street, unless such knowledge is to be inferred from knowledge of the assignment."

"The plaintiff had no notice or knowledge of any other address of the defendant or of Brackley Shaw, and there was no evidence that the plaintiff knew before commencing this suit that Fayette Shaw or Brackley Shaw had or ever had a residence in this Commonwealth, nor was there any evidence that the plaintiff had made any effort to find out the residence of either Fayette Shaw or Brackley Shaw."

The first assignment was by Fayette Shaw, of Newton, Massachusetts, and Brackley Shaw, of Montreal, Canada, doing business under the style of F. Shaw & Bros. to Ferdinand A. Wyman, of the property of the firm, in trust; first, if said Shaws, or either of them, be adjudged insolvent debtors, to convey to the assignee in insolvency such of the property as the assignee would be entitled to if the assignment had not been made; second, to produce the property to money by selling it with the right in Wyman "to carry on the

business of said firm for the completing of the manufacture of stock now on hand and otherwise so far as shall be necessary and proper for the faithful and economical administration of the trusts herein and hereby declared and imposed on him, or shall be requested by the beneficiaries"; third, to pay the proceeds (after deducting the expenses) equitably and ratably to the creditors; fourth, to pay the balance to Fayette Shaw and Brackley Shaw, or to the survivor; and it was provided that Wyman "shall have power in and concerning the premises, to use the name of them or either of them and of said copartnership, and, as their attorney irrevocable, to do all things in and touching the same which they or either of them might lawfully do if personally present had these presents not been executed."

The assignment is upon the condition that if they or either of them "shall hereafter make any arrangements with their creditors, whereby such creditors or a large majority of them consent that said property or any portion of the same shall be reconveyed to" them or either of them, Wyman shall convey the same "to the parties entitled thereto under said settlement or arrangement with creditors."

The second assignment was subsequent to the first between the same parties and of the same property, and it provided for a sale of the property, the payment of the proceeds after deducting the expenses ratably to creditors, and the payment of the balance remaining to the Shaws, or the survivor of them, with a power to do "all things in and touching the premises, which the Shaws might do if personally present."

This case has been argued by the defendant as if the Shaws had gone out of business and one of them had retained his residence in Newton, but it is plain that they were still interested in the management of the trust, and that what remained of their business was still carried on at No. 268 Purchase street, Boston, even if "they had no place of business there, or elsewhere in this Commonwealth," and that the defendant was an absconding debtor in concealment without the Commonwealth. It is important that the law of negotiable paper be definite and certain, and when notice has not been actually received in due time by an indorser, the question is whether due diligence in giving notice has been shown, and this, when the facts are all found, is a question of law. Notice may be given at the place of residence or the place of business, and when the place of residence is not the place of domicile, notice at the place of business is sufficient, although it has not been decided that notice at the place of domicile is not also good. The facts may indeed be such as to make it difficult to determine what is the place of residence or the place of business, or whether there is any place of business distinct from the place of residence, and courts must deal with such cases as best they can. The guiding principle is that notice should be sent to

the place where the party to be notified will be most likely to receive it, and reasonable diligence must be shown in ascertaining where that place is. When the indorser is a partnership, notice to one partner is notice to all, but as the partners may reside at different places, and sometimes far distant from the place where the business is carried on, a notice at the place of business, if there is such a place, is plainly the better, because there the partnership can best consult and act, so as to protect itself from loss.

In *Chouteau v. Webster*, 6 Met. 1, "the defendant's general domicil and place of business were in the city of Boston, where he had at all times an agent who had charge of the management of his affairs," but "he was actually resident in Washington, in discharge of his public duties as Senator," and the court held "that notice to the defendant addressed to him at Washington was good and sufficient notice of the dishonor of these notes."

It did not appear, as a fact, that the notice had been actually received by the defendant. The court distinguished between domicil and residence and found the decision upon the circumstances of the case, and the general rule "that notice shall be so given and at such a place that it will be most likely to reach the indorser promptly." See *Young v. Durgin*, 15 Gray. 264.

It is also plain that Morse, who had charge of the defendant's business and affairs, did not mean that the defendant should actually receive the notices of protest, although he was informed where they were sent. On the facts found by the court, if the plaintiff had known them all, it must have been considered more likely that the defendant would receive the notices if sent to 268 Purchase street, Boston, than if sent to Newton. It does not appear that the defendant had any agent at Newton, or anything there but a naked domicil, while he was concealed in Canada; even if his family were there, which does not distinctly appear, it is not found that they had any authority over his business or the business of the firm.

In *Bliss v. Nichols*, 12 Allen, 443, the court says: "But the broader and more precise ground on which the sufficiency of the evidence of notice in this case rests is this, that the being drawn in the partnership name, notice to the partnership, while it continued, was notice to all the members; that the holder, having had no notice of the dissolution of the partnership, had a right to treat it as subsisting; and that the notice sent by mail addressed to the partnership at its place of business, and where the draft was drawn, was there duly received by the agent employed to settle the partnership affairs." The execution of the assignment in the present case did not necessarily dissolve the partnership, and the notes were all expressly made payable in Boston. It may be said that Wyman was not the agent of the firm to receive notices of protest of notes so as to bind the members of the firm personally, but the no-

tices were not addressed to Wyman, but to the firm of its former place of business, where its affairs were being settled in accordance with the assignments, and there was, so far as appears, no other place of business of the firm or of the defendant, and his actual residence was without the Commonwealth and unknown. We are not required to decide whether notice addressed to the defendant or to the firm at Newton would, under the circumstances, have been a good notice, or whether, in all cases, the holder of a note may assume that the place of business of an indorser continues the same from the time of indorsement to the maturity of the note, unless he knows, or has reason to know, that it has been changed. On the facts of this case, we think it was the duty of the court below to rule that the notice was good, because it was sent to what had been the place of business of the firm where its affairs were actually in process of settlement under the trust. It was the place where the defendant expected that notices and letters would be sent to him, and had arranged that, if sent there, they should be handed to Mr. Morse, who alone had charge of his business and affairs, to be forwarded to him in Canada, if Mr. Morse deemed them important, and there was no other place of business of the firm or of the defendant, and he had absconded.

Although, perhaps, it may be assumed that the defendant's family remained in Newton, and although the court has found that the defendant's domicil was there, which must mean that he intended to return there when he thought he would be safe from arrest, yet under the decision in *Grafton Bank v. Cox*, 13 Gray, 503, we think, on the facts, a demand at 268 Purchase street would have been good, if the defendant had been the maker of the note, and the law governing a demand upon the maker is somewhat more strict than that governing notice to an indorser. See *Pierce v. Cate*, 12 Cush. 190.

We find it unnecessary to express any opinion upon the correctness of the ruling of the court, upon the admissibility and effect of the proceeding in insolvency or in the suit in equity, as that ruling, if erroneous, has not harmed the defendant. By the terms of the report it is only if the defendant has been harmed by any ruling of law, that the finding is to be set aside and a new trial ordered.

Judgment on the findings.

WEEKLY DIGEST OF RECENT CASES.

ALABAMA,	18
ARKANSAS,	22
CALIFORNIA,	4, 21, 29
CONNECTICUT,	15
ILLINOIS,	12, 13, 20
INDIANA,	5, 11
MAINE,	32
MARYLAND,	34, 37, 40
MASSACHUSETTS,	3, 7, 17, 23, 30
MINNESOTA,	24, 31, 36, 38
MISSOURI,	8, 9, 16, 35
NEW YORK,	6, 33
RHODE ISLAND,	28, 39
TENNESSEE,	16
TEXAS,	2, 25, 26
VERMONT,	1, 14, 19, 27

1. AGENCY.—*Principal and Agent—Accredited Authority—Liability of Principal for Agent's Acts within Scope of the Agency.*—If one holds another out to the world as his agent, he is bound by such agent's acts, done within the scope of the agency, without regard to the authority intended to be given such agent by the principal, provided third persons are justified, from the acts of the principal, in believing the agent had authority for the acts done. *Griggs v. Seiden*, S. C. Vt., Aug. 21, 1886; 5 Atl. R. 504.

2. ATTACHMENT.—*Intervention—Removal of Cause—Suit against United States Marshal Attaching Goods.*—An attaching creditor who has indemnified the officer may defend or prosecute in the name of such officer, but has no right to intervene, and be made a party to the record. A United States marshal who has taken goods on attachment, and is sued in the State courts for conversion, has no right, as such marshal, to remove his defense into the Federal courts. *McKee v. Coffin*, S. C. Texas, June 6, 1886; 1 S. W. R. 276.

3. CARRIER.—*Duty to Passenger at Depot.*—When a railroad company provides a platform at its station in such a manner as to invite passengers to walk over it while waiting for trains, or while preparing to leave the station, it is bound to exercise due care towards such passengers while upon the platform. The fact that a passenger had started to leave the platform at a place not intended for that purpose, with a view of crossing the track at a point where she had no right to cross it, will not relieve the company from liability for an injury to such passenger, caused by the negligence of its servants, while she was still upon the platform. *Keefe v. Boston, etc. Co.*, S. J. C. Mass., July 3, 1886; 6 East. R. 400.

4. CHARITABLE USES.—*Subscription—Effect of—Acceptance.*—A promise to pay a subscription to some charitable object is a mere offer, which may be revoked at any time before it is accepted by the promisee; and an acceptance can only be shown by some act on the part of the promisee, whereby some legal liability is incurred or money is expended on the faith of the promise. If the promisor dies before his offer is accepted, it is thereby revoked, and cannot afterwards, by any acts showing acceptance, be made good as against his estate; but the rule is otherwise when subscribers agree together to make up a specified sum, and where the withdrawal of one increases the amount to be paid by the others. In such case, as between the

subscribers, there is a mutual liability, and the co-subscribers may maintain an action against one who refuses to pay. *Grand Lodge Good Temp-lars v. Farnham*, S. C. Cal., July 1, 1886; 11 Pac. Rep. 592.

5. CONTRACT.—*Consideration—Promise to Pay a Debt for which Promisor is Already Bound—Release of Groundless Claim—Mortgage—Consideration—Release of Void Levy.*—A promise to pay a debt for which the promisor is already bound, is not such a consideration as will support a contract. The release of an utterly groundless claim is not such a consideration as will support a contract. Where an execution issued against the execution debtor is levied upon the property of a third person, and there was no color of right for such levy, its release will not constitute such a consideration as will support a mortgage executed by the owner of the property. *Harris v. Cassaday*, S. C. Ind., June 19, 1886; N. East. R. 20.

6. —. *Patent—Royalty.*—Under a clause in a contract, between a patentee and a company which agrees to manufacture the patented instrument and pay him a royalty, that the company shall pay him at least a certain sum annually for royalties or forfeit the right to manufacture if he shall so elect, the undertaking of the company is not absolute to pay such sum in each year, if the specified royalties do not amount thereto. The company has the alternative to pay the excess over the royalties on the instruments manufactured up to the sum mentioned, or to refuse to pay beyond the amount of such royalties, subject only to the hazard of forfeiting its right to manufacture at the election of the patentee. *Wing v. Ansonia Clock Co.*, N. Y. Ct. App., June 1, 1886; 3 Cent. R. 745.

7. CORPORATION.—*Municipal Corporations—Highway—Defect—Collision—Personal Injuries—When Defect is Sole Cause of—Due Care Question for the Jury.*—A. and B. were driving, in the town of H. upon a highway which was of defective construction at a certain point, and, when opposite the defect, A. turned his horse to one side to avoid contact with an approaching hack, but, in consequence of the defect, could not turn sufficiently to avoid the hack, which collided with the buggy in which A. and B. were riding, and B. was injured. Held, that, in the absence of negligence on the part of the driver of the hack, the defect was the sole cause of injury, and that the town of H. was liable for the injuries sustained by B. The question of due care is a question for the jury. *Flagg v. Town of Hudson*, S. J. C. Mass., July 3, 1886; 8 N. East. Rep., 42.

8. —. *Municipal Corporations—Mayor of City—Authority—Control of Police Force.*—The mayor of a city, who is made chief executive officer thereof, and whose duty it is to see that all laws of the State and ordinances of the city are observed within the city limits, must necessarily possess control and supervision over the police and local constabulary. Under such circumstances, a resolution adopted by the board of police commissioners, whereby they take from the mayor all control over the police force, and assume that control themselves, will be absolutely void. *Francis v. Blair*, S. C. Mo., June 21, 1886; 1 S. W. R. 299.

9. CORPORATION.—*Municipal Corporations—Streets—Personal Injuries—Acts of Residents.*—A person injured by the breaking of a plank, placed across a gully in a public street by the residents of

the neighborhood, but without the authority of the city, and at a place where the gully was not a part of the sidewalk or travelled way, cannot recover damages from the city for such injury. *Fortune v. City of St. Joseph*, S. C. Mo. 1 S. W. 287.

10. **CRIMINAL LAW—Indictment—Conviction of Lesser Offense.**—On the trial of an indictment it is competent for the jury to acquit of the offense charged, and at the same time convict of an attempt to commit such offense, or to convict of any offense necessarily included in the offense charged. *Lang v. State*, S. C. Tenn., June 10, 1886; 1 S. W. Rep., 318.

11. ———. **Plea of Guilty—Agreement With Prosecutor that Sentence May be Withheld.**—After an accused, who is of age, enters a plea of guilty, the court must either sentence him at the time, or place him in the custody of the sheriff until such sentence; and an agreement with the prosecuting attorney, under sanction of the court, that the accused may remain at large without sentence so long as the offense is not repeated, is unauthorized, and of no effect in aid of the accused. *Gray v. State*, S. C. Ind. June 23, 1886; 8 N. East, Rep. 16.

12. ———. **Practice—Continuance and Adjournment—Adjournment From Day to Day—Sheriff's Powers Under Statute—Grand Jury—Testimony Before, Admissible in Rebuttal, When.**—Court may be opened by a circuit judge on the first day of the term, and an order entered that, if no circuit judge of that circuit be there, at five o'clock P. M., of that day, the sheriff shall adjourn the court until the succeeding day. If, at any time, no judge is present, the sheriff, under § 20 of the circuit court act, (1 Starr & C. S. c. 37, par. 60,) may open and adjourn the court from day to day by proclamation in the court house, and notice posted on the court-house door. The adjournment for the first day, under such order, needs no such proclamation or notice. It is admissible to discredit a witness by proving, by a grand juror, that such witness testified differently before the grand jury. The secrecy of the proceedings of the grand jury has been so far relaxed. 1 Starr & C. St. c. 38, div. 11, § 10, p. 859, par. 472. *Bressler v. People*, S. C. Ill. Aug. 15, 1886, 8 N. East. Rep. 62.

13. **CRIMINAL PRACTICE—Evidence—Inaccuracy not Misleading as to Evidence, not Fatal—Mandatory Words in Instruction as to Effect of Evidence Disapproved—Sentence—Opportunity to Object to—Deprivation of, Not Fatal in Minor Felonies.**—Whether an inaccuracy in an instruction is ground for reversal in a particular case depends quite as much upon the evidence before the jury, to which the instruction might be applied, as upon the abstract accuracy of the language of the instruction; and so, if it is apparent that the language of the instruction, though inaccurate, yet, when applied to the evidence before the jury it could not have misled the jury, the inaccuracy will not be ground for reversal. An instruction telling the jury that in certain contingencies they should disregard certain evidence, held, properly refused. "May" ought to have been used instead of "should." In minor felonies the failure to give the prisoner opportunity to say why sentence should not be passed upon him is not ground for reversal. The court limit the decision as not applying to a capital case. *Bressler v. People*, S. C. Ill. Aug. 15, 1886; 8 N. East. Rep. 62.

14. **DAMAGES—Exemplary Damages—Wife's Tort—Husband's Liability.**—Exemplary damages are recoverable in an action against a husband and wife for the malicious trespass of the wife, even though the husband be free from blame. *Lombard v. Batchelder*, S. C. Vt. Aug. 21, 1886; 5 Atl. Rep. 511.

15. **DREED—Condition—Covenant.**—The provision in a deed: "But, nevertheless, this grant and conveyance is made with this limitation and qualification, and on these express conditions, that if, at any time hereafter, any building shall be erected on said tract or any part thereof, whose first cost shall be less than \$4,000, and which shall be used for any other purpose than a dwelling house; or if said tract shall be used for any other purpose than a meadow or park, then the whole of said tract shall be at once forfeited and revert to the grantor his heirs and assigns forever"—is a condition, and not a restriction merely or personal covenant. A quitclaim deed from the grantor to the plaintiff's grantor released to him the right of entry and destroyed the conditions, and makes the title absolute in the plaintiff, including the right of reversion; the right to enter for condition broken being assignable by statute. Gen. Stat. part 6, p. 47, § 1. *Hoyt v. Ketchum*, S. C. Conn. June —, 1886; 2 N. Eng. Rep. 557.

16. **EQUITY—Parties—Joinder—Mortgage—Foreclosure—Trust Deed—Statute of Frauds.**—A court of equity, even after a final hearing on the merits, and on appeal to the court of last resort, will compel the joinder of necessary parties defendant. A strict foreclosure is not allowed or recognized by the courts of Missouri. Every mortgage debtor is allowed his day in a court of equity. Where the owner of a trust deed forecloses the same, and buys in the premises at a nominal or grossly inadequate sum, under a verbal agreement to hold said premises in trust, and expose them at public sale, and render the surplus proceeds, after satisfying the debt, to the mortgagor, equity will compel the creditor to carry out such agreement before allowing him to enforce payment of the note accompanying the trust deed. *O'Fallon v. Clopton*, S. C. Mo. June 21, 1886; 1 S. W. Rep. 302.

17. ———. **Parties—Same Subject-Matter—Reservation—Issues.**—Where two suits have been brought between the same parties, relating to the same subject-matter, but in the second suit the parties to the first suit are reversed; the suits are brought in different counties; the second bill is not a cross-bill in form, and does not refer to the first bill, nor recite its proceedings; and the facts in the two suits, if determined on bill and answer, are not the same—the suits cannot be determined upon reservations of the two suits together, each upon bill and answer, and the causes must first be heard upon the issues. *Quincy, etc. Bank v. Tansy*, S. J. C. Mass. July 1, 1886; 8 N. East. 49.

18. ———. **Practice—When bill in will not be Considered Multifarious.**—A bill is not multifarious, because it joins as defendants some of the sureties on two bonds given for successive terms, alleging that the collector kept but one running account, to which collections were applied indiscriminately. In rendering the opinion of the court upon this point, Somerville, J. said: "The first and second bonds are, in effect, but legally one under the statute, the sureties on the additional

bond being made co-sureties with those on the first. The principal in the third bond is the same as the principal in the other two, being the one debtor who is primarily liable, and for the settlement of whose accounts with the complainant, the bill is filed. He is thus, in a certain sense, a ligament or connecting link between all the bondsmen. The demands against the two sets of sureties, it is true, are to some extent, distinct claims, but they are not entirely disconnected in view of the particular facts of this case. The collector is averred to have kept one running account extending all the way through his last two official terms, applying the funds collected miscellaneous without regard to any proper appropriation of payments. The sureties on each bond are interested in the taking of the account, and in the proper adjustment of these payments, and of correction of alleged sums in the account. The question of multifariousness is often one of policy and convenience, and therefore rests largely within the discretion of the court. It is sufficient to sustain a bill against such a charge that each defendant has an interest in some one matter common to all the parties. The objection is discouraged when sustaining it might lead to inconvenience or defeat the ends of justice. Filing separate bills against each set of sureties in this case, it seems to us, might lead to great inconvenience in view of the peculiar interest each surety has in the taking of the account, and the correction of the alleged errors of credits and payments." *Lott v. Mobile County*, S. C. Ala. Dec. Term. 1885-86.

19. EVIDENCE—*Contract in Writing—Parol, to Alter or Enlarge—Conflict of Laws—Conditional Sale—Lex Loci Contractus—Estoppel.*—A writing showing an absolute sale of a horse cannot be changed or enlarged by parol evidence to the effect that such sale was in fact conditional, as against an attaching creditor who had been shown the writing. When certain chattels were sold in New Hampshire under a parol condition that the title should remain in the vendor until they were paid for, and it appeared that such conditional sale was valid by the laws of that State against attaching creditors or subsequent purchasers, such title will be upheld in Vermont, when the vendor has done nothing to estop him from setting up his title. *Dixon v. Blondin*, S. C. Vt. August 23, 1886; 5 Atl. Rep. 514.

20. —. *Indictment—Trial—Criminal Law—People not Compelled to Produce all Witnesses Indorsed—Reasonable Doubt—Circumstantial Evidence—Instructions—Credibility—Admissions—Repetition of Instructions.*—The people are not compelled to produce all accessible witnesses whose names are indorsed on the indictment, and to give the defense an opportunity to cross-examine such witnesses. The reasonable doubt which the jury is permitted to entertain must be as to the guilt of the accused on the whole evidence, and not as to any particular fact in the case. This rule, as to particular facts, applies, *a fortiori*, to circumstantial evidence introduced to corroborate direct testimony to the principal fact in issue. Instructions on the credibility of witnesses, and upon the effect of admissions, reviewed and approved. The court need not give additional instructions upon points already fully covered by instructions given. *Bressler v. People*, S. C. Ill. Aug 15. 1886; 8 N. East. Rep. 62.

21. EVIDENCE.—*Records—Parol Evidence Affecting—Admissibility—Counties—Records of Board of*

Supervisors—Correction by Clerk.—Parol evidence, offered for the purpose of showing that what a party claims to be a record is not a record, is properly admissible, and is not parol evidence for the purpose of contradicting a record. A clerk of a board of supervisors is not clothed with power, of his own account, to correct a record of the proceedings of the board, even if it is shown that he made the correction in accordance with the true state of facts. *Dyer v. Brogan*, S. C. Cal., July 13, 1886; 11 Pac. Rep. 589.

22. FRAUD.—*Sale of Goods—Intent—Evidence—Creditor.*—To render a sale of chattels void on the ground of fraud, the vendee must have bought with the intention of never paying for them, and such dishonest intention must have actually existed at the precise time of purchase, and not be a mere afterthought. This fraudulent intention can seldom be established by direct evidence, and is therefore allowed to be shown by proof of circumstances from which the jury may infer such intent. The circumstances of this particular case reviewed, and held to show fraud sufficient to avoid the sale. As against a vendor thus deceived and defrauded, an attaching creditor cannot be deemed an innocent purchaser for value. *Taylor v. Mississippi Mills*, S. C. Arkansas, July 3, 1886; 1 S. W. R. 283.

23. —. *Statute of Frauds—Guaranty—Memorandum—Parol Evidence.*—It is sufficient to satisfy the statute of frauds requiring that the memorandum of guaranty shall show who are the parties to the contract, if that fact appears by description instead of by name; and if the promisor or promisee is described instead of named, parol evidence is admissible to apply the description and identify the person meant. *Jones v. Dow*, S. J. C. Mass., June 30, 1886; 6 East R. 408.

24. —. *Statute of Frauds—Part Performance—Estoppel—Acts in Reliance on Oral Agreement.*—The underlying principle upon which courts enforce oral agreements within the statute of frauds, on the ground of "part performance," is that when one of the parties has been induced to alter his situation, on the faith of the oral agreement, to such an extent that a refusal to enforce it would result, not merely in the denial of the rights which the agreement was intended to confer, but in the infliction of "an unjust and unconscientious injury and loss" upon him, the other party will be held estopped, by force of his acts, from setting up the statute. The acts constituting "part performance" must have been done in reliance upon and in pursuance of the oral agreement, and be related to and connected with it, but are not confined to doing what the contract stipulates; that is, "part performance," strictly so called. The acts must have been done by and to the prejudice of the party seeking to assert or enforce the contract, or those under whom he claims title; but any act which the party to the contract might have asserted and relied on as part performance may be asserted and relied on by those claiming under him. *Brown v. Hoag*, S. C. Minn., June 7, 1886; 29 N. W. R. 135.

25. HOMESTEAD.—*Abandonment.*—The question whether or not a homestead has been abandoned, turns mainly on the real intention of the homesteader, and is purely a question of fact. Circumstances reviewed, and held not to constitute

an abandonment. *Bowman v. Watson*, S. C. Tex., June 6, 1886; 1 S. W. R. 273.

26. **HUSBAND AND WIFE.**—*Abandonment—Community Property—Action—Intervention—Homestead—Exemptions—Rights of Abandoned Wife.*—The abandonment of a wife by her husband perfects all her rights in and to the community property as effectually as if he were dead. In such cases the abandoned wife may intervene for her own protection, in actions brought against her absconding husband by his creditors. An abandoned wife may claim a dwelling-house, even though built on leased grounds, and being a mere chattel, as an exempt homestead. *Cullers v. James*, S. C. Texas, June 25, 1886; 1 S. W. R. 314.

27. **INTEREST.**—*Rule for Computation—Mixed Mutual Demands—Costs—Appeal—Apportionment of Costs.*—Under a complicated state of facts (set forth in the opinion), it was held that, in the computation of interest between parties who had mixed demands against each other, annual rests should be made on the first day of January in each year following years in which items of account appeared, and simple interest computed on the amount at each rest from the date of rest to date of report, except in cases where specific payments had been made, and dates given on certain promissory notes that defendant had given or assumed for orator, in which cases interest should be computed from date of such payment; and on the said promissory notes, which bore annual interest, annual interest should be computed until the maturity of said notes, and simple interest should then be computed on the amount of each annual payment from date of payment to date of report, assuming that principal and interest on said notes had been paid according to their terms. Only in exceptional cases will the Supreme Court disturb an apportionment of costs made by the chancellor. *Flannery v. Flannery*, S. C. Vt., Aug. 21, 1886; 5 Atl. R. 507.

28. **MASTER AND SERVANT.**—*Apprenticeship—Suit for Services after Twenty-One, the Time of Majority being in Doubt.*—The plaintiff, A., while a minor in the reform school, was taken by B., the defendant, as an apprentice, under an invalid agreement of apprenticeship; B. to receive A.'s services during minority, etc. He remained several years in B.'s service, then he absconded, was re-arrested, re-committed to the reform school, and was remitted to B., as B. testified, at A.'s own earnest request. The evidence left it in doubt when A. finally left B.'s service, or when A. was of age. Sentences to the reform school were limited by law to minority. In an action by A. against B. for services rendered after A. claimed to have reached majority: *Held*, that he could not recover if he continued to work for B. after arriving at twenty-one years of age without a specific contract, or without notice to B. he should expect wages. *Burrows v. Ward*, S. C. R. I., July 10, 1886; 5 Atl. R. 500.

29. ———. *Contract for Personal Services—Action on Quantum Meruit—Evidence—Competency—Testimony Concerning Intention of Another—Set-Off and Counter-Claim—Witness—Admissibility of Evidence of Hostility.*—Where, in the case of a contract for personal services, the master denies the servant's rights under the contract, and attempts to rescind it, the latter is at

liberty to abandon the contract, and sue for reasonable compensation for work actually done. There is no error in striking out the portion of a defendant's testimony which purports to declare the intention of the plaintiff concerning the matter in dispute between them. In an action on a *quantum meruit* for personal services, the defendant cannot set off damages arising from his being compelled to surrender to his landlord his lease of the premises on which the plaintiff had been engaged to work, because the latter had violated his contract, such damage not being a direct consequence of the plaintiff's violation of his contract. A party is not injured by cross-examination of a witness to show that ill-feeling at one time existed between them, if the witness, on the direct examination, has testified favorably to the party. An employee dismissed by his employer for good cause is not entitled to any compensation for services rendered since the last day upon which a payment became due to him under the contract. *Hartman v. Rogers*, S. C. Cal., May 25, 1886; 11 Pac. R. 581.

30. ———. *Injury to Servant—Knowledge of Danger—Master Directed Work.*—Where the master undertakes to direct specifically the performance of work in a particular manner, the court will not say, as matter of law, that the servant is not justified in relying to some extent upon the knowledge and carefulness of his employer, and in relaxing somewhat the careful examination and vigilance which otherwise would be incumbent upon him. Plaintiff, a servant in defendant's employ, had driven a load of hay to defendant's barn, when he was personally directed by defendant to drive through a gateway for the purpose of unloading. In doing so, plaintiff was struck by a sign over the gate-way and injured. There was evidence tending to show that defendant was familiar with driving such loads through the gateway, and that the plaintiff was not; that it was not apparent to the plaintiff from his position, and while managing the horses, that he could not drive through with safety, and that the defendant from his position had a better opportunity than the plaintiff of personally observing the fact. *Held*, that the question of negligence, and of defendant's liability, were properly left to the jury. *Haley v. Case*, S. J. C. Mass., July 2, 1886; 6 East. R. 411.

31. ———. *Right of Discharged Railroad Employee to Sue for Wages.*—A railroad employee, upon being discharged from service, is entitled to immediate payment of the wages due, and may maintain an action for the recovery of the same; the evidence failing to show a general custom among railroads to defer payment, or notice to the plaintiff of a regulation or usage of his employer to do so. *Thompson v. Minneapolis, etc. Co.*, S. C. Minn., July 13, 1886; 29 N. W. R. 148.

32. **MORTGAGE.**—*Foreclosure—Writ of Entry—Administrator as Party—Security for Bond to Support—Breach—Demand by Widow Unnecessary—Dower—Mortgaged Lands.*—The interest and title of a mortgagee in real estate vest, upon his decease, as assets in his executor or administrator, who is the proper party to any proceeding for the foreclosure of the mortgage. Where suit is brought to foreclose a mortgage given to secure a bond for the support of a husband and wife during their natural lives, a breach of such bond must be

shown, but such breach need not be shown to have occurred during the life-time of the husband, who died first. It is sufficient if there has been a breach since the death of the husband, and before the commencement of the suit. It is not necessary, to entitle a recovery in such case, to show, that any claim has been made by the widow for her support on the administrator of the deceased mortgagor before suit commenced. The widow of the deceased mortgagee, before dower has been assigned or set out to her, has no such legal estate in the premises as would entitle her to convey any part thereof to a third person as against the administrator of the deceased mortgagee. *Plummer v. Doughty*, S. C. Me., August 6, 1886; 5 Atl. R. 526.

33. **NEGLIGENCE.—Evidence.**—In an action against a railroad company for negligently burning plaintiff's barn by fire escaping from the smokestack of an engine, where it is not shown that the fire was caused by either of two engines which were claimed to be in perfect order, but it is shown that it may have been caused by another engine having a hole cut in its fire-screen and not in good order, it is a question of fact for the jury which engine caused the fire. Where there was a conflict in the evidence as to whether the engine which caused the fire was sufficiently guarded by a screen on the smokestack which would prevent coals of fire from escaping, a non-suit was properly refused. *Seeley v. New York, etc. Co.*, N. Y. Ct. App., June 8, 1886; 3 Cent. R. 743.

34. **OFFICES—Salary.**—In England offices are incorporeal hereditaments. In this country a public office cannot be the property of the incumbent, but belongs to the people. Officers are trustees for the public. The legislature may abolish an office (of legislative creation), but courts must presume that an office, while it exists, is necessary. Although no special statute exists providing that officers shall hold over until their successors are chosen, yet a public officer, on the expiration of his term without appointment of his successor, may and should continue in the discharge of the duties of the office, and is entitled to the salary for the additional time he serves. *Robb v. Carter*, Md. Ct. App. May 27, 1886; 3 Cent. Rep. 730.

35. **RAILROAD COMPANIES—Fires From Locomotive Sparks—Insufficient Averment.**—Where a complaint states that the defendant, in the "month of May," negligently permitted fire to escape from its engines, whereby property of the plaintiff was injured, and assigns no reason why the plaintiff cannot state the time with more certainty, the complainant may be required to make the complaint more specific. Where no charge of negligence in permitting dry grass to accumulate upon the right of way is made by the pleading, it is error to submit the cause to the jury upon that issue. *Melvin v. St. Louis, etc. Co.*, S. C. Mo. June 7, 1886; 1 S. W. Rep. 286.

36. **SALE—Warranty—Executory Contract—Implied Condition—Intention to Use Property for Particular Purpose.**—A contract for the sale of a specified lot of logs, at a stated price per 1,000 feet to be transported by the vendor to a distant place of delivery, and there measured, delivered, and paid for, considered executory, and not an executed sale. At the time of making such an executory contract, the logs being so situated that they could not then be inspected by the vendor,

any undertaking which may be implied on the part of the vendor as to the merchantable quality of the logs is to be treated as a condition, rather than a warranty as to defects which were, or, being obvious upon inspection, might have been, discovered when the logs were delivered in performance of the contract; and the receiving and retaining of the logs by the vendee under the contract has the effect of a waiver of such implied condition as to quality. In a purchase of specific defined property no warranty is implied from the mere fact that the vendor knew that the vendee intended to use the property for a particular purpose. *Thompson v. Libby*, S. C. Minn. July 15, 1886; 29 N. W. Rep. 150.

37. **—Negligence—Evidence—Witness.**—In a suit upon a promissory note, where plaintiff was vendee of certain real property with power of sale thereof, the proceeds of which, when sold, were to be applied to the payment of the note; and the defense set up was that plaintiff had been negligent in the sale of the property, and, owing to such negligence, the property failed to bring enough to pay the note; where it appears plaintiff offered the property for sale before maturity of the note, but did not get a bid for it, and afterwards sold it for an amount which, after deducting the amount of incumbrances thereon, was not sufficient to pay the note; held, that plaintiff might recover the amount still due on the note, less the amount paid to defendant from the proceeds of the sale of the property. As a general rule a party will not be permitted to impeach the general reputation for truth, or to impugn, by general evidence, the credibility of a witness he has called; the party may show that the evidence has taken him by surprise, or is contrary to what the party had reason to believe he would testify to. If the witness has made to the party who calls him, or the attorney of such party, a statement totally variant from his sworn testimony, and on the faith of such statement he has been called, he may be asked if he made such a statement; and if he denies it, such statement may be proved, not for the purpose of impeaching his general character, but for the protection of the party calling him, in the discretion of the judge. *Smith v. Briscoe*, Md. Ct. App. June 24, 1886; 3 Cent. Rep. 733.

38. **VENDOR AND VENDEE—Contract—Strict Performance—Election.**—A contract for the sale of land prescribed definite times for the payment of the purchase price, and contained terms which, standing alone, imported an agreement for strict performance, and that the times specified for payment should be deemed to be of the essence of the contract; but it further provided that, in case of any default in such strict performance, the vendor should have the right to declare the contract null and void. It was further agreed that all overdue payments should bear an increased rate of interest. Held, that the contract gave to the vendor the election to determine whether strict performance should be required; that, in the absence of a determination to require strict performance, and of reasonable notice of such election, the mere default of the vendee to make the specified payments would not operate to extinguish his equitable rights; and a subsequent declaration of forfeiture by the vendor, without notice and reasonable opportunity to make payment, was also ineffectual. *O'Connor v. Hughes*, S. C. Minn. July 12, 1886; 29 N. W. Rep. 152.

39. *WILL—Contingent Devise or Bequest*—Testator gave his property of every kind to trustees, *inter alia*, * * * upon death of his son to convey the estate in equal shares to his son's wife and children, and, upon death of son leaving no wife or child, for the use of a church. *Held*, upon death of the son leaving a widow, but no child, none having been born to him, that the church took nothing, the contingency upon which it was to take not having occurred, but that the widow took the entire residue of the estate. *Morse v. Church*, S. C. R. I. June 26, 1886; 5 Atl. Rep. 501.

40. —. *Devise—Construction*.—A will must be construed with reference to the law as it existed when the will took effect. Where a devise is to A., and "if he dies without issue," then over, these words, according to their settled legal construction, import a general or indefinite failure of issue; and, whenever found in a will, must be taken in their technical sense, unless there be something clearly demonstrating a different intention on the part of the testator. Under such devise, where the first taker takes the fee, the devise over is void because the contingency is too remote. *Comegys v. Jones*, Md. Ct. App., May 27, 1886; 3 Cent. R. 735.

QUERIES AND ANSWERS.*

[Correspondents are requested to draw up their answers in the form in which we print them, and not in the form of letters to the editor. They are also admonished to make their answers as brief as may be.—Ed.]

QUERIES.

23. A. lives in Louisiana, but does a mercantile business in Mississippi, through a resident agent, B. B. employs a salesman, C., for A. Can D., a Mississippi creditor of C.'s garnish the non-resident A., by service of process on B. Again: A owes D., by promissory note (same parties). Can D. garnish A. by service on B.? Cite authorities, J. B. S. Osyka, Miss., July 9, 1886.

QUERIES ANSWERED.

Query 43.—[22 Cent. L. J. 430].—A. sells B. and C., who are partners, a lot of lumber at \$10 per 1000 feet, and takes their note for the amount. B. and C. dissolve partnership, C. assuming the payment of all the firm debts, of which A. had notice. After the dissolution C. dies, and his only heir, his father, takes charge of his assets and undertakes to settle his debts. A. presents the note of B. and C. to B. for payment, and B. refers him to C.'s father, stating that he will pay all the firm debts. C.'s father refuses to pay the note, stating as an excuse that the measurement of the lumber was not correct, falling considerably short of the measurement made when the note was given, but proposes to pay a smaller amount than the note calls for if A. will take it for satisfaction of the note. A. hesitates, but finally agrees to take it in order to avoid a law suit, and in furtherance of that agreement, C.'s father makes A. a small payment, promising to pay balance in a few days. He never paid balance, and after the expiration of six months, A. sues B. on the note of B. and C., and B. sets up as a defense the agreement of A. and C.'s father, and the part performance thereof, and tenders A. the balance due on the agreement. Is A. bound by the agreement he made with C.'s father? Cite authorities.

WILL P. FRAZEL.

Answer.—An agreement to accept a less sum in satisfaction of a greater will not operate as a defense against the original claim. Proof of partial payment of the sum agreed on, readiness to pay, or of a tender and refusal, is not sufficient. R.'s defense is not good. An acceptance of all is necessary. *Frost v. Johnson*, 8 Ohio 393; *Noe v. Christie*, 51 N. Y. 279; *Simmons v. Clark*, 56 Ill. 98; *Russell v. Lytle*, 6 Wend. 390; *Person v. Civer*, 29 How. [N. Y.] 432; *Smith v. Keels*, 15 Rich. 318. S. S. M.

RECENT PUBLICATIONS.

THE AMERICAN DECISIONS, containing the cases of General Value and Authority Decided in the Courts of the Several States from the Earliest Issue of the State Reports to the Year 1869. Compiled and Annotated by A. C. Freeman, Counsellor at Law, and Author of "Treatise on the Law of Judgments," "Cotenancy and Partition," "Executions in Civil Cases," etc. Vols. LXXV and LXXVI. San Francisco Bancroft-Whitney Company, Law Publishers, Booksellers and Stationers. 1886.

These two volumes are fully up to the standard of the valuable series of which they form a part. We could hardly say more in their favor, or add to the commendations which we have bestowed on their predecessors. If there were nothing else to be said in favor of the collection, the well established reputation of the editor, Mr. Freeman, as a jurist of rare ability and profound learning, would be an ample warrant for the favor of the profession.

JETSAM AND FLOTSAM.

ANTI-VACCINATION—*The London Law Times*, says:—"The state of things brought about by the anti-vaccination movement at Leicester grows more and more discreditable to the administration of the law in this country. Recent statistics show that during the last year only 20 per cent. of children born in the town have been vaccinated, while the total number of persons openly defying the law is about 10,000. The most serious aspect of the case, however, lies in the fact that the guardians have definitely ceased from proceeding against defaulters. In other words, a local administrative body, charged with the duty of enforcing the law of the land, take upon themselves to override the law by refusing to enforce it. For aught we know, the vaccination acts may be as pernicious as the people of Leicester suppose. But while they remain on the statute-book and are enforced in one part of the country, they ought to be enforced in all. No civilized State can afford to have the observance of its public statutes made a matter of local option."

The "guardians" at Leicester are certainly much to blame for not enforcing the law—if they can, but with ten thousand fools resisting their authority they probably need reinforcements. There is however, or is said to exist, a public functionary who is even more remiss than the "guardians," to-wit, the fool-killer. If there is such a person, and Leicester is within his jurisdiction, as surely it ought to be, his opportunities there for exercising his peculiar functions are very extensive and particularly tempting.

The Central Law Journal.

ST. LOUIS, OCTOBER 1, 1886.

CURRENT EVENTS.

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HOW JUDGES SHOULD BE CHOSEN?—This is one of that class of questions which are easier asked than answered, and prudent people usually hedge their solutions of them with an ample stock of provisos and conditions. In the United States we have tried, and are trying, three modes of selecting judges: Appointment by the executive, "by and with the advice and consent, &c.," election by the legislature, and election by the people. To each of them have been made grave objections which, upon analysis, will be found to amount to the same thing, to wit, that the qualities most likely to secure a judicial position, are not the qualities essential to a good judge. Whether the Governor appoints, or the Legislature elects, they say that the ermine is too apt to be the reward of antecedent political partizan service, not at all connected, nor indeed consistent, with the possession of the essential and indispensable judicial attributes. If the people elect, there is the same objection, except that the political service is prospective. A party convention nominates for judge, a man who can bring some strength to the party, who can carry something, and not have to be himself carried. The party wants for such an office a man whose manners are popular, who has personal "magnetism," who can gain votes for the party. If, in addition to this, he possesses the integrity, learning, and mental power essential to the proper discharge of judicial functions, so much the better. To do them justice, we believe political parties usually do their best with the material at their disposal, and nominate for judges the men who are best fitted for the offices, *provided*, always, that besides that fitness, they possess sufficient personal popularity to keep them abreast with the ticket.

Party managers are eminently practical men and take a very practical view of these matters. They would not nominate for a judicial office a Justinian, or a Kent, or a

Marshall, if they believed that his nomination would hurt the party.

We do not believe that the appointment or election of judicial officers, whether by a governor or the legislature, or the people, can ever be made independent of the control, partial or absolute, of party politics. As long as political parties exist, they will strive to control every civil office of government to which is attached, either honor or profit. No office is so high, and none so low, that the political party will not seek to render it, or its incumbency, a source of party capital. There are differences in degree of course, party lines are not drawn as strictly in an election for the office of circuit judge as for a member of congress, but the principle is the same, and with few exceptions, the democrat votes for the democratic candidate for judge, and the republican for the republican candidate.

We do not consider this a pessimistic view of the case, we regard it as a necessary and natural condition of popular government. If it is an imperfection of our system, it is inseparable from it. Our experience of the past hundred years, has surely taught us that judicial purity, integrity, and ability, are consistent with free institutions, and during all that time our judges have been chosen in one of the three modes we have indicated, and each of them is necessarily infected with political influences.

Which of these three modes of selecting judicial officers is best, we do not presume to say, but will merely remark, that although in many States changes have been made from executive appointment, and legislative election, to popular vote, the reverse process; so far as we are advised, has never taken place, there are *nulla vestigia retrorsum*. Whatever universal suffrage has once obtained it has never relinquished. This in a great measure is the result of the prevalent sentiment, that government should be "of the people, for the people, by the people." The fact remains, however, that the judges of those States in which they are chosen by universal suffrage, have never suffered in the comparison, other things being equal, with the judges of those States in which the older and more conservative modes are retained.

We therefore think that public policy does

not demand any special changes in the modes of electing judges, and that, among the many projects of "Reform" that have recently been suggested and advocated in Bar Associations, legal journals, and newspapers, this is entitled to as little favor as any. Far more important than the mode of his election, is the independence of the judge, and this can be most effectually secured by a reasonably long term of office and a liberal salary.

NOTES OF RECENT DECISIONS.

BURDEN OF PROOF—RATIFICATION OF LEASE—ESTOPPEL—JUDGMENT BY DEFAULT.—In a case¹ recently decided in the United States Circuit Court for Oregon there are several rulings which we deem worthy of note. It seems that at a meeting of the directors of a corporation a lease was authorized which its officers proceeded to execute, and upon which the lessee proceeded to act. In the suit under consideration, the lessor corporation denied by answer the validity of the lease, because, at the meeting at which it was authorized, there was not a quorum of the directors present. The plaintiff, also a corporation, replied that it had no knowledge or notice of a want of a quorum at the meeting. There is a further reply of ratification by the defendant, of the contract of lease in question.

As to the burden of proof, the court held that it lay upon the defendant to prove the allegation it made, that the lease in question was executed by authority of a meeting of the board at which a legal quorum was not present. It admitted the *prima facie* case made by the answer, but sought to avoid it by new matter, the illegality of the meeting, and this, it was incumbent upon the defendant to prove. In view, however, of the further ruling of the court, the questions whether the meeting was legal or illegal, and whether the plaintiff had or had not notice that a quorum was not present at the meeting were, as we think, immaterial issues, for it being conceded that a lease was made by apparent authority, the subsequent ratification of it by authority of the defendant company, real, as

well as apparent, was held to be as obligatory upon the defendant, as if the original proceeding had been strictly regular. On this point the court says:

"A corporation, like a natural person, may ratify any act of its agent or any one professing to act by its authority, which it has the power to perform."²

And it proceeds to define ratification thus:

"Ratification takes place when one person adopts a contract made for him or in his name, which is not binding on him because the one who made it was not duly authorized to do so. Ratification is a question of fact and in the great majority of instances turns on the conduct of the principal in relation to the alleged contract or the subject of it, from which his purpose and intention thereabout may be reasonably inferred."³ And generally, deliberate and repeated acts of the principal with a knowledge of the facts, that are consistent with an intention to adopt the contract, or inconsistent with a contrary intention, are sufficient evidence of ratification."

And for the purposes of establishing a ratification, there is a presumption that whatever is done by the officers of a corporation under its corporate seal, nothing appearing to the contrary, is lawfully done.⁴

Upon the question how far a defendant is estopped by a judgment by default, the court held that a judgment by default, like a judgment upon contest, is conclusive of all that it professes to decide, as determined by the pleadings,⁵ and that such a judgment so rendered, is conclusive, as between the parties to the action, as to every matter well pleaded therein and necessary to the judgment. And it would appear that such a judgment may be replied to a plea in a subsequent action between the same parties involving the same issues, setting up matter that might have been pleaded to the former action.

² Eureka Co. v. Bailey Co., 11 Wall. 491; Gold Mining Co. v. National Bank, 6 Otto, 644; Witt v. Mayor, 5 Rob. (N. Y.) 259; The E. C. Society v. The Episcopal Church, 1 Pick. 375; P. R. M. Co. v. D. S. & G. R. Ry. Co., 7 Saw. 67.

³ Story on Agency, §§ 253-260.

⁴ Bank v. Dodridge, 12 Wheat. 70; McKeon v. Citizens etc. Co. 42 Mo. 79.

⁵ Bigelow on Estoppel, 27.

¹ Oregonian R. R. Co. v. Railway & Nav. Co., Oregonian, Sep. 16, 1896.

STATUTE OF LIMITATIONS—IMMUNITY OF THE UNITED STATES—TRUST FUNDS.—The Supreme Court of the United States before its adjournment in the spring of 1886, decided a case of some interest involving the statute of limitations, its application to the United States as to demands held by it against citizens, and the questions whether the immunity of the government from the operation of the statute is affected at all, and to what extent by the time and mode of acquiring such claims, and by the fact that they are held in trust for others.⁶ The case in brief was this: The United States in 1832, made a treaty with the Chickasaw Nation of Indians, by which the United States Government became the trustee for the Indian Nation to hold an invest for the benefit of the Nation certain funds, the proceeds of the sale of the Indian lands, and subsequently, in 1852 invested a portion of such funds in the bonds (with coupons attached) of the defendant company. Still later, in 1878, the United States accounted with the Indian Nation and closed the trust, satisfying the Indians otherwise, and retaining the coupons in suit as the property of the government. The bonds themselves, and later coupons than those in suit, were all duly paid. The defence insisted on was the Statute of Limitations, that, as the United States held the coupons as trustee, at the time of their maturity, the Statute of Limitations then began to run, and that the bar was complete. The Circuit Court of the United States instructed the jury that the plaintiff's action was barred by the statute, and judgment for defendant was rendered accordingly. The Supreme Court reversed this judgment, and in delivering the opinion of the court, Mr. Justice Gray furnished an admissible compendium on the law of the subject. He said:

"It is settled beyond doubt or controversy—upon the foundation of the great principle of public policy, applicable to all governments alike, which forbids that the public interests should be prejudiced by the negligence of the officers or agents to whose care they are confided—that the United States, asserting rights vested in them as a sovereign government, are not bound by any statute of limitations, unless Congress has clearly mani-

festated its intention that they should be so bound.⁷ The nature and legal effect of any contract, indeed, are not changed by its transfer to the United States. When the United States, through their lawfully authorized agents, become the owners of negotiable paper, they are obliged to give the same notice to charge an indorser as would be required of a private holder.⁸ They take such paper subject to all the equities existing against the person from whom they purchase at the time when they acquire their title; and cannot therefore maintain an action upon it, if at that time all right of action of that person was extinguished, or was barred by the statute of limitations.⁹ But if the bar of the statute is not complete when the United States become the owners and holders of the paper, it appears to us, notwithstanding the dictum of Cowen, J., in *U. S. v. White*,¹⁰ impossible to hold that the statute could afterwards run against the United States.¹¹ In the present case, the United States bought the coupons sued on, and the bonds to which they were annexed, long before any of them became payable, or the statute of limitations had begun to run against the right of any holder to sue thereon. The money with which they were bought was money received by the United States from the sale of the lands ceded to them by the Chickasaw Nation of Indians. Those lands, the money received from their sale, and the securities in which that money was invested, were held by the United States, in trust, to be applied for the benefit of those Indians, in performance of the obligation assumed by the United States by treaties with them. The securities were thus held by the United States for a public use in the highest sense, the performance of a *quasi* international obligation; and they continued to be so held until that obligation had been performed and discharged, after which they were held by the United States, like all other

⁷ *Lindsey v. Lessee of Miller*, 6 Pet. 686; *U. S. v. Knight*, 14 Ib. 301, 315; *Gibson v. Chouteau*, 13 Wall. 92; *U. S. v. Thompson*, 98 U. S. 486; *Fink v. O'Neil*, 106 Ib. 272, 281.

⁸ *U. S. v. Barker's Adm'r*, 4 Wash. C. C. 464, and 12 Wheat. 560; *U. S. v. Bank of Metropolis*, 15 Pet. 377, 392, 393; *Cooke v. U. S.*, 91 U. S. 389, 396, 398.

⁹ *U. S. v. Buford*, 3 Pet. 12, 30; *King v. Morrall*, 6 Price, 24.

¹⁰ 2 Hill (N. Y.), 59, 61.

¹¹ *Lambert v. Taylor*, 4 B. & C. 138; *S. C. 6 D. & R.*, 188.

⁶ *United States v. Nashville, etc. Co.*, April 26, 1886;

22 The Reporter, 321.

property of the government, for the ordinary public uses.¹² The necessary conclusion is that the statute of limitations of Tennessee never ran against the right of action of the United States upon these coupons, either while the United States held them in trust for the Indians, or since they have held them for other public uses; and that the decision of the circuit court was erroneous.

This case does not present the question. What effect the statute of limitations may have in an action on a contract in which the United States have nothing but the formal title, and the whole interest belongs to others.¹³

¹² *Van Brocklin v. Tennessee*, 117 U. S. 151, 158.

¹³ *Maryland v. Baldwin*, 112 U. S. 499; *Miller v. State* 38 Ala. 690.

LIABILITY OF AN EMPLOYER TO AN EMPLOYEE INJURED BY THE NEGLIGENCE OF A FELLOW EMPLOYEE.

I. Introduction.

Importance and difficulty of the subject.
General misapprehension regarding it.
Statement of the doctrine of common employment.

II. General Principles Involved.

Rule.—One is liable only for his own wrongful act.
Exceptions.
Respondent superior.
Qui facit per alium facit per se.
Origin and extent of exceptions.
Rule as to co-servant.
Foundation of the rule.
Early cases.

III. Present status of the doctrine of common employment.

Extent of the rule.
Duties of the master.
Who are fellow-servants?
What constitutes common employment?

IV. Conclusion.

The law in other countries.
Statutory changes.

"If law be a science and really deserve so sublime a name, it must be founded on principle, and claim an exalted rank in the Empire of Reason."—Sir William Jones.

The frequency with which the courts are called upon to decide questions arising from the doctrine of common employment, bears witness to the importance and difficulty of the subject. In this age of great industrial enterprises, this branch of law is important,

partly because of the number of persons affected by it, and partly by reason of the degree of their interest; for the questions occurring on this subject are not remote and theoretical, but are practical, and frequently of vital moment to the parties.

Nor is the topic free from perplexity. Owing to the complex relations of the employees of large corporations, it is often difficult to decide who are fellow-servants, to the intent of exempting the master from liability. But the obscurity and apparent confusion in which this doctrine has hitherto been involved, have arisen largely from a prevailing misapprehension of the principles upon which it is founded. In view, therefore, of its importance and difficulty, the subject is worthy of close and thoughtful attention.

The legal proposition in question, known as the doctrine of "common employment," may be stated as follows: When a master uses due care in selecting competent and trustworthy servants, and in furnishing suitable means for the service, he is not responsible to one person in his employ for a personal injury occasioned by the negligence of another in the same service, unless the latter was occupying the position, or performing a duty of the principal.

It shall be the object of this paper to point out the fundamental principles and rules of law involved, and thus to reduce this branch of the law of master and servant to a more logical and consistent whole; to show that there are sound legal maxims in accordance with which, questions that arise under this head may be definitely solved; and, finally, to state the law as it exists, as clearly, concisely and accurately as may be.

II. In considering the question of a master's liability to a servant for an injury to the latter, occasioned by the negligence of a co-servant, the first and most elementary principle to be borne in mind is, that primarily a man is liable for his own acts only, and not for those of others. It has been common to assume that the master would be liable in the absence of any rule of law to the contrary, and then to seek to explain away his liability. This is an error which has rendered the subject needlessly difficult and obscure. Instead of starting, as is generally done, with the maxims *respondent superior* and *qui facit per*

alium facit per se, a more accurate and logical method of treating the subject, would be to regard these as the exceptions to the general proposition above stated.

Though the principle may be supposed to have existed in the bosom of the law from time immemorial, the doctrine of common employment is the result of modern legislative and judicial action; the earliest case in which the doctrine was declared, *Priestley v. Fowler*,¹ was decided in 1837. Nevertheless, to understand thoroughly the present law governing a master's liability, it is necessary to trace the history of the principles involved, and especially of the maxims *respondeat superior* and *qui facit per alium facit per se*, though the latter applies to principal and agent, rather than to master and servant.

The relations of master and slave, under the Roman law, and of lord and vassal, under the feudal system, were such that no question of the kind under consideration could arise under those systems. By the English common law the master is liable to his servant for his individual wrong;² a servant is likewise liable to his fellow-servant.³ Such was not the case under the Roman law, where neither son nor slave was *sui juris*; the *pater familias* was the only one who could sue or be sued. The doctrine of *respondeat superior*, therefore, was a natural development of the latter system. The rule *qui facit*, etc., is derived from the same source.

These maxims were first introduced into the English law on grounds of public policy, about the time of Lord Holt;⁴ the earliest recorded case being, it is said, the old case of *Michael v. Allestree*.⁵ From the days of Charles II. such has been the rule of the common law of England,⁶ though we have high judicial authority for saying that, before that time, "there is no instance of a master being liable for the negligence of his servant."⁷ That a man should be liable for an injury occasioned by his own act or neglect

is obviously just. That he should be liable for the act of another which he not only did not command, but, perhaps, even forbade to be done, must be justified upon the ground of public policy rather than of natural justice. Such, however, is the well established and eminently satisfactory and salutary exception as to a master's liability to a stranger injured by a servant acting in the line of his duty. Should the same exception be extended to the case of a servant injured by a fellow-servant?

This question seems seldom to have been examined in a thorough, unprejudiced and comprehensive manner. Justice Story, with his usual breadth of view in speaking of the doctrine of common employment, says, that in attempting the solution of the new cases which will arise on this subject, "It would be well to settle more definitely than has yet been done, the grounds upon which a master is in any case made liable for the negligence of his servant toward a stranger to the agency; and to see what and how many of such reasons apply, and with what force, to such new cases. This seems never, as yet, to have been attempted."⁸

In analyzing the reasons for the present rule, it is, perhaps, best to examine first the early cases in which it was first enunciated. Although the case of *Priestley v. Fowler*,⁹ did not distinctly declare the doctrine, it is generally referred to as the first recorded case on the subject. A butcher's servant was sent to deliver meat on a van which had been loaded by a fellow-servant, but loaded too heavily, in consequence of which the van broke down, and the man's thigh was broken.

In deciding that the butcher was not liable, Lord Abinger, admitting that there was no precedent for the action, and basing his decision upon general principles, said that the plaintiff must have known as well as the master, and probably better, whether the van was sufficient; and that the consequences of a decision in favor of the servant would be alarming, subjecting the master to unknown and unreasonable responsibilities, and encouraging the servant to omit the diligence and caution due to his master, "which diligence

¹ 3 Mees. & Wels. 1.

² *Ashworth v. Stanwix*, 3 El. & El. 701; *Flike v. Boston*, etc. R. R. Co. 53 N. Y. 550.

³ *Swanson v. Northeastern Ry. Co.*, 3 Exch. Div. 341, 343; *Osborn v. Morgan*, 130 Mass. 102.

⁴ *Turberville v. Stampe*, 1 Lord Raym. 264. (By Lord Holt, 1698.)

⁵ 2 Levinz' 172, (1688).

⁶ *Austin's Lect. on Jurisp.* (3rd Lond Ed. 513.)

⁷ *House of Com. Docu.* 1877, No. 286, p. viii,

⁸ *Story on Agency*, 8th ed. p. 564, note.

⁹ 3 M. & W. 1.

and caution, while they protect the master, are a much better security against any injury the servant may sustain by the negligence of others engaged under the same master, than any recourse for damages could possibly afford."

Priestley v. Fowler is the earlier authority, but the case of Hutchinson v. York, Newcastle and Berwick Railway Co.,¹⁰ has been regarded as the leading English case upon the subject. In this case it is laid down that there is no implied contract of indemnity between employer and employed; but that, on the contrary, there is an implied contract on the part of the servant to run the ordinary risks of the service. Baron Alderson, in delivering the opinion of the court, said: "The principle is, that a servant, when he engages to serve a master, undertakes, as between himself and his master, to run all the ordinary risks of the service, and this includes the risk of negligence on the part of a fellow-servant whenever he is acting in discharge of his duty as a servant of him who is the common master of both."

The earliest American case involving the doctrine of common employment was Murray v. South Carolina R. R. Co.,¹¹ a South Carolina case decided in 1841, in which the carelessness of an engineer resulted in injury to the fireman. The court reached substantially the same conclusion as in Priestley v. Fowler. But in this country, as in England, a later and more ably and thoroughly considered case is regarded as the leading authority. This is the case of Farwell v. Boston & Worcester R. R. Co.,¹² in which the opinion of the court was pronounced by Chief Justice Shaw. This opinion has been regarded as one of the most profound and able to be found in our reports, and has been extensively cited on both sides of the Atlantic.

This was an action brought by an engineer to recover for damages caused by a misplaced switch. "The general rule," says Shaw, C. J., "resulting from considerations as well of justice as of policy is, that he who engages in the employment of another for the performance of specified duties and services, for compensation, takes upon himself the natural

and ordinary risks and perils incident to the performance of such services, and in legal presumption the compensation is adjusted accordingly. And we are not aware of any principle which should except the perils arising from the carelessness and negligence of those who are in the same employment."

It will be seen from the foregoing cases, that the authorities base the master's exemption first, upon public policy, and, second, upon an implied contract.

(1) The decisions have been justified upon grounds of public policy, because the opposite doctrine "would subject employees to unreasonable and often ruinous responsibilities,"¹³ and would be an encouragement to the servant to omit that diligence and caution which are the best protection alike to the master, to the servant and to the public.

(2) It has been objected to the argument of an implied contract, that such a contract is rarely in the mind either of master or servant, when the contract of employment is made. Those who urge this objection, overlook the fact that this is but one of a large class of cases in which relations and duties imposed by law are set forth under the disguise of fictitious agreements and promises, a custom which permeates whole branches of the common law; and, although the expression is, perhaps, an unfortunate one, there is nothing peculiar in its employment here.

(3) In addition to this, the rule seems to be in accordance with natural justice. If it is true that primarily a man is liable only for his own wrongful acts, conversely it is equally true that every man must bear his own misfortunes. If the sufferer would have the law interfere for his relief, it must be upon the ground that the injury was caused by the wrongful act or neglect of the defendant, while the plaintiff himself was free from blame. This, extended by the maxims *respondeat superior* and *qui facit*, etc., may be taken as a general statement of the law, if we except the Illinois doctrine of comparative negligence. Now, applying these principles to the case of a servant injured by a fellow servant, if he would recover from the master, the burden is upon him to show good reason why the latter should be liable. If

¹⁰ 5 Exch. 343 (1850).

¹¹ 1 McMullan's Law, 385.

¹² 4 Metc. 49.

¹³ Cooley on Torts, p. 541.

the master himself is free from fault he must be made liable in accordance with the rule of *respondeat superior*. But *respondeat superior* does not mean that the master must answer in damages to all persons for all the acts of one who is, in relation to some matters and toward some persons, his representative. It means simply that the master must respond for those acts in respect to which the negligent servant was his representative toward the plaintiff.¹⁴ The same caution must be employed in applying the rule *qui facit per alium facit per se*.

In the case of an injury from a co-servant, the liability of the master turns upon the question whether, in respect to the act complained of, the negligent employe was the representative of the common employer toward the plaintiff. If he was such representative the master should be liable, otherwise, the master should not be liable—results which, it will be found, the courts have reached in applying the doctrine of common employment. As between co-servants, strictly speaking, neither represents the common master with respect to the other, but it often happens that an employe sustains the double relation of fellow-workman and representative of the master.

To determine when a servant represents the common master, with respect to a co-servant, necessitates an inquiry into the duties of master, a point which will be taken up later in the discussion.

III. No doubt any longer exists as to the common law rule exempting an employer from liability to an employe injured by the negligence of a fellow-workman, when the employer is himself free from fault; the disputes which now arise are as to the limits of the rule, and are occasioned mainly by questions as to who are fellow-servants to the intent of exempting the master. What constitutes common employment? To what extent should the master be liable for the acts of his manager or foreman? When should persons in different branches of an extensive business be regarded as fellow-servants? On all these and other heads much room remains for critical discrimination, and new cases must continue to arise.

Many of the questions above suggested will be answered by discovering what are the duties of the master. It may be laid down as a general proposition which, as we shall show, is borne out by the cases, that in America, under the common law, and in England, under the "Employer's Liability Act," a master is liable to his servant for any neglect of the master's duty, whether committed by the master himself or by one to whom he had delegated his authority.¹⁵

The duties of an employer may be summed up as follows:

First: To provide safe and suitable machinery and appliances for the business. This includes the exercise of reasonable care in furnishing such appliances;¹⁶ and the exercise of like care in keeping the same in repair and making proper inspections and tests.¹⁷

Second: To exercise like care in providing and retaining sufficient and suitable servants for the business.¹⁸

Third: To establish proper rules and regulations for the service.¹⁹

All of the foregoing duties, it will be perceived, are included in the one general duty of the master to provide a safe plant. The law is well settled that the master is not required to be a guarantor in this behalf; but is only required to employ reasonable and ordinary care in selecting what he requires in his business.²⁰

Fourth: In addition to the duties enumerated is the special one, growing out of the employment of youthful or inexperienced servants, to see that they are not employed in a more dangerous position than that for which they were engaged, and to give such warning of danger as the case demands.²¹ Applying these principles, it will be found that they enable us to determine a large proportion of the cases.

¹⁴ *Corcoran v. Holbrook*, 59 N. Y. 517; *Chicago, etc. R. R. Co. v. Jackson*, 55 Ill. 492.

¹⁶ *Hough v. Texas & Pacific R. R. Co.*, 100 U. S. 218; *Booth v. Boston, etc. R. R. Co.* 67 N. Y. 593.

¹⁷ *Frazier v. Penn. Co.* 38 Pa. St. 104.

¹⁸ *Harper v. Indpls. & St. L. R. R. Co.* 44 Mo. 480.

¹⁹ *Chicago, etc. R. R. Co. v. Taylor*, 69 Ill. 461.

²⁰ *Cooley on Torts*, 557; *Redhead v. Midland R. R. Co.* 2 Q. B. 412; *Toledo, etc. R. R. Co. v. Fredericks*, 71 Ill. 294.

²¹ *Grizzle v. Frost*, 3 Post. & F. 622; *Coombs v. New Bedford Cardage Co.* 102 Mass. 572.

First: As to the master's duty to provide suitable equipments for the business and to keep the same in repair; where a brakeman was killed by an accident resulting from defective construction of the road, the railroad company was held liable. "There is no rule better settled than this, that it is the duty of railroad companies to keep their road and works and all portions of the track in such repair and so watched and tended as to insure the safety of all who may lawfully be upon them, whether passengers or servants, or others. Such an obligation is permanent and cannot be avoided by the delegation of the power or authority to any other or number of persons."²²

Accordingly, it has been held that a section foreman and brakeman are not fellow-servants because the former performs an implied duty of the master.²³

In the case of *Smith v. Flint, etc. Ry. Co.* where a brakeman was injured through the negligence of a car inspector, the doctrine of fellow-servants was improperly applied.²⁴

Second: "The obligation to employ suitable servants is precisely the same as that to provide suitable machinery and appliances for the business."²⁵

If a master negligently employs or retains incompetent servants he "is liable for an injury occasioned to a fellow-servant by their incompetency."²⁶

Where a fireman was placed in charge of an engine, and in consequence of his incapacity the conductor was injured, the company was held liable.²⁷

To provide sufficient servants for the undertaking is likewise one of the absolute duties of the master. Where a train was started with only two brakemen, when the safety of the train required three, the defendant was made to respond in damages to a servant injured in consequence, although the immediate negligence in starting the train

without sufficient brakemen was that of a co-servant.²⁸

Third: Where a switchman was killed through the default of the railroad company in not making and enforcing such proper rules and regulations as would secure the safety of its employees, the company was held liable.²⁹

The same duty in regard to rules is recognized by Justice Field in *Chicago, Milwaukee & St. Paul Railway Co. v. Ross*.³⁰

Of this case, which has attracted considerable attention, it may be said, in passing, that with all respect to the eminence of the court which pronounced the decision, to hold that a conductor and engineer are not fellow-servants, is contrary to the well established and uniform current of decisions both in this country and in England. To reach this conclusion, the opinion assumes that the conductor has the entire control and management of the train. "He directs when it shall start, at what speed it shall run, at what stations it shall stop, and for what length of time, and everything essential to its successful movements, and all persons employed on it are subject to his orders." As a matter of fact, this is seldom the case. A conductor runs either in accordance with a time card prepared by the company which "directs when the train shall start, at what speed it shall run, at what stations it shall stop, and for what length of time," etc., or in accordance with telegraphic orders, which determine these points for him. Both conductor and engineer carry these time cards and are alike guided by them; the telegraphic orders are sent to both, and both are equally bound to obey them. In short, both work under the orders of the same superior and for the same end, and, therefore, as will be seen hereafter, are fellow-servants. It is worthy of note that Justices Bradley, Matthews, Gray and Blatchford, dissenting, say: "We think that the conductor of the railroad train in this case was a fellow-servant of the railroad company with the other employes on the train." The case, however, might well have been decided against the company for its neglect of the duty under consideration,

²² Breesé, C. J. in *Chicago & N. W. R. R. Co. v. Swett*, Admr. 45 Ill. 197, 203.

²³ *Lewis, Admr. v. R. R. Co.* 59 Mo. 496.

²⁴ 46 Mich. 258.

²⁵ *Coeley on Torts*, 558.

²⁶ *Gray, J. in Gilman v. Eastern R. R. Co.*, 13 Allen, 488.

²⁷ *Harper v. Indianapolis & St. Louis R. R. Co.*, 47 Mo. 567.

²⁸ *Fluke v. Boston & Albany R. R.* 53 N. Y. 553.

²⁹ *Chicago & N. W. R. R. Co. v. Taylor*, 69 Ill. 461.

³⁰ 112 U. S. 377.

namely: to make and enforce such regulations as would secure the safety of its servants. It has been well said that "no prudent railway superintendent at this day would move a train of any character by telegraph, unless his rules provide that both the conductor and engineer were given copies of such telegraph orders."

Fourth: Where a boy was directed to adjust a belt on a rapidly revolving wheel, and, in attempting to execute the order, had his arm torn from his body, the employer was held liable on the ground of the youth and inexperience of the plaintiff, notwithstanding the boy was a fellow servant of the one who gave the order.³¹

Grizzle v. Frost is the leading English case on the same point.³²

It will be seen that a corporation, or person employing a large number of servants, escapes no responsibility by delegating the duties of master to an agent; and, therefore, contrary to the argument often urged against the doctrine of common employment, has no advantage in this respect over a smaller proprietor, who manages his own business.

In all of these cases the law will presume that the master has performed his duty; and the burden of proof is therefore upon the servant to establish negligence on the part of the master.³³

It is to be observed that one to whom a master's duties have been delegated may, as to such matters, stand in the place of the master, and as to all others be a mere co-servant.³⁴

If the negligence of a master combine with that of a fellow-servant to produce the injury, the master, being one of the two joint wrong-doers, is liable.³⁵

A servant has the same right of action as a stranger when the injury is caused by another servant of the same master engaged in a wholly distinct business, on the ground that

the servant only assumes the risks of his own employment.³⁶

The doctrine of common employment applies to a volunteer just as to a co-servant;³⁷ also, where the service is induced by the request of a servant in the defendant's employ.³⁸

The question who are fellow-servants within the meaning of the rule is a difficult one, and has been rendered more so by conflicting decisions. When persons are working together for a common end, the test as to whether they sustain the relation of master and servant, or of co-servants, has been placed upon the ground of the power to hire and discharge men. But this is far from being satisfactory, for unless one hires in virtue of his own right, rather than by the authority of another, he is not the employer.³⁹

It had also been held that the power to discharge does not create the relation of master and servant.⁴⁰

Judge Wood, in his work on Master and Servant, lays down the rule that those are co-servants who are subject to the same general control, and engaged in the same common pursuit.⁴¹

This rule will be found generally applicable except to the cases where a servant is performing one of the enumerated duties of the master; as to such duty the relation is that of master and servant.⁴² It has repeatedly been held that superiority of rank or grade does not change the relation.⁴³

The relation depends rather upon the nature of the duties to be performed. It may be said, therefore, that except as to the absolute duties of a master, those are fellow-servants who are engaged in the same common pursuit, under the same general control, without reference to the grade of service or dissimilarity of work, provided there is such a connection between the different kinds of employment as necessarily brings the servants into contact with each other.

³¹ Railroad Co. v. Fort, 17 Wall. 553.

³² 3 F. & F. 622.

³³ Tarrant v. Webb, 18 C. B. 797; Baulec v. R. R. Co. 59 N. Y. 355.

³⁴ Wood's Master and Servant, p. 860; Crispin v. Babbitt, 81 N. Y. 520.

³⁵ Paulmeiser v. Erie Ry. Co. 34 N. J. 151.

³⁶ Cooley on Torts, p. 560.

³⁷ Degg v. Midland R. R. Co. 1 H. & N. 773.

³⁸ Potter v. Faulkner, 5 L. T. 455.

³⁹ The King v. Hoseason, 14 East. 605.

⁴⁰ Reedie v. London, etc. R. R. Co. 4 Ex. 244.

⁴¹ Woods M. and S. p. 837.

⁴² Cooley on Torts, 544; Filke n. Boston, etc. R. R. Co., 53 N. Y. 549, 553.

Thus, it has been held, that the relation of fellow-servants exists between a carpenter employed by a railroad company and its train hands;⁴³ and between an engineer and switchman.⁴⁴

But the receiver of a railroad and a servant employed on the railroad are not fellow-servants.⁴⁵

IV. In France, a case which was probably the very first involving the doctrine of common employment was brought before the Court of Lyons in 1834, three years earlier than *Priestley v. Fowler*. The Court of First Instance held that the plaintiff, having accepted the danger, could not recover, and this judgment was affirmed on appeal.⁴⁶

This case, however, was afterwards overruled, and it was determined that Article 1384 of the Code Civil, rendered the employer liable.

The Italian Code (Art. 1153) contains a provision similar to that of the French Code, and would probably be given a similar construction.⁴⁷

The Prussian law has recently made the master liable and has prohibited contracts in derogation of this liability.⁴⁸

In Scotland alone, when presented as a question of novel impression, do we find the courts rejecting the doctrine of common employment.⁴⁹

In 1858, however, the House of Lords decided that the rule was the same for Scotland as for England, and the laws of the two countries have since been in harmony on this point.

The courts of Ireland have always followed the English rule.⁵⁰

As showing the general trend of public sentiment on this question, it may not be amiss to note the recent statutory changes.

The most carefully considered statute and the one which has attracted the most atten-

tion is the English "Employer's Liability Act of 1880."⁵¹

It cannot be denied that until modified by this enactment the doctrine of common employment, as enforced in England, was often unjust and subject to abuse. To such an extent has this defense been carried that the law was stated as follows: "At present a master is not liable to any servant for any injury which arises from the act or default of any fellow-servant whether that fellow-servant be in a position of authority or not, and in ascertaining whether the person to whose act or default the injury is due, is a fellow-servant, the widest possible construction is given to the term Common Employment."⁵²

The English Liberals, embracing this as an excellent opportunity for agitation and reform, secured the passage of the act above referred to, popularly called the "Gladstone Bill." The effect of this act was not to abolish the defense of common employment; it restores the doctrine to about the position it held when *Priestley v. Fowler* had been decided in 1837, which is substantially the same as the present American law when unaffected by statutes. But the enactment in question goes further and gives to an employee the same remedy as to a stranger for a personal injury, caused "by reason of the negligence of any person in the service of the employer who has charge or control of any signal, points, locomotive engine or train upon a railway."⁵³

In practice this act has not accomplished what was expected of it, as a servant may, by express contract, waive the benefit of the statute except as to criminal negligence, and such a contract will be enforced.⁵⁴ The law is the same in this country, as to such contracts, unless expressly forbidden by statute.⁵⁵

The results of an examination of the American statutes on this subject may be summarized as follows: six States, Georgia, Iowa, Kansas, Mississippi, Rhode Island and Wisconsin, and the Territories of Montana

⁴³ *Morgan v. Vale of Neath R. R. Co.* L. R. 1 Q. B., 149.

⁴⁴ *Columbus, etc. R. R. Co. v. Troesch*, 63 Ill. 545.

⁴⁵ *Meara's Admr. v. Holbrook*, 5 Am. Rep. 638.

⁴⁶ *Dalloz*, 1837, 2nd pt. 161.

⁴⁷ *Beven's Emp. Liab. Act*, 1880, p. 6.

⁴⁸ (1876) House of Commons Doc. 372, p. 27.

⁴⁹ (1830) *Sword v. Cameron*, 1 Scotch Sess. Cas. 493; (1852) *Dixon v. Rankin*, 14 Scotch Sess. Cas. 420.

⁵⁰ *McEnerny v. Waterford & Kilkenny Ry. Co.* 8 Ir. C. L. R. 313.

⁵¹ 43 and 44 Vict. c. 42.

⁵² House of Com. Doc. 1877, 285.

⁵³ Sec. 1, sub-sec. 3.

⁵⁴ *Griffiths v. Earl of Dudley*, 51 L. J. Rep. Q. B. D. 543.

⁵⁵ *Western, etc. R. R. Co. v. Bishop*, 50 Ga. 465.

and Wyoming, have adopted statutes providing the same remedies for railroad employes as for the public in general. The State of Rhode Island, though extending protection to other employes than those of railroads, limits the remedy to cases where loss of life occurs. It is noticeable that, with the exception of Rhode Island, recent litigation changes the common law doctrine only with respect to railroads.

Thus we see that, when presented as a question of novel impression, except in the Scottish courts, the master has uniformly been held exempt from liability to a servant injured by the negligence of a co-servant; that there is a general tendency, in this country as well as in Europe, to modify this rule by statute; that the common law in this behalf is based on sound legal principles and is in accordance with natural justice, and in general terms may be stated as follows:

When a workman, without fault of his own, is injured by the negligence of another, in the services of the same master, the injured party may have his action against the negligent servant in any event; he may recover from the master when the latter is personally at fault, or when the negligent servant was performing one of the duties which the law imposes on the master, or where—though the two servants had a common employer—they were engaged each in a different business, or in such different departments of the same business that they were not likely to be brought together; but that the injured servant may not recover from the master when the fault was that of a competent servant performing a servant's duties, and engaged in the same branch of business with the person injured.

The doctrine of common employment has been sharply criticized, partly because of the unsubstantial nature of the remedy against a co-servant, and partly by reason of the sympathy naturally felt for the weaker party, but properly understood and enforced, it is a safe and reasonable rule.

Chicago, Ill.

FRANK H. CLARK.

TAXATION—CONSTITUTIONAL LAW—INTER-STATE COMMERCE.

THE WESTERN UNION TELEGRAPH COMPANY V. THE STATE BOARD OF ASSESSMENT.

Supreme Court of Alabama, December Term, 1885.

1. *Taxation—Extent of Words, Property and Taxable Property.*—The words "property" and "taxable property," as used in the constitutional provisions requiring taxes on property to be assessed in exact proportion to its value, and limiting the rate of taxation on taxable property (Art. XI, §§ 1, 4), do not include all the subjects of taxation; and those provisions have no application to taxes imposed as licenses on particular occupations or privileges, or on the gross receipts of any business.

2. *Constitutional Law—Discrimination Between Kinds of Business.*—A tax of two per cent. on the gross amount of the receipts by any and every telegraph company, derived from business done in this State, is not violative of either of these provisions nor is it objectionable as discriminating between the corporations specified and corporations engaged in other kinds of business.

3. *Inter-State Commerce—Messages Beyond Borders of State.*—The tax is imposed on the gross receipts of the business done in this State, which includes receipts from messages sent beyond the limits of the State, or received here from messages sent from beyond this State, and this is not an unauthorized interference with inter-State commerce.

Appeal from Montgomery Circuit Court.

Tried before Hon. John P. Hubbard.

Messrs. Gaylow B. Clark and Jones & Faulkner, counsel for appellants; *Hon. T. N. McClellan*, *Atty-Gen.*, contra.

CLOPTON, J., delivered the opinion of the court:

Subdivision six of section six of the revenue law, levies a tax of two per centum "on the gross amount of the receipts by any and every telegraph, telephone, electric light, and express company derived from business done by it in this State." Acts, 1884-85, p. 10. The constitutionality of the statute is the material point of contestation; which question we shall consider on account of its importance to both the State and the tax-payer, premitting any expression of opinion as to the appropriateness or regularity of the proceedings. Appellant contends the statute violates section one of article eleven of the Constitution, which requires that, "All taxes shall be assessed in exact proportion to the value of such property;" and also section four of the same article, which provides: "The General Assembly shall not have the power to levy, in any one year, a greater rate of taxation than three-fourths of one per centum on the value of taxable property within this State."

Prior to the Constitution of 1865, the only limitations on the power of taxation were, that no one shall be obliged to pay any tithes, taxes or other rate, for the building or repairing of any place of worship, or for the maintenance of any minister

or ministry; that no power to levy taxes shall be delegated to individuals or private corporations; and taxes shall not be levied for their benefit, without the consent of the tax-payer. The *ad valorem* rule was first introduced, and then only applicable to real property, in the Constitution of 1865, by the mandate, "all lands liable to taxation in this State, shall be taxed in proportion to their value." On personal property, taxes could be imposed as the legislature might consider most expedient. The rule was extended, and its application enlarged, in the Constitution of 1868, by incorporating therein an article providing: "All taxes levied on property in this State, shall be assessed in exact proportion to the value of such property;" and also a prohibition, that the General Assembly shall not have power to authorize any municipal corporation, "to levy a tax on real and personal property to a greater extent than two per centum of the assessed value of such property." The provision of the Constitution of 1868, first quoted, entered in *totidem verbis*, into the present Constitution, with a superadded prohibition as to the rate of taxation to be levied by the General Assembly; and the rate authorized by municipal corporations was reduced. There are other provisions relating to taxation in the two later Constitutions, which it is unnecessary to note, as they have no material bearing on the question under consideration.

Having been taught by experience, that no legislative power is more liable to oppressive use than the taxing power, and having suffered evils by resting it too broadly on discretion, the people have shown, in the history of the successive constitutions, a progressive policy to restrain the power of the legislative department in this respect, and to remedy existing, and guard against apprehended evils, by imposing limitations consistent with the public needs, and the public safety. The just expositor, in interpreting the constitutional mandates and inhibitions, will consult the changes that have been made from time to time, the causes which produced them, and the mischief intended to be remedied. The words used should be allowed such operation and force as will reasonably accomplish the purposes proposed, but without extension beyond their legitimate meaning, and so as to avoid embarrassing and disabling proper governmental administration. Thus considered and interpreted, do the provisions of the Constitution apply to every subject of taxation, to which resort is usually, and may be legitimately made, to raise money for public purposes and needs; or only to direct taxation on property as such, by prohibiting an arbitrary, specific standard, and requiring assessment in proportion to its value? Was it intended to limit the subjects of taxation, or only to prescribe the mode of assessing taxes, when levied on a particular subject?

Fortunately we are not without aid in interpreting these provisions. Substantially similar provisions

were contained in the Constitutions of some of the other States, which had received judicial construction, prior to their incorporation in either of our Constitutions. The Constitutions of California, Texas, Virginia, Louisiana, Illinois, Ohio, and other States, contain similar or equivalent provisions, which had been construed, not to prescribe a limit as to the subjects of taxation, but as intended to prohibit an arbitrary taxation of property, as to kind or quality, without regard to value. *People v. Coleman*, 4 Cal. 46; *Eyre v. Jacob*, 14 Gratt. 422; *Sawyers v. City of Alton*, 3 Scam. 127; *Aulanier v. Governor*, 1 Tex. 653; *Baker v. Cincinnati*, 11 Ohio St. 534. In *Aulanier v. Governor*, *supra*, it is said: "The word property, as used in the Constitution, cannot, by any forced construction, be tortured into meaning an occupation, calling or profession." In *Glasgow v. Rowse*, 43 Mo. 479, *Wagner, J.*, says: "That taxes should be uniform, and levied in proportion to the value of the property to be taxed, is so manifestly just, that it commends itself to universal assent. But notwithstanding the constitutional provision, there are some kinds of taxes that are not usually assessed according to the value of property, and some which could not be thus assessed; and there is, perhaps, not a State in this Union, though many of them have in substance the same constitutional provision, which does not levy other taxes than those imposed on property. * * * *"

It therefore seems plain, that the constitutional requirement, that 'taxation upon property shall be in proportion to its value,' does not include every species of taxation; nor, indeed, would it be possible to place such an interpretation upon it without doing the grossest injustice." In *Burroughs on Taxation*, § 54, referring to such limitations, the author observes: "These provisions, as a general rule, are held to apply to property alone, and not to include taxation on privileges or occupations, or upon the exercise of a civil right, as taking by devise or descent." *Cooley Cons. Lim.*, 619; *Western U. Tel. Co. v. Mayor*, 28 Ohio St. 521; *State v. Western U. Tel. Co.*, 63 Me. 518.

It is conceded that the word property is sometimes employed in the revenue laws in its comprehensive sense, and as synonymous with subjects; and will be so construed, when required by the context, or the manifest purpose of the law will be otherwise defeated. Such is the case of *Lehman v. Robinson*, 59 Ala. 219. Being used in more than one sense, the inquiry is, in what meaning is it employed in respect to the levying of taxes? If there be nothing showing a different intention, words ordinarily are to be taken in their usual and familiar import; and when general and continuous usage in legislation respecting a particular subject-matter was imparted a particular meaning, subsequent use of the same word in legislation relating to the same subject-matter creates a reasonable inference, that it was intended to be employed in the same sense, there

being nothing in the context showing a different intention. Taxes are not levied upon the right a man may have to anything, the right of possession, use, enjoyment and disposition, which is property taken in its legal and technical signification; but upon the subject of these rights. Therefore, in specifying the subjects, generally an obvious distinction is recognized and maintained between property taxed as such, and the other subjects of taxation. In *Lott v. Rose*, 38 Ala. 156, the question was, whether the authority conferred on the County of Mobile to assess and collect a tax, not exceeding twenty cents upon each hundred dollars of taxable property within the county, conferred a power to levy a tax of twenty cents upon each hundred dollars of the gross amount of the sales of merchandise. The authority was claimed on the ground that the State revenue law assessed a tax on the gross amount of sales of merchandise, thereby constituting such sales taxable property. It was held, that every subject of taxation, under the State laws, cannot be considered as embraced by the terms, "taxable property," employed in the special act; and that, in various sections of the general revenue law, the distinction between property made liable to taxes, and other subjects of taxation, is clearly drawn. It is said: "A tax upon the gross amount of sales of merchandise, under § 391 of the Code, is not a tax upon the goods themselves, or the fruits of the sale, but upon the business or act of selling. This is not, then, a property or income tax, but an occupation or privilege tax, the amount being regulated by the extent to which the privilege has been enjoyed." Property, when employed in connection with the assessment and levy of taxes, had thus received a judicial interpretation, which, we must presume, was in the contemplation of the framers of the organic law.

Not only were the provisions of the Constitution adopted in view of the judicial construction placed upon the meaning of "property" as used in the revenue laws several years previously, but the special matter of consideration was the necessity and expediency of restraining the power to tax, as conferred by the general grant of legislative powers. The convention was advised that, independent of special restrictions, the taxing power extends to "person or property or possession, franchise or privilege, or occupation, or right," and reaches every source of revenue and subject of taxation within the jurisdiction of the State, only limited by public purposes, and only restrained by the protection guaranteed to private rights against oppression; and that all these sources and subjects of taxation had been and were resorted to. Property always had been and was the main reliance for raising revenue. The apprehended evils and dangers of oppressive and arbitrary taxation were especially directed to this subject, property, tangible and visible, capable of being reached, and easily confiscated. The *consideratum* was the protection of the property of

the citizen against forced contributions, or legislative plunder. Assessment in exact proportion to value is the mode and means of protection, with an added limitation on the rate of taxation. Hence, the limitation in the Constitution of 1865 is extended in the Constitution of 1868 from lands to property, as embracing the subjects of ownership, whether real or personal, and the same laws were brought into the present Constitution without any modification or change. With a knowledge of the various subjects of taxation; of the well-defined distinction between property, when made liable to taxes, and other subjects of taxation; and that, among such other subjects were occupations, privileges, business and licenses, which, in the nature of things, are incapable of determinate value, valuation was adopted as the basis and measure of assessment. The limitations, by their terms, signify an intention that the provisions shall be only applicable to property, the value of which is capable of definite ascertainment by the officer, whose duty it is to make the assessment; and that all other subjects of taxation should be excluded from their operation. The language is: "All taxes levied on property in this State, shall be assessed in exact proportion to the value of such property." The terms are restricted to property, as a species of the genus, "subjects of taxation." The context shows that the word is employed in its usual and ordinary meaning, designating the thing owned, in the same sense in which it was generally used in the sections of the revenue laws, relating to the assessment and levy of taxes. The legal and logical sequence of the position of appellant would be, that the limitations operate to prohibit the levy of taxes on any subject not susceptible of determinate value.

It is contended, that if the word "property," as used in section one of article eleven, be construed as not synonymous with "subjects of taxation," the terms "taxable property," as used in section four of the same article, include any subject which can be taxed; and that the section forbids a greater rate of taxation on any subject than three-fourths of one per cent. If the terms of the section had been general, prohibiting a greater rate on any taxable property, without qualifying words, there would have been much force in the argument of counsel. But here, also, we find valuation constituting the basis on which the prohibition as to the rate rests, and by which it is determined. In *Lott v. Rose*, *supra*, these words were construed. It is said: "Where the words 'taxable property' occur in an independent act, it would seem that they should be understood in the sense of things taxed which are susceptible of ownership or possession, unless there is something in the context which affixes to them a different meaning, or unless the plain object of the law will be defeated if they are not held to cover subjects of taxation which are not property in the ordinary sense."

If so construed when employed in an independent act, *a fortiori*, such should be the construction when used in a section composing, with others, the articles of the Constitution relating to the subject of taxation, all the sections of which, being in *pari materia*, should be construed together. The framers of the present Constitution, experiencing that the limitation in the one preceding, requiring taxes levied on property to be assessed in proportion to value, was ineffectual to prevent oppressive taxation, connected therewith a prohibition as to the rate of taxation on such valuation.

It may be considered that the gross receipts from business are property in its strict meaning. In such sense it was undoubtedly employed in the majority opinion in *State Freight Tax*, 15 Wall. 284; the authority of which is weakened by the dissenting opinion, in which it was said, that the tax on gross receipts of railroad companies is a tax for the privilege of transportation. In *Lott v. Rose*, *supra*, it was held that the tax on the gross amount of sales of merchandise, which are gross receipts, is not a property or income tax, but an occupation or privilege tax, the amount regulated by the extent of the business done. In *Board of Revenue v. Gas Light Co.*, 64 Ala. 269, and in *State v. Board of Revenue*, 73 Ala. 65, the tax was imposed on the net income, and not on the business. The money, held and owned by the company, as the net result of the business, was the subject of taxation. An income tax stands on different principles; its value is determinable; and the rules governing such tax are inapplicable to a tax on gross receipts. One of the recognized modes of taxing business is a tax on the gross receipts, which generally are not regarded as property for taxing purposes. *State v. P. W. & B. R. R. Co.*, 45 Md. 361; *Phil. Con. Ins. v. Commonwealth*, 98 Penn. St. 48; *Sacramento v. Crocker*, 16 Cal. 120; *Warring v. Savannah*, 60 Ga. 99; *Winby v. Girardy*, 31 La. Ann. 382. Taxable, as used in the fourth section, qualifies and designates property, not which it may be in the power of the legislature to make liable, but which is made liable, to taxation. The value of such property must be determined, before it can be ascertained that the rate of taxation imposed exceeds the rate limited by the Constitution. By what measure or *criteria* can the value of business be ascertained, which so largely depends upon the vigilance, energy and skill, exercised in its prosecution? The gross receipts constitute no measure of value, for they may be large, and yet the business be valueless, by reason of losses, misfortune or mismanagement. Business, though made a subject of taxation, not being capable of determinate value, is not taxable property, in the meaning of the terms employed in the constitutional limitation of the rate of taxation.

It is further insisted, that the section of the revenue law under consideration is violative of the Constitution, in that the rule of equality and uni-

formity is disregarded, by putting an arbitrary value on the gross receipts of telegraph companies and a different value on the gross receipts of other kinds of companies. The proposition as stated in the argument of counsel is, "when income or gross receipts are taxed, everybody that is taxed in this State, must be taxed alike." The fallacy of the proposition consists in the assumption that the tax on gross receipts is levied by a standard of valuation, instead of by the character and extent of the business. Whilst there is no provision of the Constitution, commanding in terms, equality and uniformity, the principle should underlie and regulate the provisions of every law imposing public burdens and charges. It is not contravened, that the taxing power may select the subjects of taxation, and constitutionally classify them. Taxes should be imposed on any subject in just proportion to the benefits and protection which such subject receives more than other subjects of taxation. The rule of uniformity does not require that all subjects be taxed, nor taxed alike. The requirement is complied with when the tax is levied equally and uniformly on all subjects of the same class and kind. It extends to the class upon which the tax shall operate; that is the taxation as to telegraph companies shall be uniform as to all such companies. Different occupations may be taxed at different rates, and some may be altogether exempted; and the requirement of uniformity is not infringed, if the various classifications include all occupations similarly circumstanced and of the same kind. *Moog v. Randolph*, 77 Ala. 597; *State Railroad Tax Cases*, 92 U. S. 575; *Worth v. Wil. & Wel. R. R. Co.*, 13 Am. & Eng. R. R. Cas. 286; *County of San Mateo v. So. Pac. R. R. Co.* 8 Am. & Eng. R. R. Cas. 1; *Coolley on Taxation*, 170. The tax complained of may be onerous; and apparently unequal with the tax levied on the business of other corporations or companies. This is a matter submitted to the discretion and judgment of the legislature, and their conclusion must be regarded as conclusive. The remedy, in such case, is the ballot box. The courts cannot interfere unless an illegal or unauthorized exaction is attempted.

A construction, which limits the tax to gross receipts derived from business done between points, both of which are within the territorial limits of the State, is more restrictive than the words and purpose of the statute import. The legislature knew that the appellant company operated extensive telegraph lines from places beyond, into and through the State, and intended to make the tax commensurate with the benefits and protection received from the government. Receiving messages at offices located in the State, for transmission, and transmitting them without, is business done in this State, though the service may not be complete until the delivery to the sendee at some place beyond its boundaries. The statute does not purport to tax gross receipts not collected in Alabama, but by fair interpretation,

includes all receipts derived from business done in this State, and actually received here, though the message may have to be delivered, at, or may be sent for delivery from, some office without the jurisdiction of the State. Though thus construed, the statute is not an unauthorized interference with inter-State commerce. This question is fully and ably considered and discussed in the following cases. *W. U. T. Co. v. Richmond*, 26 Gratt. 1; *W. U. T. Co. v. State*, 55 Tex. 314; *W. U. Tel. Co. v. Mayer*, 28 Ohio St. *supra*; *I. of Mobile v. Leloup*, 76 Ala. —. And is expressly decided in respect to a tax on the gross receipts of railroad companies, though consisting in part of freights received for transportation of merchandise from one State to another State, or into the State from another, in *State Freight Tax Cases*, 15 Wall. 284; *Osborne v. Mobile*, 16 Wall. 479.

Further discussion would be superfluous.

Affirmed.

NOTE.—In addition to the authorities in the text upon the meaning of the word property in tax laws, we may cite the following in which, in Maine, a tax upon franchises, rolling stock, and fixtures; in Massachusetts, a tax on savings banks on account of their depositors; in Pennsylvania, on coal companies according to the quantity mined; in Ohio, upon gas companies to defray the salary of a public inspector of gas meters; in Georgia, on the privilege of carrying on business; in Texas, on ten-pin alleys; in Wisconsin, on gross earnings of plank-road and railroad companies, were held to be taxes on franchises or occupations, as the case might be, and not on property, although the constitutions of all these States required taxes to be "equal" or "uniform," or "proportioned" or "*ad valorem*."

A few exceptions, real or seeming, to this course of decision are to be noted. New Hampshire laid a tax on railroad expressmen on their gross receipts, or according to the number of miles run, which her courts put aside as at variance with the constitutional provision requiring "proportional and reasonable assessments." A North Carolina statute formed the railroads of the State, for purposes of taxation, into three classes, according to the exemptions in their charters. Companies enjoying immunity from taxation on their shares of stock were taxed on their real and personal property, those exempted from taxation on real and personal estate, were reached through their franchises, and so forth. But the court overthrew the act, declaring that the uniform rule demanded by the Constitution in taxing trades, professions and incomes, required those pursuing the same vocation to be treated alike.

In Kansas, a tax was imposed upon railroad companies to meet the expenses of the railroad commission, which exercised oversight of all common carriers. The tax was held to be bad, as being laid upon railroads only and not upon all common carriers.³

As stated in the text, the requirements of "uniform-

ity," "equality," or other like words, are complied with when the law is "uniform as to the class upon which it operates,"⁴ and requires those in the same vocation to be treated alike.⁴

As Justice Miller illustrates it: "Inn-keepers may be taxed by one rule, ferries by another, railroads by another, provided, the rule as to inn-keepers be uniform as to all inn-keepers," and so as to the others.⁵

Not only is classification consistent with—it is necessary to uniformity and equality of taxation.⁶

The Kansas decision now becomes clear. The railroad commission law included all common carriers, and the tax for the support of the commission should have included all common carriers and not railroads only. The New Hampshire case must be admitted to be contrary to the law as laid down in the text, and followed in this note. It may still be remarked, however, that, by the wording of the law, the tax was imposed on railroad expressmen—that is, on express companies doing business on railroads, and not on all expressmen, although this fact attracted little comment in the opinions of the court. The law appeared to be aimed at one company which enjoyed an almost monopoly in the express business of the State.

But classification in taxation, we think may proceed still further, and those in the same calling be subdivided, if only the case of each class be the same. Liquor sellers are in the same calling, but a tax on licenses may be graduated according as the tavern is in a locality more or less favorable for profits.⁷

A tax on "the Police Gazette, Illustrated Police News, and other illustrated publications of like character" has been held to be uniform, since it exempted no publications of that class.⁸

This case stands, however, on another ground also—because taxation may be used as a means of discouraging public vice.

The principle that legislation may, without violating the canon of uniformity and equality, discriminate among those in the same calling, if their circumstances be unlike, has the sanction of our highest tribunal. The Constitution of Iowa requires that her laws be of "uniform operation." A Granger statute classified railroads according to the business done, and imposed a separate tariff of rates on each class. A class might include but a single company. To the objection that this was unequal legislation, the Supreme Court, through C. J. Waite, replied: that the act granted to no railroad any privileges or immunities which upon the same terms did not belong to any railroad coming into any class, it had all the immunities belonging to that class.⁹

True, this case was not one of taxation, but we apprehend that the rule of equality in legislation is a general one, and the matter of taxation only one of its applications.

Perhaps we may now reconcile the last of the three, at first sight, discordant cases, which have been noted.¹⁰

If Iowa could classify her railroads by the value of business done, why could not North Carolina marshal her's by their immunity from one or another kind of taxation? May not the distinction be that in the former case the State took and classified the roads as she found them, while in the latter case the conditions upon which the classification was made, came from

¹ *State v. M. C. R. R.* 74 Me. 376; *Com'th v. Saving Bank*, 1 Allen, 423; *Onal Co. v. Com'th*, 9 Penna. St. 100; *Gas Co v. State*, 18 Ohio St. 267; *Ins. Co. v. Augusta*, 50 Ga. 510; *State v. Buck*, 9 Tex. 269; *M. & M. R. v. Waukegan*, 9 Wis. 424. The rule was reversed in *State v. R. R.* 11 Wis. 34, and returned to in *W. O. R. R. v. Taylor Co.* 53 Wis. 37.
² *State v. Express Co.*, 30 N. H. 219; *Worth v. R. R.* 32 N. C. 331; *Railroad v. Howe*, 33 Kansas, 737.

³ *Const. Ill. State R. R. Tax Cases*, 92 U. S. 612.

⁴ *Worth v. R. Road*, *supra*.

⁵ *State v. R. R. Tax Cases*, *supra*.

⁶ *Agnew, C. J. Com'th v. Coal Co.*, *supra*.

⁷ *East St. Louis v. Wehning*, 46 Ill. 393.

⁸ *Thompson v. State*, 17 Tex. App. 253.

⁹ *O. B. & Q. v. Iowa*, 94 U. S. 135.

¹⁰ *Worth v. Railroad*, *supra*.

the State's own act? The State could hardly extend a chartered immunity in one hand and with the other wrest away a tax laid on account of that very immunity. Such a basis of classification, moreover, might well be inequitable in itself.

As to inter-State commerce, the State Freight Tax Cases expressly decide, as stated in the principal case, that a tax on gross receipts, is not an unwarranted interference with inter-State commerce. The decision applies equally to telegraphs, which as instruments of commerce are within the commercial clause of the Constitution.¹¹

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¹¹ W. U. Tel. v. A. & P. Tel. 5 Nev. 102.

**RES JUDICATA—OBITER DICTUM—EQUITY
—PLEADING—AMBIGUITY—CONSTRUCTION—RIGHT OF WAY.**

ALMY v. DANIELS.*

Supreme Court of Rhode Island, May 13, 1886.

1. Where, in a former action, the bill was dismissed, on the ground that no contract was proved for a private way over the strip of land in dispute, as alleged in the bill; yet, as the question as to the construction of the deed, which conveyed testator's interest in the gangway, or street, in question, was raised and fully argued in the case, although it was not strictly necessary for the court to pass upon the question, the construction put upon the deed must be held to be *res judicata*.

2. Where a question presented by a bill in equity is urged and relied upon in the argument, and passed upon by the court in its opinion, it cannot with reason be said that the point was not involved, and that the opinion of the court on the question is *obiter dictum*.

3. Where a grant is somewhat ambiguous in language, or by the surroundings and appellations of the subject matter thereof it is not entirely clear what was intended to be included therein; in order to aid in its construction, parol evidence is admissible, without infringing the rule that parol evidence is not admissible to vary the terms of a written agreement.

4. Where plaintiffs and defendant were tenants in common of a strip of land, and defendant has absolutely excluded plaintiffs, against their objection, from all use and benefit of one-half part thereof for many years, and the remainder is and has been occupied by both parties as tenants in common, plaintiffs are entitled to an account.

TILLINGHAST, J., delivered the opinion of the court:

This is an action of account brought under the provisions of Public Statutes R. I. 236 (see Knowles v. Harris, 5 R. I. 402, for the construction of this statute as distinguished from that of 4 Anne, chap. 16, § 27), by the executors of Humphrey Almy, deceased, against the defendant, who, it is alleged, was a tenant in common with

the plaintiffs' testator in his lifetime of a certain strip of land, forty by thirty-six feet, lying on the southerly side of Custom House street, in the City of Providence.

The case was tried to a jury at the last October term of this court, resulting in a verdict for the plaintiffs for an account by direction of the court. The defendant now petitions for a new trial upon the ground that certain rulings of the judge presiding at said trial, and particularly the one directing a verdict for the plaintiff, were erroneous.

The first contention which the defendant makes is, that the plaintiffs' testator had no title to the premises in question, because he in his lifetime, by deed dated June 21, 1860, conveyed all his right, title and interest therein to one Lewis P. Mead, which title, by sundry mesne conveyances, has come to him, and that he is not the sole owner of said premises.

In order to prove their title, the plaintiffs, after introducing a number of deeds bearing thereon, offered the plat and papers in Almy v. Daniels, an equity suit between the same parties respecting the same strip of land, tried and determined in this court in 1875 (see Almy v. Daniels, 11 R. I. 250), together with portions of certain depositions taken and used in the trial of said cause to aid the court in the construction of said deed. The defendant's counsel consented to the offering of this testimony, but objected to its competency to explain the deed, and contended that it did not explain the deed.

The plaintiffs contended at the time of the offering of said evidence, that this deed from Almy to Mead had already been judicially construed by the court in the equity suit referred to, and that the question was therefore *res judicata*. The defendant contended, however, that the construction put upon said deed in said case was mere *obiter dictum*. Upon a careful examination of that case we find that the title of the plaintiffs' testator to the land in question was directly involved therein. The defendant then claimed precisely what he now claims, viz.: that by this deed the plaintiffs' testator "conveyed all his interest in the gangway or street to Mead, which by sundry mesne conveyances has come to him."

The bill asks "that the deed be construed to apply only to such interest in the street as was conveyed to the complainant by Bailey; or, if the court do not give such construction, to reform the deed, as it was a mistake which arose from the fact that the scrivener copied the language of Bailey's deed, not knowing that Almy had any other interest in the street than that mentioned in said deed." The opinion shows that the question as to the proper construction of said deed was "raised and fully argued in the case," and that thereupon the court decided that this strip of land is held by the complainant and defendant as tenants in common. And although it was not strictly necessary for the court to pass upon this question, as the bill was dismissed on the ground that no

*S. C., 2 New England Reporter, 615.

contract was proved for a private way over the strip of land in dispute as alleged in the bill, yet as the point was distinctly raised by the pleadings, fully argued by counsel, and thus deliberately passed upon by the court, we think the construction put upon the deed must be held to be *res judicata*. The dismissal of the bill, also, without reforming the deed as prayed, shows that the court must have found that it did not need reformation.

In *Alexander v. Worthington*, 5 Md. 471-489, the court says: "All that is required to establish the authority of any decision is that the very point decided was actually before the mind of the court and was investigated with care and considered in its fullest extent."

When a question is presented by a bill in equity, urged and relied upon in the argument, and passed upon by the court in the opinion, it cannot with reason be said that the point was not involved, and the opinion of the court on the question is *obiter dictum*.

People v. Wabash, etc. R. R. Co., 104 Ill. 476, 488. See also *Wells, Res Adjudicata*, § 5582; *Central Land Co. v. City of Providence*, Index to R. I. Reports, X. 76 (1 New Eng. Rep. 873); 2 Smith, Lead. Cas. 7 Am. ed. 648; *Aurora City v. West*, 7 Wall. 82 (74 U. S. bk. 19, L. ed. 42); *Perkins v. Walker*, 19 Vt. 144.

Whether the evidence admitted as aforesaid, to explain the deed, against the defendant's objection as to its competency for that purpose, was the basis upon which the justice presiding at said trial made his ruling as to the construction thereof, or whether it was upon the ground of the former decision, is not apparent from the record. Nor is it material; for, even admitting that the evidence offered was the basis of the ruling, still there is no occasion for defendant to complain thereof, as he has suffered no possible harm thereby. We think it would have been the duty of the court to rule as it did, without this evidence, upon being informed of the former case. The ruling complained of, therefore, was correct, irrespective of the ground upon which it was put.

We have also carefully examined and considered the evidence offered as bearing upon the construction of said deed, and are of the opinion that it fully supports the decision arrived at in *Almy v. Daniels*, *ante*.

It frequently happens that, either by reason of some ambiguity in the language of a grant, or by the surroundings and appellations of the subject-matter thereof, it is not entirely clear what was intended to be included therein. And in order to aid in the construction of deeds containing such infirmities, the law wisely permits the introduction of parol evidence. Neither is this any infringement of the well known rule contended for by the defendant, that parol evidence is not admissible to contradict or vary the terms of a written agreement. On the contrary, it is for the express purpose of ascertaining precisely what was the

intention of the parties, and of giving force and effect thereto. Furthermore, the fact that there is a repugnancy in the deed under consideration, between the language first used and that which follows, does not necessarily compel the court to accept the *prima facie* construction of the former to the exclusion of the latter, so long, at least, as it is possible either by careful study of the whole instrument, together with what is made a part thereof by reference, or by the aid of extrinsic evidence, to ascertain the true intention of the parties thereto.

The rule laid down by this court for the construction of deeds in *Almy v. Daniels*, *supra*, and *Waterman v. Andrews*, 14 R. I. 589, is in accord with the current of authorities of the present day, and well adapted, in our judgment, to secure the ends of justice.

The only remaining question to be settled is, whether, under the evidence, the plaintiffs are clearly entitled to an account.

The evidence shows that the defendant, who was the owner of twenty twenty-sevenths of the strip in question, erected a building on 20 feet of the west part thereof in 1875, against the objection of the plaintiffs' testator, and ever since has had the exclusive use thereof; that there was a sidewalk next to said building $2\frac{1}{2}$ feet wide, which the defendant generally occupied for the storing of oil-casks and other merchandise; that there was also a sidewalk next to the plaintiffs' block, opposite, 4 feet wide, on which the tenants of the plaintiffs stored oil-casks, molasses and other merchandise, and that the defendant never used said last mentioned sidewalk for the purposes of storage or in any other way, although never denied the use thereof; and that the gangway between said buildings was used about as much by the defendant as by the plaintiff and his tenants. Also that said Humphrey Almy deemed it very important to the value of his property that said strip of land should be kept open of the width of 40 feet, as he had arranged offices, constructed a stairway, and made improvements in his block which he would not have made had he not expected that said lot would have been so kept open.

The defendant offered to show, by the testimony of wholesale grocers who were acquainted with the use made of the premises by Almy's tenants, that he did in fact have the use and benefit of fully seven twenty-sevenths of said strip of land; the defendant contending that it was a question of fact for the jury, whether, notwithstanding the exclusive use and occupation by him of the part covered by his building, the plaintiffs did not still have all the use they were legally entitled to. This evidence was ruled out by the court, and the defendant duly excepted thereto.

It was also in proof on the part of the plaintiffs, that the defendant never paid any rent for the use of the 20-foot strip, covered by his building, from the time he erected the same to the death of Hum-

phrey Almy, June 24, 1883, and that demand for rent was made by the plaintiffs Sept. 5, 1885.

The evidence further showed that no objection had ever been made by the defendant to the use made of the premises by the plaintiffs' testator or his tenants; nor had the defendant's use of the sidewalk and gangway ever been objected to by the plaintiffs' testator.

The facts then, in short, are these: The parties are tenants in common of the strip of land in question, the plaintiffs owning seven twenty-sevenths, and the defendant twenty twenty-sevenths thereof. The defendant has absolutely excluded the plaintiffs' testator and the plaintiffs, against their objection, from all use and benefit of one-half part thereof since 1875, and the remainder is and has been occupied by both parties as tenants in common. Are the plaintiffs, under this state of facts, clearly entitled to an account? We think they are. The right of action here employed is given as between tenants in common: "Whenever * * * one or more of the owners of such common property shall take, receive, use or have the benefit thereof, in greater proportion than his or their interests therein." And it can hardly be claimed that the defendant, by absolutely ousting his cotenant from all use and benefit whatsoever of one separate half of the common property, did not "take, receive, use or have benefit" of that part at least, "in greater proportion than his interest therein." And we think it quite immaterial, whether or not, in point of fact, the plaintiffs' testator did subsequently receive more than his share of the use and benefits of the remainder of said common property as is claimed by the defendant, or whether, in fact, he did receive what would, in the judgment of others, be equal in value to the use of his share of the whole. He had an undoubted right to the use of the entire strip, in common with the defendant, and the latter could not assume the right simply because of his larger ownership therein, to make partition thereof, and thereby exclude his cotenant from any particular part.

Having excluded him from all use and benefit of one-half of the common property, and having erected thereon a permanent building, of which the defendant has had the sole and exclusive use and benefit for a number of years, we think that, as matter of law, and irrespective of what was shown in evidence, or could have been shown under the offer of proof made by the defendant as to the manner in which the remainder of the common property had been used by the cotenants, the plaintiffs are clearly entitled to an account. The court very properly ruled the evidence inadmissible. See *Izard v. Bodine*, 11 N. J. Eq. 403; *Hayden v. Merrill*, 44 Vt. 336; *Knowles v. Harris*, 5 R. I. 403.

Petition dismissed.

WEEKLY DIGEST OF RECENT CASES.

ALABAMA,	4, 14
CALIFORNIA,	15, 21, 23, 25, 30, 39
CONNECTICUT,	16
INDIANA,	13, 24
IOWA,	28
MAINE,	35
MARYLAND,	2, 32
MASSACHUSETTS,	27
MINNESOTA,	8, 31
MISSOURI,	11, 20, 36
NEW JERSEY,	3, 19, 40
NEW YORK,	9, 12
NORTH CAROLINA,	29
OHIO,	33
PENNSYLVANIA,	37
RHODE ISLAND,	6, 7, 26, 34
TENNESSEE,	1
TEXAS,	17, 22
UNITED STATES,	5
VERMONT,	18, 38
VIRGINIA,	10

1. AGENCY.—*Appropriation of Benefits by Principal—Repudiation—Ratification.*—It is incompetent for a principal to appropriate the avails of an agency, and afterwards deny and repudiate the fact of such agency. Such an appropriation by the principal amounts to a complete ratification of what has been done by the unauthorized agent. *Gundelupé, etc. Co. v. Beatty*, 8. C. Tenn., June 5, 1886; 1 S. W. Rep., 848.

2. ASSIGNMENT FOR BENEFIT OF CREDITORS.—*Fraud.*—The grantee in an assignment for the benefit of creditors is not a *bona fide* purchaser for a good consideration. Therefore, if the deed is in fact made by the grantor with intent to hinder, delay and defraud his creditors, it is null and void, whether the grantee had or had not notice of such intent. When the deed is fair upon its face and dedicates all the grantor's property to the payment of all his creditors, the motive by which he is governed in making the assignment is immaterial. *Farrell v. Farnan*, Maryland Ct. App., June 24, 1886; 6 East. R., 579.

3. ATTACHMENT.—*Covenant—Damages.*—The defendant had possession of a mine under a lease in which he covenanted to pay \$2 a ton royalty for all ore mined and removed, and to mine and remove ten thousand tons per annum. *Held*, that attachment would not lie for the damages accruing on breach of the covenant to mine and remove the stipulated quantity. The plaintiff's preliminary affidavit in attachment is not conclusive as to the nature of his claim. The defendant in attachment may give bond and have his personal property discharged, after appearing and pleading in the action. *Heckscher v. Trotter*, S. C. N. J., Aug. 24, 1886, 6 East. R., 583.

4. CHARITY.—*Equity—Voluntary Associations—Jurisdiction.*—A charitable trust, as recognized and known at common law, and sustained by courts of equity, was public in its nature, and the persons to be benefitted by it were, until designated as the beneficiaries for the time being, vague, uncertain, and indefinite; and where a common fund is created by voluntary contributions, its benefits being restricted to the members of the association, it cannot be considered a char-

itable trust, nor subject as such to be controlled by a court of equity. Nor can the jurisdiction of equity over such voluntary associations and their funds be sustained on the ground of partnership, since the members, whatever may be their relation or liability to third persons, are not partners *inter sese*; there being no mutual participation in profit or losses, no authority to bind or assign the common property, and no dissolution wrought by the death of a member. But the jurisdiction of courts of equity over such associations and their funds is maintained, independent of the statute of uses, or of any prerogative power, on the ground of the trust nature of the fund, the charitable uses for which it is designed, and the inadequacy of legal remedies. When the operations of such voluntary associations have been discontinued, its objects and purposes being abandoned by common consent, a court of equity has jurisdiction to decree a dissolution, and to distribute the common fund among the contributors in proportion to the amount contributed by them respectively. A new association being formed, composed of some of the members of the old with other persons, members of the same church, and made subject to such laws and restrictions as the church might prescribe; while an unauthorized dismissal of some of the members, by the arbitrary act of the minister in charge, without a trial or hearing, might offer grounds for legal proceedings to compel their restoration, such nugatory act would not authorize a court of equity, at their instance, to decree a dissolution of the association, or a distribution of the common fund among the members. *Burke v. Roper*, S. C. Ala., 1886.

5. CONSTITUTIONAL LAW.—*Ordinance—Arbitrary Power to Control Exercise of Lawful Calling.*—

An ordinance empowering the authorities of a city to grant or withhold the exercise of the right to earn a livelihood in an ordinary and proper way is unlawful as in violation of the provisions of the Federal Constitution providing that no one shall be deprived of life, liberty or property without due process of law, in that it gives such authorities the arbitrary power to deprive a person of his property, and of his right to exercise his proper calling. *Yick Wo v. Hopkins*, S. C. U. S., May 10, 1886; 22 Rep., 280.

6. ———. *Statute Part Void, Part Valid—Intoxicating Liquors—Sale on Sunday.*—When a

statute is unconstitutional in part, and constitutional in part, while the unconstitutional part may be void, the constitutional part may be valid, and may be carried into effect: provided, that the parts of the statute are not so interdependent that it must be presumed that the statute was enacted as a whole, and was intended to be carried into effect as a whole. A statute (Pub. St. R. I. c. 87, § 81) prohibiting the sale of intoxicating liquors on Sunday, except by druggists and upon physicians' prescription, is not void because it is part of a chapter enacting a license system, under an amendment to the State Constitution (Const. R. I. amend. 5) prohibiting the manufacture and sale of such liquors as a beverage. *State v. Clark*, S. C. R. I., July 28, 1886; 5 Atl. R., 635.

7. CONTRACT.—*When Closed—Telegram—Conflict of Law.*—A telegram accepting an offer, if sent

within the time agreed upon, completes the contract. The time of telegraphing is the time the contract was closed, and when sent from one State to another, the State from which the telegram was

sent determines the place of the contract. *Perry v. Mount Hope, etc. Co.*, S. C. R. I., July 24, 1886; 5 Atl. Rep., 632.

8. CORPORATION.—*Action against Individual Members.*—Articles of incorporation of a "Mutual Benefit Association," apparently intended as a sort of mutual insurance company, were duly executed by defendants, and duly recorded with the register of deeds and Secretary of State. M. became a member of the association, paid his dues, and received a certificate of membership, and sustained bodily injury entitling him, as such member, to pecuniary benefit, to recover which this action is brought against the original signers of the articles of association as individual persons. The association did not become a corporation *de jure*, not having complied with the statute so as to become an insurance corporation *de jure*, and not being a "benevolent society," under title 8, c. 84, Gen. St. 1878. Held, that, although not a corporation *de jure*, the association is, as between its members, to be regarded and treated as a corporation *de facto*, and hence this action against the defendants as individual persons will not lie. *Foster v. Pray*, S. C. Minn., July 17, 1886; 29 N. W. Rep., 155.

9. ———. *Insurance—Mutual Relief.*—Where the objects of the association, as declared in the certificate of incorporation, are to combine the efforts of the members with a view to effect mutual relief, leaving the details of the plan to be provided in the by-laws, and they provide for a system of life insurance, with the power to each member to designate any person he may choose to receive payment, the designation of a person for that purpose who is not a member of the family of the deceased, is not in contravention of the certificate of incorporation. The subject of life insurance is not one of the objects enumerated in chapter 267 of the Laws of 1875, entitled "An Act for the Incorporation of Societies or Clubs for Certain Lawful Purposes," unless it is embraced in the terms "mutual benefit" or "benevolent." There is no restriction in the Act which requires that the benefits or benevolence be confined to members of the families of the members. *Massey v. Mutual, etc. Society*, N. Y. Ct. App., June 1, 1886; 3 Cent. Rep., 755.

10. ———. *Municipal Corporation—Assessments for Waterworks—Exemption on Payment of Water-rates.*—The legislature may empower a municipal corporation to assess specially the lots along which a water service is laid to maintain the service; and to exempt those lots where the owner pays the water-rates. *Richmond, etc. Co. v. Lynchburg, etc. Co.*, S. C. App. Va., Feb. 23, 1886; 22 Rep., 350.

11. ———. *Torts of Officers—False Representations as to Stock—Fraud of Incorporators—Liability to Creditors.*—Where managers of a corporation make false reports, or resort to fraudulent devices, and thereby induce persons to take stock, such purchasers, in order to recover in an action for fraud and deceit, must show that they acted upon the faith of the representations. The fact that incorporators committed a fraud upon the corporation does not give a creditor of the corporation cause of action against the incorporators. *Priest v. White*, S. C. Mo., June 21, 1886; 1 S. W. Rep., 361.

12. CRIMINAL LAW.—*Evidence—Joint Indictment—Separate Trials.*—When a fact sought to be proved

is erroneously excluded, but afterward admitted during the course of the trial, the error is cured; and where the evidence as finally admitted does not fully cover the fact, owing to an objection made by the party first seeking to prove it, he cannot be heard to complain that the question was finally left in doubt. On a joint indictment for the crime of feloniously and by false pretenses obtaining signatures to a written instrument with intent to defraud, the court may, in its discretion, order separate trials. *People v. Clark*, N. Y. Ct. App., June 25, 1886; 6 East. R., 551.

13. ———. *Intoxicating Liquor*.—A defendant cannot escape the punishment prescribed by law for the unlawful sale of intoxicating liquor to a minor, upon his *bona fide* belief that such minor was of lawful age, based solely upon appearances, but it must also be shown that he had used due care to ascertain the minor's age. The action of the court, even if erroneous, in permitting the jury to take an annotated copy of the Revised Statutes to their room, cannot be complained of on appeal, unless objected or excepted to at the time. *Mulread v. State*, S. C. Ind., June 15, 1886; 4 W. Rep., 498.

14. ———. *Selling Liquor without License—Evidence of Intoxicating Effect of "brandy cherries"*.—In a prosecution for selling intoxicating liquor in violation of a prohibitory law, a witness for the prosecution having testified that the liquor or beverage sold by the defendant produced on him effects similar to those produced by whisky, it is competent for the defendant to prove by other witnesses, who had drunk it, that it had no intoxicating effect on them. In delivering the decision of the court, Somerville, J., said: "The question for decision was the intoxicating quality of this fluid, or beverage, which contained cherries, and was sold in bottles by the defendant. A witness for the State had testified that its effect upon himself and another person had been similar to that ordinarily produced by whisky. It was competent to show by others that its effect on them, when drunk in appreciable quantities, was not intoxicating. The most available mode of testing the nature and properties of a fluid or drug, next to that of chemical analysis, is by its effect on the human system. That a liquor, when taken in certain quantities, intoxicated, or failed to intoxicate, the person taking it, is as competent to prove or disprove its intoxicating qualities, as it would be to prove the poisonous effect of a drug by the effect following its administration. Negative testimony of this kind may often be very weak and inconclusive, because of the comparison involved in determining the relative facility with which different persons may, or may not, become intoxicated or drunk. But we cannot say what would have been the effect of this evidence upon the mind of the judge, who was substituted for the jury as the trier of the facts of the cause. We decide nothing more than the admissibility of this evidence, leaving to the county court itself to decide what shall be its weight or credibility. *Knowles v. State*, S. C. Ala., Dec. Term, 1885-86.

15. DAMAGES.—*Excessive Damages—Malicious Prosecution*.—In an action for malicious prosecution, in having the plaintiff arrested on a charge of assault, where he was never put in jail or subjected to any real hardship or act of oppression, and the charge was subsequently dismissed, and the testimony as to probable cause for the arrest was con-

flicting: *Held*, that a verdict of \$4,000 was excessive, and should be reduced to the sum of \$1,000. *Phelps v. Cogswell*, S. C. Cal., July 23, 1886; 11 Pac. Rep., 626.

16. DEED.—*Condition Subsequent—Restriction as to Building and Use—Quitclaim Deed—Conveys Reversion—Merger—Interest Conveyed—Construction—Intent—Effect of Deed*.—A provision in a deed that the grant is made with the limitation and qualification, and the express conditions, that if, at any time, thereafter, any building of a certain character shall be erected on the land, or if the land shall be used for other than specified purposes, it shall be at once forfeited, and revert to the grantor, his heirs and assigns, is a condition, and not merely a restriction, or personal covenant. A subsequent quitclaim deed by the grantor to one claiming under the grantee conveys his reversion and right of entry for condition broken, and so destroys the condition, and makes the title absolute; the right to enter for condition broken being assignable in Connecticut by statute. Where the language used in a written instrument leaves no room for doubt, the secret, unexpressed intention of the parties cannot be permitted to vary or change its meaning. The effect of a release of "all the right, title, interest, claim, and demand whatsoever," which the releasor has, or ought to have, in and to a certain tract, is not destroyed by the statement in the deed that the premises had been theretofore mortgaged to the grantor. Though the grantor in the quitclaim deed may not have intended to release his reversionary interest, he has in fact done so, and the law will afford him no relief. *Hoyt v. Ketcham*, S. C. Conn., June, 1886; 5 Atl. R., 606.

17. ———. *Construction—What Land Passes—Record of Deed*.—The heirs of an estate conveyed the land in controversy to appellant's vendor in 1881, but the deed was not recorded until 1883. In 1882 the same heirs joined in an instrument to convey to the husband of one of them all of the real estate belonging to the estate of the deceased. *Held*, that the deed of 1882 did not embrace the land in controversy. *Galbreath v. Engelke*, S. C. Tex., June 25, 1886; 1 S. W. Rep., 346.

18. EVIDENCE.—*Admissions—Negligence—Witness—Wife of Deceased Bailor—Experts—Whether a Horse Should have been Tied*.—Subsequent declarations of a bailee may be shown in negligence admitting his liability; he is not, however, absolutely bound thereby, but may be neutralized by his testimony. The wife of a deceased bailor is a competent witness to the bailee's declarations. Expert evidence is not competent to show whether a horse should have been tied to prevent him from running away by reason of a sudden fright. *Stowe v. Bishop*, S. C. Vt., March 15, 1886; 22 Rep. 319.

19. EXECUTORS AND ADMINISTRATORS.—*Costs—Party Forcing an Action by Refusing to Deliver up Papers Belonging to Another must pay*.—The will of a decedent was given to the next of kin and heir at law by the executor of the estate. The heir, being dissatisfied with the will, gave it to her husband, who secreted it. A bill was filed, and an injunction asked for restraining the heir or her husband from destroying the will. The answer admitted the possession of the will, but contended that the defendants never refused to deliver it. *Held*, that the evidence showing a demand for the paper by the executor, which was not complied

with, defendants should pay costs of suit. *Beckett v. Zane*. N. J. Ct. Ch., August 24, 1886; 5 Atl. R., 638.

20. **GUARDIAN AND WARD—Jurisdiction of the Court—Conducting Business for Insane Person—Competency of Evidence—Compensation of Guardian—Annual Settlements of Guardian of Insane Person—Bond—Liability of Sureties—Past Defaults.**—The court may order the guardian of an insane person to carry on the business of the ward. Even though no previous order is procured, the annual settlements, and orders of approval made thereon, are competent to show that the business was carried on under the supervision of the court, and reasonable compensation may be allowed therefor. The annual settlements of the guardian of an insane person are not conclusive, but only *prima facie*, evidence of their correctness. Sureties are not liable for past defaults, unless made so by the terms of the bond. *State, to use, etc. v. Jones*. S. C. Mo., June 21, 1886; 1 S. W. Rep. 355.

21. **HUSBAND AND WIFE—Divorce—Alimony—Counsel Fees—Jurisdiction.**—The trial court is vested with power, in an action of divorce, to make an order for the payment, by the defendant, of a sum for counsel fees, to enable his wife, who was without any means or property otherwise than as obtained from him, to prosecute her action then on appeal. *Ross, J.*, dissenting, on the ground that the power to allow a wife counsel fees in the appellate court is properly vested in the appellate court. *Ex parte Winter*, S. C. Cal. July 30, 1886; 11 Pac. Rep. 630.

22. **INJUNCTION—Execution Sale of Wife's Land—Trespass—Remedy at Law.**—A court of equity has no jurisdiction to enjoin a threatened sale of lands belonging to the wife, under an execution against her husband. Upon the consummation of such a sale, the wife has a complete legal remedy by an action in form trespass *quare clausum*, and meanwhile, her title is neither jeopardized nor beclouded. *Purinton v. Davis*, S. C. Texas, June 18, 1886; 1 S. W. Rep. 343.

23. **INSURANCE—Fire Insurance—Adjustment of Loss—Arbitration.**—Under the language of the stipulations of an insurance policy stated in the opinion, *held*, that the contract of the parties was that, if the amount of loss cannot otherwise be adjusted to the satisfaction of the parties, it shall be adjusted by the mode of arbitration therein prescribed, and that until such adjustment, or a fair effort on the part of the insured to obtain it, no cause of action arose. *Adams v. South British, etc. Co.*, S. C. Cal. July 23, 1886; 11 Pac. Rep. 627.

24. —. **Fraud—Husband and Wife**—Where a mill property was conveyed to a married woman, and no part of the consideration was paid by the husband, and the grantor furnished money to them with which to procure an insurance upon the property, and the policy was taken in the name of the wife, no matter how fraudulent the purpose may have been in having the property conveyed to her, the policy belongs to the wife, and in case of loss the proceeds of the policy cannot be taken from her by her husband's creditors. A conveyance by a stranger to a third person will not be set aside, nor will the property conveyed be subject to the payment of the debts of the fraudulent debtor, where it appears that none of his property or money has gone into the property so conveyed.

McLean v. Hess, S. C. Ind. May 25, 1886; 4 West. Rep. 661.

25. **INTEREST—Claims Against Decedent's Estate.**—A claimant against the estate of a decedent is entitled to interest at the rate of 7 per cent. per annum, on claims allowed against the estate by decree of the probate court, from the date of such decrees, notwithstanding the indebtedness which was the basis of the claim did not of itself draw interest. *Estate of Olvera*, S. C. Cal. July 20, 1886; 11 Pac. Rep. 624.

26. **MORTGAGE—Property not in Mortgagor's Possession—Deed—Mistake—Impeaching—Mortgagee Acquiring Tax Title—Redemption—Laches—Failure to Redeem.**—A mortgage of land in the possession of another, adverse to the mortgagor, is good in equity between the parties to it. A deed which, by mistake, conveys land not intended to be conveyed, passes the legal title to the grantee, and can be impeached only by the grantor, or some one claiming under him. A mortgagee, either in possession or out of possession, is not entitled to set up as against the mortgagor or the other mortgagees, a tax title to the mortgaged estate purchased by him at a tax sale. A failure to redeem for six years and a half does not constitute laches. *Hall v. Wescott*, S. C. R. I. July 24, 1886; 5 Atl. Rep. 629.

27. **NEGLIGENCE—License to Cross Tracks—Public Way.**—A mere permission or license from a railroad company to persons to cross its tracks is not an invitation. Whether the construction of a crossing over a railroad is such, as of itself to amount to an invitation, or evidence for the jury of an invitation by the railroad company to the public to use the same for its convenience, must be determined by considering, whether the construction was such as reasonably to induce the public to believe that the crossing was a public way. A person struck by a car while walking upon the railroad track without right cannot maintain an action for injuries in the absence of evidence of willful or reckless conduct on the part of the company or its agents. *Wright v. Railroad Co.*, S. J. Ct. Mass., July 8, 1886; 6 East. Rep. 611.

28. —. **Master and Servant—Railroad—Snow Bank—Posting Signals—Temporary Obstruction—Signal—Speed of Train—Contributory Negligence.**—A railway company is not liable in negligence for injuries to an employee by reason of its failure to post a signal on a snow bank close to the track; the employee must take notice of such obstructions. A railway company is not required to sound a signal on approaching a temporary snow bank close to the track which an employee had assisted to make, as an obstruction, to warn that employee of danger; he must be held to take notice of that obstruction. Where an employee of a railway company contributes to his injury he cannot set up the speed of the train as negligence in the company. *Brown v. Chicago, etc. Co.*, S. C. Iowa, June 17, 1886; 22 Rep. 303.

29. **NEGOTIABLE INSTRUMENT—Notice—No Evidence—Agent.**—If the endorsee of a negotiable instrument before its maturity knew, or if such facts came to his knowledge, which, if inquired into, would have informed him of an equity of the maker, he takes the instrument *cum onere*. Where a negotiable note is secured by a mortgage, the fact that one-half the land has been released, is some

evidence to charge a purchaser of the note before maturity with notice that there has been a partial payment on the note. If anything appears to a party calculated to attract attention or stimulate inquiry, the person is affected with knowledge of all that the inquiry would have disclosed. Notice to an attorney of any matter relating to the business in which he is engaged for his client, is notice to the client. Where an attorney sold a note to a person who was occasionally his client, and such attorney, acting for the purchaser, investigated the title to the land on which the note was secured by a mortgage, and was afterwards employed by the purchaser to bring suit on, and collect the note; it was held, to be some evidence that the attorney was acting for the purchaser in the sale of the note. (*Dupree v. Ins. Co.*, 92 N. C. 417; *Bunting v. Ricks*, 2 Dev. & Bat. Eq. 180, cited and approved.) *Hulbert v. Douglas*, S. C. N. C., 1886; 1 Ga. Rep. 652.

30. PLEADING — Evidence — Judgments — Amendments — Judicial Discretion — *Lis Pendens* — Abatement — Judgment. — A stipulation signed by the parties, and filed in an action, whereby it was admitted and agreed that the amount in controversy was involved in another action, and that the matters in the action, and the claim of plaintiff therein, should enter into and abide the event of such other suit, is admissible in evidence in support of a plea in bar of the judgment in such other action, notwithstanding such stipulation has not been specially pleaded. The allowance of amendments to pleadings is a matter within the discretion of the trial court, which has the power to permit the same at any stage of the trial, when necessary to the purposes of justice. Under the circumstances stated in this case, held, that there was no abuse of discretion in permitting the amendment of an answer by setting up the pendency of another action at the end of the trial, and before judgment. Where an action has been commenced for an accounting, and subsequently one or more items of the account are made the subject of a separate suit between the same parties, a defense of prior *lis pendens*, set up in the latter suit, is good. Where judgment is rendered for defendant in an action, on his plea that the action is barred by the judgment in another suit, the proper order should be that the action abate, and not that the plaintiff take nothing by his action, and the defendant recover costs. — *Conbrough v. Adams*, S. C. Cal. Aug. 2, 1886; 11 Pac. Rep. 634.

31. SALE — Warranty — Notice of Defect — Waiver — Notice by Agent of Seller — Notice by Mail. — Upon a condition in a warranty of an agricultural machine that written notice, stating wherein the machine fails to satisfy the warranty, is to be immediately given by the purchaser to the seller at Battle Creek, Michigan, (the machine being sold in Minnesota,) and reasonable time allowed to get to it and remedy the defect, unless it is of such a nature that the seller can advise by letter, held, that the seller might waive the written notice. Also, that the purchaser might give the notice by agent, writing in his behalf, and for that purpose might select as his agent one who, was agent for the seller. Also that the notice might be given by properly mailing it. *Nichols v. Root*, S. C. Minn. July 7, 1886; 29 N. W. Rep. 160.

32. SLANDER — Of a Clerk — Actionable Words. — An employer will be liable in slander to his clerk for words spoken of him which impute to him any

want of qualification as a clerk. *Wilson v. Cottman*, Md. Ct. App. June 1886; 22 Rep. 385.

33. SURETYSHIP — Guardian's Bond — Final Settlement. — In an action upon a guardian's bond for the recovery of the amount found due the wards after a final settlement of the guardian's accounts in the probate court, the sureties are concluded by the settlement, and will not be heard, in the absence of fraud and collusion, to question its correctness, or to demand a rehearing of the accounts. *Braiden v. Mercer*, S. C. Ohio, June 1, 1886; 22 R. 340.

34. TRADE-MARKS — Arbitrary Numbers — Quality — Origin. — Arbitrary numbers, (viz. 30, 111, etc.,) not already known to the trade, and in use by others to indicate quality, may be appropriated to his exclusive use by a manufacturer, and they will be protected as trade-marks, if used to indicate origin. *American, etc. Co. v. Anthony*, S. C. R. I., July 3, 1886; 5 Atl. Rep. 626.

35. TRESPASS — Liability for Others Acts — State Lands — Trespass With Agent's Permission. — Persons who without power authorize others to commit trespasses will themselves be held liable in damages for the injuries suffered. Where persons in charge of State lands consent that others may go upon them and commit trespasses thereon, they will be liable in damages for injuries done to the State. *State v. Smith*, S. J. Ct. Me. May 25, 1886; 22 Rep. 332.

36. USURY — Executor — Illegal Bonus for Loan of Estate Funds. — Deed of Trust. — Where the executor of an estate, who was also president of a bank, loaned \$16,000 of the funds of the estate, receiving therefor, a promissory note for said amount, secured by a deed of trust, and thereupon deposited in the bank to the credit of the maker of the note \$15,000, taking a credit for himself of \$1,000, as a bonus from the maker of the note in consideration of the loan; held, that the executor was trustee of the estate; that the contract for the bonus was illegal; and that a deduction of \$1,000 must be made from the face of the note. Under Rev. St. Mo. § 1008, the tender of payment, where no deposit is made in court, will not release the security created by a deed of trust for the amount due at the time the tender was made, but only stop the running of interest thereafter. *Landis v. Saxton*, S. C. Mo., June 21, 1886; 18 W. R. 359.

37. WILL — Contesting Probate — Testamentary Capacity — Question for Determination — Evidence — "Crazy." — In an issue *devisavit vel non*, the precise question for determination is whether or not the testator's mind was sufficiently sound to enable him to know and to understand the business in which he was engaged at the time when he executed the will. To charge the jury that testimony that testator was not competent to make a will amounts to nothing, when the witnesses do not testify that testator was crazy, which would have been evidence, is error. *Shaver v. McCarthy*, S. C. Penn. 5 Atl. Rep. 614.

38. — Legacy — Trust — Vested Interest. — A bequeathed the whole of his estate in trust, and directed the trustees to pay such portions of the income as might be necessary for the support and education of his daughter, and when she should be eighteen, or if she married before arriving at that

age, to pay the whole of the estate to her, or such portions of it as in their judgment should seem most beneficial. In case the daughter should die before eighteen, he disposed of his estate by various bequests over. The daughter was never married, and died at twenty-three. The trustees had never paid over the estate to her, acting, in withholding the same, according to their best judgment, and she had never demanded it. *Held*, that the estate vested in the daughter when she was eighteen, at least. *Weatherhead v. Stoddard*, 8 C. Vt., August 18, 1886; 5 Atl. R. 517.

39. ———. *Probate — Jurisdiction — Contest — Depositions — Admissibility — Proof of Non-Residence of Witnesses — Wills — Execution of Validity.*—A petition for the probate of a will need not state whether it is an olographic or other species of will, nor will any defect of form, or in the statement of the jurisdictional facts actually existing, make void the probate of a will; but the court is to admit the will to probate or not, under all the facts shown in evidence. On the contest of a will, where the tribunal found against the contestants on all the issues raised by them, the fact that it also found upon an issue not embraced in the pleadings of the contest, or that in such case there was no finding declaring the will valid as olographic, will not affect the validity of the probate of the will. Parties cannot complain on appeal of error in the court below, in the admission of depositions without the preliminary proof that the persons whose depositions were offered resided out of the county where the cause was tried, if, at the time of offering the depositions, the party presenting them also offered to prove the fact of such non-residence, and such fact was then admitted without proof by the opposing party. A will, made and executed by a testator in accordance with section 1277 of the California Civil Code, is not invalid because made and executed by him anterior to the time when such section became operative, if the testator did not die until the statute referred to had gone into effect. *In re Learned*, 8 C. Cal., July 13, 1886; 11 Pac. R. 569.

40. *WITNESS—Cross-Examination—Limit of—Denial of Charge.*—Where a party to a suit denies the principal allegation or charge made against him, in his direct examination, he thereby lays himself liable to a cross-examination upon every circumstance or transaction with which he was connected, which may tend to establish the allegation or charge. *Pullen v. Pullen*, N. J. Ct. Ch., Sept. 9, 1886; 5 Atl. Rep. 639.

QUERIES AND ANSWERS.*

[Correspondents are requested to draw up their answers in the form in which we print them, and not in the form of letters to the editor. They are also admonished to make their answers as brief as may be.—Ed.]

QUERIES.

24. A. sells a town lot to B. for \$1,000; before the deed is given, B. sells to C. for \$1,500. By an arrangement between A. and B. to which C. is not a party, the deed runs from A. to C. direct, and names the consideration as \$1,500. C. is not informed of the actual amount received by A. The title falls and C. is ousted. In an action by C. against A. upon the covenants of warranty in A.'s deed, can C. collect the \$1,500 actual

sum paid by him or only the \$1,000, amount received by A.?

H. P. R.

QUERIES ANSWERED.

Query 10. [23 Cent. L. J. 70.]—A. loses his house, which was insured, by fire. The Insurance Company believed that A. either did or procured the burning thereof, refuses payment of loss. A. sues to recover the amount claimed under the policy. The company answers, setting up as their defense A's guilt in regard to the fire. What is the quantity of proof required at the company's hands to release it from liability? Must it establish A's guilt "beyond a reasonable doubt," as would be required of the State in a criminal prosecution for the crime, or must it simply show it by "the preponderance of testimony," only, as is the rule in other civil cases?

Answer.—The question has frequently arisen, and been decided by the courts. Authorities are collected in May on Insurance (2d ed.), § 583; also, 2 Greenleaf on Evidence (14th ed.), § 408, note b. See also, *Monaghan v. Agricultural Fire Ins. Co.* 18 N. W. Rep. (N. S.) 797. In England it was held that the presumption of innocence must be rebutted by equally strong proof in a civil as in a criminal case; but while this view has been followed here and there in this country, it is generally rejected. The so-called presumption of innocence is not so much a presumption as a positive rule of law which prescribes that when a man is accused of crime, and his life or liberty placed in jeopardy, the charge shall be proved beyond reasonable doubt. The rule was established in favor of life and liberty, nor does it obtain when these are not involved. In a civil case there is no such presumption as in a criminal case, and if the defendant makes out his defence by a preponderance of evidence he cannot be denied his civil rights merely because it happens to be disagreeable to the plaintiff to be stigmatized as a criminal, although no legal penalty can follow. W. W. C.

RECENT PUBLICATIONS.

THE AMERICAN DECISIONS, Containing the Cases of General Value and Authority Decided in the Courts of the Several States from the Earliest Issue of the State Reports to the Year 1886. Compiled and Annotated by A. C. Freeman, Counsellor at law, and Author of "Treatise on the Law of Judgments," "Co-tenancy and Partition," "Executions in Civil Cases," etc. Vols. LXXIII and LXXIV. San Francisco: Bancroft-Whitney, Company, Law Publishers, Booksellers and Stationers 1886.

The issue of these volumes has been somewhat delayed, in consequence, as we learn of the recent misfortune by fire of the publishers. In our last number we noticed the receipt of two later volumes, 75 and 76. We can add nothing to what we then said in commendation of the series, except that these volumes in typography and otherwise are fully up to the high standard of the collection.

JETSAM AND FLOTSAM.

NOT OF THAT KIND.—"Was your husband on the stand yesterday?" asked the lawyer of a woman in a case in which husband and wife were witnesses. "No," she answered with a snap, "he wasn't on the

stand. He was on the set. That's the kind of a man he is, whenever there is anything to set on, from a sat-in sof to the top rail of a worm fence."

ABOUT THE SUIT—Lawyer (to timid young woman)—"Have you ever appeared as witness in a suit before?"

Young Woman (blushing)—"Y-yes, sir, of course."

Lawyer—"Please state to the jury just what suit it was."

Young woman (with more confidence)—"It was a nun's velling, shirred down the front and trimmed with a lovely blue, with hat to match."

Judge (rapping violently)—"Order in the court!"

IN THE OLD ATTORNEY'S OFFICE.—"Well, what can I do for you, ladies, this morning?"

"Why, I want to see if I can get a divorce from my husband," said the sharp-nosed, thin-lipped one.

"What are your grounds for a divorce?"

"Well, he's been with some other woman. I reckon that's enough; and I've got this lady to prove that she heard him, as well as I did, say that at a certain time he was wrapt in the arms of Morpheus."

"Umph, Morpheus isn't any woman; it's—"

"Ye can't fool me. Ye wouldn't catch him wrapt in the arms of any man. I know him, and I'll be durned if you can't get me a divorce I'll go to a Chicago lawyer, where I know I'll get it. Good-bye."

A TIGHT DECLARATION.—"The following declaration, drawn up by an Hibernian attorney, in an action of assault, is an impressive warning against loose methods of constructing pleadings. The plaintiff further says, that on the night of the first of June the defendant herein came to this plaintiff's house and demanded admission in a noisy and bolsterous manner, which admission this plaintiff refused to grant, being in fear of bodily harm; that the defendant notwithstanding continued to demand admission and pounded heavily on the door; that this plaintiff then opened an upper window and warned the defendant to go away, whereupon the said defendant pointed a loaded blunderbuss at this plaintiff, and told him that if he (the plaintiff) did not open the door he (the defendant) would send his soul to h--, which this plaintiff verily believes he would have done if he had not opened the same."—*Ex.*

We do not see anything *loose* in this declaration. On the contrary, we regard it as particularly "tight." The plaintiff, wiser than some people are now-a-days, knew "where he was going to," and the attorney merely reproduced that knowledge in the declaration. The plaintiff's faith in his destiny is a-kin to that of the gambler in a Mississippi steamboat wreck, who, at the ultimate moment, jumped overboard with the exclamation—"Now, gulls, save your own!"

ANCIENT PROCEDURE.—The trial by ordeal was a very ancient mode of trial, and seems to have been in existence in England so early as the reign of Ina; and we may conclude these somewhat discursive remarks by stating briefly how the trial by ordeal was conducted according to the laws of Ina. The trial took place in a temple or church. A piece of iron, weighing not more than three pounds, was placed upon a fire, the fire being watched by two men, who placed themselves on either side of the iron, and who were to determine upon the degree of heat it ought to possess. As soon as they were agreed, two other men were introduced, who placed themselves at either extremity of the iron. All these witnesses passed the night fasting. At day-break the priest who presided, after sprinkling them

with holy water and making them drink, presented them with the gospels to kiss, and then crossed them. The service of the mass was then begun, and from that moment the fire was no more increased, but the iron was left on the embers until the last collect. That finished, the iron was raised, and prayers were addressed to the Deity to manifest the truth. Thereupon the accused took the iron in his hand, and carried it the distance of nine feet; his hand was then bound up and the bandage sealed, and after three days it was examined to ascertain whether or not it was impure; it being accounted impure, and therefore the accused to be guilty if it should turn out to have suppurred; if, on the other hand, the sore was found to be healthy, the accused was adjudged to be innocent. The ordeal by water consisted in the accused plunging his arm up to the wrist for inferior crimes, and up to the elbow for crimes of deeper dye, in a vessel filled with boiling water. The other proceedings were similar to those in an ordeal by fire.—*Canada Law Journal.*

MISCARRIAGE OF JUSTICE.—The London *Daily Telegraph* gives an account of a case in which a very lamentable miscarriage of justice has just been brought to light. It seems that a man, named David Wilby, who was sentenced to five years' penal servitude, for a robbery with violence, last February has been set free from Chatham Convict Prison "without a stain on his character." He was employed as groom to a retired contractor, living in Ealing, and his master alleged that Wilby attacked him on a dark night and robbed him of a bag containing £180. Subsequently the prosecutor committed suicide, and at the inquest it was shown that his brain was diseased, and that he had been subject to hallucinations for several years. This fact, and the absence of any corroboration of the story of robbery, sufficed to induce the Home Secretary to send the convict back to his wife and children.

"WHAT is this man charged with?" asked the Judge. "With whisky, your Honor," replied the sententious policeman.

A YOUNG lawyer in this city, who boasted that he had been engaged in the trial of an interesting liquor case, neglected to state that it was a case of champagne, which he and some companions had been trying the night before.—

THE money value of a wife's services above the food, clothing, and medicine, to which she is legally entitled from her husband, has just had a curious illustration in Rhode Island. During the civil war, William R. Cripps, of Newport, married Mrs. Elizabeth H. Thurston, whose husband was supposed to have been killed while serving in a Rhode Island regiment; but after the lapse of years the first husband reappeared, and upon learning the state of things, married another woman. Cripps, a few months ago, turned his wife out of doors, refused to support her, and applied for a divorce, which the judge granted, as the marriage was illegal. The woman was destitute. A lawyer, J. P. Galvin, took her case in hand, and brought suit against Cripps for services rendered by his supposed wife as his housekeeper, and secured judgment in the sum of two thousand dollars.

The Central Law Journal.

ST. LOUIS, OCTOBER 8, 1886.

CURRENT EVENTS.

THE OBLIGATION OF CONTRACTS. — In October last Mr. Aldace F. Walker, President of the Vermont Bar Association, delivered before that body an address upon the Dartmouth College Case,¹ and subsequent adjudications on the same clause of the Constitution. That address, re-printed in a pamphlet bearing the rather fantastic title, "A Legal Mummy," is now before us. Toward the close of his address he says of this celebrated case: "In fact this historic cause has been embalmed in spices, and laid carefully away upon a shelf, like the corpse of an Egyptian king." It may, however, be questioned whether the rulings of that case are so very dead, as Mr. Walker supposes, but it is certainly true that the constitutional provision has been shorn by judicial construction of very much of its efficiency. The provision is short, and apparently very simple. "No State shall pass any law impairing the Obligation of Contracts." No ten words in the language have occasioned so much controversy. If the matter were *res integra* there would seem to be no difficulty. There are but two questions latent in the provision. What is a contract, and what is its obligation? The answer to the first would be, that a contract is an agreement of two or more competent persons, for a consideration, reciprocally, to do, or abstain from doing, stipulated things. The obligation of a contract is the duty of the parties to it, to perform or fulfil it according to its terms. In the first case involving this clause of the Constitution, in 1810, the Supreme Court held, in effect, that the clause in question meant precisely what it said, and included all contracts, executed and executory.² In 1819, in the Dartmouth College Case,³ the *fons et origo* of the subsequent stream of adjudications, the court made two concessions; that the Constitution only

protected property or money contracts, and did not restrain the States in the regulation of their civil institutions. This latter concession was as the "letting out of water;" under it all manner of licenses, State and municipal, and the vast, indefinite, indefinable "Police Power" of the States were emancipated from the operation of the constitutional restriction. Mr. Justice Bradley said: "Legislative discretion as to the exercise of the police power can no more be bargained away than the power itself."⁴ Mr. Walker enumerates in detail the successive adjudications by which this great, general, pervasive, and beneficent constitutional provision has been shorn of its power and restricted in its operation. Upon its face, and in its terms, it included all contracts, but the Supreme Court has decided that it does not include implied contracts, or contracts which do not "respect property or some object of value, and confer rights which may be asserted in a court of justice." It must succumb to the Police Power of the States, and affords no protection against demands made in the name of Eminent Domain. We have not the space to follow Mr. Walker through his long list of adjudications, each of which clips off something from the efficacy of the provision, and but for three recent cases in which its vitality is asserted,⁵ we would be ready to believe, with Mr. Walker, that the constitutional provision, and the "great historic cause" in which it is expounded, are as dead as Ptolemy Philadelphus. All these modifications of our organic law have, no doubt, been rendered necessary or expedient by the changes wrought by time and progress, but we are of the opinion that they are of too radical a nature to have been appropriately accomplished by judicial construction, but should have been effected by constitutional amendment. We fully recognize the fact that the wisdom of one generation may well become utterly folly in the next—that all human institutions should be made to conform to the progressive spirit of the age—we only insist that all changes should be made in the proper man-

¹ Boston Beer Company v. Massachusetts, 97 U.S. 25.² New Orleans etc. Co v. Louisiana etc. Co., 115 U.S. 650; New Orleans Water Works v. Rivers, 115 U.S. 674; Louisville Gas Co. v. Citizens Gas Co. 115 U.S. 683.³ Trustees of Dartmouth College v. Woodward, 4 Wheat. 518.⁴ Fletcher v. Peck, 6 Cranch. 87.⁵ *Supra*.

ner and by the prescribed authority. With this proviso, we fully concur with Sydney Smith, who said, doubtless in view of the omnipotence of Parliament: "Whenever a man talks to me about an unalterable law, the only impression he makes upon me is that he is an unalterable fool."

FEES AND PRACTICE.—The following excellent article was written by Mr. Donovan, at the request, made through this office, by one of our subscribers, a Minnesota lawyer, who desired to know how one should fix his fees and yet retain his clients. ED. C. L. J.

A learned and able advocate, lately sent on a foreign mission after a fine career in practice, in which he acquired a fortune, once told me that he began by low fees and gauged his charges in proportion to the ability of the client to pay and the benefit derived from his services. His method of stating his bill was quite taking. To the question of "How much will that be?" he would say; "It will depend very much on the work required, say \$50 a day, with one day in advance for looking up the facts before trial." "I will give you a receipt for a part of it now if convenient." Thus he decided for the halting client and settled the whole matter; striking while the iron was hot and pleasing his customer. Ten dollars for justice cases, and \$30 per day for the Circuit and \$50 for Supreme Court, with extra for outside cases, were his first fees in a city practice—a fair rate for young lawyers.

In fixing counsel fees he was equally skillful. "We'll make it \$10—if that will be about right!" or "You may write me a check for a hundred," or "You may leave me \$5, if you have it handy," in such a mild form his money would be cheerfully paid over and he never failed to treat the subject with delicate courtesy—leaving room to revise his charges if required by a stubborn client, but generally saying to such, "O, yes, certainly, you can hire such lawyers, but I am too busy at present to take very low priced practice." This is an instance of a wise man's course. Law practice opens many doors of paying business outside of court rooms—he took advantage of them and bought and sold prop-

erty. "I have never realized," said Judge Shipman, "what a help it is to have a good counsel in matters of deeds and settlement of business matters until yesterday. Such men are valuable partners in a firm's business. I have just settled an estate or found it all settled by a joint deed which left a fine property to the wife without any court proceedings—simply by looking ahead in season."

These two men have grown eminent and well-off by kind, fair, and ingenious treatment of clients—many others drive away custom by overcharging and carelessness. If the example of the first named is a lesson, it is certainly a wise one. But every one must use his own weapons. One may be small, like Spurgeon—then let him be as earnest and he will approach this wonderful speaker. Another may be plain and practical, with few gifts of oratory or eloquence—such men are more useful as judges or corporation counsel. Still another may be poor and just struggling for a foot-hold—let him use the ladder of integrity, for it will soon bear him higher, while the quality of his work, the extent of his acquaintance, must influence his business. It may be he can form in the procession by joining a firm and watching for an opening. If ingenious and determined that will help him. Let him make an honest measure of his ability and go forward on the right road in confidence.

Practice is always precarious, for a few years at least, and never afterwards if one is prepared for it. It is the beginning that counts in law, letters, or farming. As a tree grows larger from all branches, so law business increases by the good name given you by your clients. Live and labor for a good name and you will find it a fee, a retainer, and a fortune. Don't give up too easily. In your section—in the great Northwest, are firms forming contracts to make, wills to draw, men to defend, money to handle. Mingle with the world with frankness—the friendly will have friends everywhere—and success depends on how many you can grapple to you with hooks of steel. Every man that gives you a good name is a client.

J. W. DONOVAN.

CONSTRUCTION OF A "CELEBRATED FABLE."

—We said some time ago, apropos, of the *Albany Law Journal's* suggested heroic treatment of the maladies of the Federal judiciary:

"We are not so much addicted to iconoclasm as our contemporary, and hesitate to assail a *l'outrance*, and without appropriate preliminaries, so venerable and venerated an idol as the life tenure of Federal judicial office. Milder measures are first in order, and contrary to the philosophy of the spelling-book fable, we would use tufts of grass first to dislodge the naughty boy from the apple-tree, before 'trying what virtue there is in stones.'"

Upon this our contemporary remarks:

"But what an iconoclast our brother is, who thus misrepresents the celebrated fable in Webster's spelling-book. For 'contrary' read 'according.'"

Doctors will differ, judges sometimes dissent, and even editors cannot always agree. Under deep submission we adhere to our construction of the *philosophy* of the "celebrated fable." The husbandman used tufts of grass—in vain, but upon trying what virtue there was in stones, the naughty boy quickly came down from the tree and humbly "begged the old man's pardon." The philosophy of the story is, that milder measures will fail, but pebbles from the brook will, as we learn from an ancient precedent, prove very efficient.

Hence, our kind-hearted leaning to milder methods was *contrary*, not *according*, to the philosophy;—the lesson taught by the celebrated fable.—Q. E. D.

NOTES OF RECENT DECISIONS.

CONTRACT—IMPLIED PROMISE—QUANTUM—MERUIT—EVIDENCE.—The Supreme Court of Vermont recently decided a case¹ which is chiefly remarkable for what it does *not* decide. The facts were that the plaintiff began to work for defendant in his livery stable without any contract more definite than that defendant assured him that "it would be all right." While so engaged he received an of-

fer of employment, upon what terms does not appear, from Morgan, and defendant told him that he, defendant, would do as well for him as Morgan would. Afterwards, the parties signed a written agreement by which it was stipulated that plaintiff's remuneration should be his board and clothes. Nevertheless, he brought suit for his wages as upon an implied contract or a *quantum meruit*, proved by Ridge, a livery stable "help," what his services were in his (Ridge's) opinion, worth, and recovered judgment therefor. And this judgment the appellate court affirmed.

It does not appear that defendant failed to perform his part of the board and clothes contract, and we cannot understand how, in the absence of averment and proof of a breach of that contract, any judgment at all could have been rendered in favor of the plaintiff. The evidence showed that his health was poor, and the written contract showed that both parties regarded a mere subsistence as full compensation for such services as he could render. The opinion of the court ignores the written contract altogether except in an immaterial point of construction, decides that Ridge's opinion as to value of plaintiff's services was competent evidence, and that no presumption against the validity of a creditor's claim arises from his failure to dun, unless he is not only poor, but in need of ready money for present use.

The case is very remarkable because the opinion of the appellate court utterly ignores the only substantial question between the parties, and the judgment of the trial court is affirmed upon issues manifestly immaterial.

It is well settled law that, when one agrees to serve gratuitously, no promise to pay any compensation will be implied.² And if by written contract, compensation for services is made contingent upon the happening of a particular event, if the event does not happen, the compensation is lost and the written contract cannot be varied by parol evidence.³ In an old Massachusetts case, Parsons, C. J., said: "As the law will not imply a promise where there was an express promise, so the law will not imply a promise of anyone against

² Woods Mast. and Servt. § 66; Bartholomew v. Jackson, 20 Johns. 28.

³ Zerrahn v. Ditson, 117 Mass. 583.

¹ Stone v. Tupper, 6 East. Rep. 465.

his own express declaration."⁴ It is very true that when one party renders services of which the other avails himself, the law will imply a contract to pay for them what they are reasonably worth.⁵ But if the suit is brought upon a *quantum meruit*, and it appears that the subject matter was covered by an express contract, the recovery will be limited by the amount specified by such express contract.⁶ The gradations are well settled; an implied contract is always overruled by an express parol contract; that by a written contract, and that by a specialty.

NEGLIGENCE—MASTER AND SERVANT—FELLOW-SERVANT — PERILOUS EMPLOYMENT. — There seems to be no limit to the infinite variety of combinations of which the subject of negligence is capable. The Supreme Court of Minnesota recently decided a case,⁷ in which it appeared that plaintiff's intestate was engaged in handling disabled cars on the "repair track" in the yard; that on that track all cars are in "bad order," and are only moved to and fro as occasion may require for the purposes of repair. Plaintiff's intestate was killed in attempting to mount one of the "bad order" cars which was in motion, but it did not appear why he attempted to mount it at all.

The court held that as the employment of handling these bad order cars was essentially and avowedly perilous, the deceased must be presumed, in entering upon it, to have assumed all the risks growing out of the bad order and imperfections of the cars. It says:

"The subject of the case is, then, this: The plaintiff's intestate is notified, generally, that the car is in bad order, so that it has been necessary to withdraw it from ordinary service and lay it up for repairs. When he comes to handle it, he does so knowing that, for some reasons, not disclosed to him, it is not suitable for use in the ordinary way. Not knowing what, in particular, those reasons are, if he handles the car at all, he handles it as a car unsuitable for use, and at his own

risk, not only for its defects,—at least, for such as are apparent to or would fairly be suggested by ordinarily diligent and careful observation, like those of the brake on this car,—but also at the risk of the negligence of his fellow-servants in handling the same. We discover nothing in the testimony to take the case at bar out of the full application of this proposition. The plaintiff's intestate must be taken to have assumed the risk of handling this car as one in bad order, which it therefore might be dangerous to handle in the ordinary way, and as to which, in the absence of any definite information as to the respect in which it was defective, the burden of ascertaining the defect and source of danger was cast upon and assumed by him. As he took this risk and burden upon himself, he cannot hold the defendant responsible for it."⁸

⁴ *Fraker v. R. Co.*, 32 Minn. 54; s. c., 19 N. W. Rep. 349; *Watson v. H. & T. C. R. Co.*, 58 Tex. 434; *Flanagan v. Chicago & N. W. R. Co.*, 45 Wis. 98; s. c., 50 Wis. 462 and 7 N. W. Rep. 337; *Chicago R. Co. v. Ward*, 61 Ill. 130; *McCosker v. Long Island R. Co.*, 84 N. Y. 77; *Whart. Neg.* § 214; *Thomp. Neg.* 1009.

THE DOCTRINE OF RECEIVERS CERTIFICATES.

I. WHEN AUTHORIZED.

The practice of issuing receiver's certificates has grown up in the past few years. At first resorted to as an extraordinary expedient and only allowed on the ground that their issue was indispensable to make necessary repairs in order to preserve the property from destruction, the courts have, by degrees, relaxed somewhat from the strictness of rule and principle originally adopted, and now sanction their issue for a variety of purposes. In regard to certificates issued for necessary repairs, there appears to be no doubt, either on authority or principle. In a case¹ decided by the Supreme Court of the United States, Mr. Justice Bradley says: "The power of a court of equity to appoint managing receivers of such property as a railroad when taken under its charge as a trust fund for the payment of encumbrances, and to authorize

⁴ *Whiting v. Sullivan*, 7 Mass. 107.

⁵ *Crane v. Bandouline*, 55 N. Y. 556.

⁶ *Mansur v. Botts*, 80 Mo. 651.

⁷ *Kelley v. Chicago etc. Co.*, Sept. 8, 1886: 29 N. W. Rep. 173.

¹ *Wallace v. Loomis*, 97 U. S. 146.

such receivers to raise money necessary for the preservation and management of the property, and make the same chargeable thereon for its re-payment cannot at this day be seriously disputed. It is part of the jurisdiction always exercised by the court by which it is its duty to protect and preserve the trust fund; it is undoubtedly a power to be exercised with great discretion and, if possible, with the consent of the parties interested in the fund."

The criterion of the propriety of issuing receivers certificates is the necessity of the expenditures which demand their issue.²

Is the issue of such certificates necessary for the preservation of the road. To preserve its value it generally must be continued in operation and sold as a going concern, and if the court has been obliged to take possession of it, to prevent the rapid diminution of value, the derangement and disorganization that would otherwise result, it is but proper that the court should borrow money for that purpose if it cannot otherwise do so, in sufficiently large sums by causing certificates of indebtedness to be issued. They are but a substitute for common methods by which money is raised for the use of a receiver in a particular case, a mode of appropriating, in advance, a portion of the value of the property in order to enable the court to save a greater portion thereof from destruction.³

Before authorizing the issue, the court should require a detailed statement specifying the items of the sums needed, and the purposes to which they are to be applied, supported by clear proof of the correctness thereof, and of the necessity for raising the money, and after proper notice to and hearing the parties interested. There cannot be too great caution exercised.⁴

In a case where it appeared by the report of the receiver that the railroad was in such need of repairs that it could not be operated with safety to the travelling public unless the repairs were made, the court authorized the making of the repairs and the issuing of receivers' certificates of indebtedness therefor, and declared the same to be a debt incurred

for the benefit and protection of the property.⁵

In another case, the receivers upon their appointment, found in the possession of the company several locomotives held under a lease from the makers, and for which the rent was unpaid. Upon their application they were authorized to issue certificates of indebtedness to provide for the payment of such rent.⁶

As a general rule receivers will not be authorized to engage in the completion of unfinished roads, their legitimate function being the conservation of the road as it is.

It was said in a recent case,⁷ "It is no part of the duty of a court of chancery to build railroads, and the assent of all parties interested in the property cannot make it one. A court of equity may authorize the receiver of a railroad to issue certificates of indebtedness * * * for the purpose of raising funds to make necessary repairs and improvements, but it is a power to be sparingly exercised, and only used from sheer necessity, and to a very limited extent."

There have been, however, exceptions to this rule. Where, to prevent a valuable land grant in favor of a railroad from lapsing, a receiver was appointed, at the instance of the bondholders, whose principal security was the land, and was empowered to borrow money by issuing certificates to complete certain unfinished portions of the road.⁸

And again, where it became necessary, to insure the safety of the trains, that a portion of a railroad which had been built in a hasty and temporary manner should be rebuilt in a substantial and permanent way, the same method to meet the expenses was adopted.⁹

Not for convenience or ornament; not to lay out money in ways not essential to the preservation of the property, although the court may think the value of it will be thus increased; "not for the completion of an unfinished work, or the improvement, beyond

⁵ Hoover v. Montclair, etc. R. R. Co., 29 N. J. (Eq.), 4.

⁶ Coe v. N. J. Midland R. R. 27 N. J. (Eq.), 87.

⁷ Credit Co. v. Arkansas Cent. R. R. 15 Fed. Rep. 46; Sandon v. Hooper, 6 Beav. 546; Shaw v. R. R. Co. 100 U. S. 602; Kennedy v. St. Paul & Pac. R. R. 2 Dill. 448; Stanton v. Ala. & Chattanooga R. R. 2 Woods, 506.

⁸ Kennedy v. St. Paul & Pac. R. R. 2 Dill. 448.

⁹ Stanton v. The Ala. & Chattanooga R. R. 2 Woods 506.

² Jones on Railroad Securities, § 535.

³ Meyer v. Johnston, 53 Ala., 237, 348.

⁴ Meyer v. Johnston, 53 Ala. 350; Wallace v. Loomis, 97 U. S. 146.

what is necessary, for the preservation of an existing one—but to keep it up, to conserve it as a railroad property," pending litigation, the court can borrow money for such purpose, if it cannot do so otherwise, by causing certificates of indebtedness to be issued; and then never in excess of such need. As from the nature of the property it must be continued in operation to prevent serious injury and impairment, the court may continue the running of trains and the usual business of the road, and if the income be insufficient for that purpose, it may provide the requisite means by creating charges upon the property.¹⁰

II. PRIORITY.

According to the weight of recent decisions there appears to be no doubt of the power of a court of equity to authorize the issue of receivers certificates which shall constitute a prior and paramount lien upon the property and funds, irrespective of the consent of the holders of prior securities.¹¹

In a recent case¹² it was said: "It seems to be well settled that a court of equity has the power * * * to authorize its receiver to issue certificates of indebtedness and make the same a first lien upon the road for the purpose of raising funds to make necessary repairs and improvements. But it is a power to be sparingly exercised. It is liable to great abuse, and while it is usually resorted to under the pretext that it will enhance the security of the bondholders, it not infrequently results in taking from them the security they already have, and appropriating it to pay debts contracted by the court."

The case of *Wallace v. Loomis*, *supra*, furnishes an instructive commentary on the authority of the court in this regard. In that case, upon the filing of a bill by the trustees of the first mortgage on a railroad, the court appointed receivers, "with power to put the

road and property in repair, and to complete any unfinished portions thereof, and to procure rolling stock, and to manage and operate the road to the best advantage, so as to prevent the property from further deteriorating in value, and to save and preserve it for the benefit and interest of the first mortgage bondholders and all other persons having an interest therein," and with power also for these purposes, to raise money by loan to an amount stated by issuing certificates, "which should be a first lien upon the property." The final decree declared that the moneys raised by loan or advanced by the receivers, and expended on the road pursuant to the order were a lien paramount to the first mortgage and should be paid out of the proceeds of sale before such first mortgage bonds.

In another case,¹³ where a decayed and dilapidated railroad came into the hands of receivers under a decree of the court, made in a cause brought by trustees of a first mortgage to foreclose the same, and it became necessary to borrow money in order to preserve the road and to complete some considerable portions thereof, and to put it in a condition for the transaction of its business, the court authorized the receivers to borrow money for such purposes and made the sums so borrowed a lien upon the property superior to that of the first mortgage.

In a case¹⁴ which arose upon the petition of a receiver to make certain necessary repairs to a railroad, the chancellor after authorizing the making of the repairs and the issuing of certificates to provide the means therefor said, "the certificates will be declared to be a debt incurred for the benefit and protection of the property, and to be a first lien upon it."

A recent case¹⁵ in the Supreme Court of the United States, is an exhaustive and authoritative decision on the question of priority. Upon it being represented to the court that the road was in great need of repair, and in an unsafe condition to be operated, and required an immediate outlay for iron, ties,

¹⁰ *Meyer v. Johnston*, 53 Ala. 237, 346; *Jerome v. McCarter*, 94 U. S. 784; *Bank of Montreal v. Chicago, Clinton & Western R. R.* 48 Iowa, 518; *Barton v. Barbour*, 104 U. S. 126; *Un. Trust Co. of N. Y. v. Chicago & Lake Huron R. R.* 7 Fed. Rep. 513; *Turner v. Peoria & Springfield R. R.* 95 Ill. 134; *Swann v. Clarke*, 110 U. S. 602.

¹¹ *Miltenberger v. Logansport R. R.* 106 U. S. 286; *Un. Trust Co. N. Y. v. The Illinois Midland R. R.* 117 U. S. 434; *Wallace v. Loomis*, 97 U. S. 146.

¹² *Credit Co. v. Arkansas Cent. R. R.* 15 Fed. Rep., 46, 49.

¹³ *Stanton v. The Ala. & Chattanooga R. R.* 2 Woods, 506.

¹⁴ *Hoover v. Montclair & Greenwood Lake R. R.* 29 N. J. (Eq.), 4.

¹⁵ *Union Trust Co. of N. Y. v. Illinois Midland Co.*, 117 U. S. 434.

and other materials, balasting and labor, the receiver was authorized to borrow a sum, specified in the order, and issue his certificates of indebtedness therefore, and further declared these certificates to be a first lien upon the property. He was also authorized to pay off tax liens, to replace the net earnings diverted from paying the operating expenses and ordinary repairs, and to pay for betterments. The learned judge, in passing upon the power of the court to authorize the issue of the certificates and to constitute the same prior liens; held, "That in regard to those issued for necessary repairs, there could be no doubt either on authority or principle." That those issued to pay the liens be allowed priority, those issued to replace net earnings, and to pay for worn out portions of the road, also for items, for wages due employees of the receiver, debts due from them to other railroad companies, and for supplies and damages, wages due employees of the road within six months preceding the appointment of the first receiver, and debts incurred for the ordinary expenses of the receivers in operating the road, should be allowed priority out of the *corpus* of the property, if there was no income fund. And further, in commenting upon and defining the power the court possessed, when dealing with cases of this nature, said: "Property, subject to liens, and claims, and debts of various characters and ranks, which is brought within the cognizance of a court of equity for administration, and conversion into money, and distribution, is a trust fund. It is to be preserved for those entitled to it. This must be done by the hands of the court through officers. The character of the property gives character to the peculiar species of preservation which it requires. A railroad and its appurtenances is a peculiar species of property. Not only will its structures deteriorate, and decay, and perish if not cared for and kept up, but its business and good will will pass away if it is not run and kept in good order. Moreover, a railroad is a matter of public concern. The franchises and rights, of the corporation which constructed it, were given not merely for private gain to the corporators, but to furnish a public highway, and all persons with the corporation as creditors or holders of its obligations, must necessarily be held to

do so in the view that, if it falls into insolvency and its affairs come into a court of equity for adjustment, involving the transfer of its franchises and property by a sale into other hands, to have the purposes of its creation still carried out, the court, while in charge of the property, has the power, and under some circumstances it may be its duty, to make such repairs as are necessary to keep the road and its structures in a safe and proper condition to serve the public."

As we have before remarked, the principle upon which these certificates were originally issued, was to "preserve" the property. Bondholders and creditors were anxious that this should be done, and so a practice which was right, within its proper limits, has grown into a most dangerous abuse. The receiver is to take care of and "preserve" the property of the insolvent road, and for that purpose his certificates are good, but beyond that they are worthless. It is a monstrous perversion of well settled rights, that an officer of a court, subject to no supervision but that of the tribunal which appointed him, and which derives its information in most cases solely from him, should have the power to issue these certificates, as has been done in many instances, to the full value of the property to meet losses occasioned by his incompetence or desire to carry on a reckless railroad war, and make them a first lien upon it. Judge Baxter is reported to have expressed himself strongly, in a recent case¹⁶ before the Circuit Court of the United States, against the practice of placing railroads in the hands of receivers. He cited the case of a railroad in Georgia, which cost \$15,000,000. The receiver, who was in charge for 3 years, issued certificates to the value of \$1,500,000, and when the road was sold, the proceeds were insufficient to pay the certificates.

The language of Miller, J.,¹⁷ is pregnant with the true sentiment of the law, viz: "That the appointment of receivers, by the court, to manage the affairs of a long line of railroads continued through 5 or 6 years, is one of those judicial powers, the exercise of which can only be justified by the pressure of absolute necessity."

Equally pertinent is the language of Bar-

¹⁶ Jones on Railroad Securities, p. 508 (note).

¹⁷ Mill. & Min. R. R. v. Souther, 2 Wall. 510.

certificate was not a negotiable instrument in the sense that will cut off equities or defenses as against innocent holders for value, but that it was subject to the same defenses in the hands of the holder, notwithstanding he may have in good faith paid full value therefor, as could be made against the original payee. And it further rested its decision on the broader ground that the certificate of the receiver was not commercial paper, and was not such an instrument as was assignable at common law, or under the statute.

In the case of *Stanton v. The Alabama, etc. R. R.*, *supra*, the master in his report says: "These securities until within a few years were unknown, they are all directed to be issued by special appointees of the court clothed with special and limited powers, and in relation to a particular case * * * they may be likened to the English debentures of a business corporation, as to which it has been well settled, that when issued by the directors without due authority under the seal of the company, they cannot be enforced by members of the company who have accepted them after being present at the meeting when the irregular issue was sanctioned, and a *bona fide* transferee of such debentures from such shareholders will stand in no better position, nor can strangers, or their assignees, enforce them where they were accepted by the first holders with knowledge that the condition on which they were issued had not been fulfilled." ²⁶

RICHARD F. STEVENS, JR.

New York City.

²⁶ *Re Magdalena Steam Nav. Co. Johns* (Eng. Ch.), 690; *De Winton v. Mayor of Brecon*, 26 Beav. 533.

NEGLIGENCE — CONTRIBUTORY NEGLIGENCE — PLEADING — MUNICIPAL CORPORATION — PRACTICE — NEW TRIAL.

NEIER v. MISSOURI PACIFIC RAILROAD CO.*

Supreme Court of Missouri, June 21, 1886.

1. *Municipal Corporations — Ordinance Regulating Movement of Trains.*—A city has authority to pass an ordinance regulating the movement of trains propelled by steam power within its limits.

2. *Practice—New Trial—Evidence as to Time of Filing Motion.*—Where the bill of exceptions and rec-

ord shows that the motion for a new trial was filed within the time provided by law, this is sufficient.

3. *Contributory Negligence—When no Recovery can be had.*—The negligence of a plaintiff contributing directly to the cause of his injury, will prevent a recovery; that is, if but for his concurring and co-operating fault, the injury would not have happened, except where the more proximate cause is the omission of the defendant, after becoming aware of the danger to which the plaintiff is exposed, to use a proper degree of care to avoid the injury.

4. —. *Undisputed Facts, Proper Instructions.*—Where the undisputed facts show the contributory negligence of the plaintiff, it is the duty of the trial court to declare to the jury the inference which the law draws from such facts.

5. —. *Taking Case from Jury.*—Evidence examined, and case found to be one of contributory negligence, authorizing its withdrawal from the jury.

6. *Pleading Contributory Negligence.*—Where an answer states that if plaintiff suffered damages it was brought about, "either in whole or in part by her own carelessness and negligence contributing thereto," contributory negligence is sufficiently pleaded.

7. *Practice — Remanding Cause.*—Where the evidence discloses no grounds which would authorize a recovery, the cause should not be remanded for another trial.

Appealed from St. Louis Court of Appeals.

Louis Gottschalk, for respondent; *Thos. J. Porris*, for appellant.

Opinion states the facts.

SHERWOOD, J., delivered the opinion of the court:

Action for damages for injuries done the wife of Joseph Neier, her co-plaintiff, by one of the locomotives of the defendant's company. On trial had, the jury returned a verdict for \$4,000 damages, and on appeal to the St. Louis Court of Appeals the judgment was affirmed. 12 Mo. App. 25. At the same term of the circuit court Joseph Neier also recovered against the defendant for the same injury the sum of \$2,085 in the action brought in his name alone. 12 Mo. App. 35. In that case, as in this, the question involved as to the validity of ordinance (10,305), is to be ruled against the defendant, following the rulings made on that point in the cases of *Merz v. R. R.*, 22 Cent. L. J. Mo. Ad. lxviii, and *Bergmann v. R. R.*, 22 Cent. L. J. 550, decided at the present term, but owing to the amount recovered in this case, the pecuniary jurisdiction of this court attaches, and this necessitates an examination of the merits of the cause.

1. Preliminary to this, however, it is insisted that such examination cannot be made, for that it does not appear that the motion for a new trial was filed at the same term. The statute requires that "all motions for new trials * * * shall be made within four days after the trial, if the term shall so long continue, and if not, then before the end of the term." Sec. 3707. Although

*S. C., 12 Mo. App., 25.

the statement in the motion, that it was made "within the time provided by law," is no evidence whatever of that fact, yet the bill of exceptions shows that the trial took place on the 11th day of February, and the record proper of the proceedings had in open court shows that the motion was filed on the 12th of February. This is sufficient to show that the motion was filed at the same term and within four days after the trial, no order of adjournment till court in course appearing on the record. For this reason *Welsh v. City*, 75 Mo. 71, and similar cases do not apply.

2. Coming now to the merits of the cause, no attempt will be made to examine any of the instructions given or refused, except the one in the nature of a demurrer to the evidence asked by defendant's counsel at the close of the testimony, as the point thereby taken, if well taken, precludes any necessity for further examination.

The evidence discloses: That Catherina, the wife, was accustomed for seven years prior to the accident in question to drive the milk wagon of her husband, who was a dairyman, through the streets of St. Louis, and in the neighborhood and at the locality where the collision occurred, and there to deliver milk to his customers; that she was perfectly conversant with the running of trains in that vicinity, and of the time of their arrival and departure, seeing them as she did when going her daily rounds; that, on the morning of the accident, August 7, 1880, the train was due at the locality of its occurrence ten minutes after six; that she was fully aware of this when she reached the vicinity of the point where she was afterwards injured; that on her arrival there she was met by a flagman, who directed her to drive on a vacant lot which was near the corner of Third and Poplar streets, as "the train was coming pretty soon;" that after remaining on the lot a little while she left her wagon there, took milk to a customer near by, went into the basement, took a drink of coffee and remained in the house about ten minutes; on her return, seeing no flagman, she drove her wagon from its place of security down Poplar street toward the river, from which direction and on which street the expected train would come, until she came to Mrs. Sauer's, one of her customers, who lived on that street between Main and Second; when she arrived at that point it was twenty minutes past six o'clock and the train past due ten minutes, as she well knew and testified, but she proceeded to measure out milk for her customer, and while thus engaged a policeman told her the train was coming, and she heard some one else say "Hurry up," and in her endeavor to cross the track and reach an alley, the locomotive struck the rear end of the wagon and threw her out. The above is the substance of her testimony.

Other testimony in the case discloses that had the wagon remained where it was, the width of the street was sufficient to have let the train pass without striking the wagon; that the engineer of the train did what he could to prevent the injury,

after discovering the danger; that if she had urged her horse out of a walk she would have crossed the track, as she only had some forty feet to traverse in order to be safe; that she was always slow in getting out of the way of trains; that on some half a dozen previous occasions the trains had to be stopped in order to let her get out of the way; that on this occasion she could have seen the flagmen who were flagging the train as it came up from the levee and made the curve into Poplar street, and that she could have seen the smoke of the train as it came up the levee; indeed, she admits that she saw the smoke of the approaching train, as she looked when endeavoring to cross the track, after having been warned by the policeman and the flagman. The testimony also shows that the train was running from sixteen to eighteen miles an hour, and had to do so in order to ascend the grade, and that the flagmen were all at their posts doing what in them lay to signal and stop the train.

Upon these undisputed facts should the instruction asked by defendant's counsel have been given?

I am of opinion that it should, and these are my reasons therefor: It is said to be a rule, without exception or qualification, the negligence of plaintiff contributing directly to the cause of his injury will prevent his recovery. *Dunkman v. R. R.* 16 Mo. App. 547.

And "one who is injured by the mere negligence of another cannot recover at law or in equity any compensation for his injury if he, by his own or his agent's negligence or willful wrong, proximately contributes to produce the injury of which he complains, so that, but for his concurring and co-operating fault, the injury would not have happened to him, except where the mere proximate cause of the injury is the omission of the other party, after becoming aware of the danger to which the former party is exposed, to use a proper degree of care to avoid injuring him." * * It is not essential to this defense that the plaintiff should have been, in any degree, the cause of the act by which he was injured. It is enough to defeat him, if the injury might have been avoided by his exercise of ordinary care. The question to be determined in every case is not whether it contributed to the injury of which he complains; neither is it necessary that the plaintiff's negligence should have contributed to the injury in any greater degree than the negligence of the defendant." *Sherman & Redfield Neg.*, §§ 25-34. The same learned authors elsewhere say: "The rule which denies relief to a plaintiff guilty of contributory negligence is based less upon considerations of what is just to defendant than upon grounds of public policy, which requires, in the interest of the whole community, that every one should take such care of himself as can reasonably be expected of him." *Sherman & Red. Neg.* § 42.

And *Wagner, J.*, in *Hueslenkamp's case*, 37 Mo.

537, observes: "When there has been mutual negligence and the negligence of each party was the proximate cause of the injury no action whatever can be sustained by either, for the reason that as there can be no apportionment of the damages there can be no recovery."

It is the well-settled law of this State what the duty is of a person who approaches a railroad crossing or track, and comes within actual or probable reach of the dangerous machinery thereon employed. He must use his eyes and his ears; he must look and he must listen. Failing to observe such ordinary precautions, such natural promptings of the dictates of prudence and of the very instinct of self-preservation, the law will afford him no remedy and grant him no redress for a loss or injury which results from his own lack of even the minimum of care, notwithstanding there may have been remissness in duty on the part of those managing the train in giving the customary signals, or in using an undue rate of speed.

In a word, that negligence of a plaintiff directly contributing to the injury complained of, or in contributing in equal degree thereto, precludes any recovery by him, unless the defendant, after becoming aware of the danger to which the plaintiff has by his own imprudence exposed himself, omits to all proper care to avoid injuring him. *Sherman & Red. Neg.*, §§ 25 and 34, *supra*; *Henze v. R. R.* 71 Mo. 638; *Zimmerman v. R. R.* 71 Mo. 483; *Purl v. R. R.* 72 Mo. 168, and cases cited; *Hixson v. R. R.* 80 Mo. 335; *Bell v. R. R.* 72 Mo. 50; *Powell v. R. R.* 76 Mo., 80; *Lenix v. R. R.* Ib. 36. And it is the duty of the court where the facts of the case showing contributory negligence are undisputed to declare to the jury the inference which the law draws from such facts. Ib.

If the facts in this case do not constitute a clear case of contributory negligence, such negligence as ought to take the case from the jury, and let the law draw the conclusion, then no case can be found in the books to warrant such action to be taken by the trial court.

Not only was the plaintiff repeatedly warned of the approaching train, not only could she have heard it if she listened, or seen its approaching smoke had she looked; but aside from all that, she knew this particular train was coming and might appear any moment from the direction her horse was facing.

In such a case, the giving of signals or the warning of flagmen, brought neither notice to her ears nor knowledge to her mind. Her act cannot therefore be characterized as any other than one of extreme rashness. *Kelly v. R. R.*, 11 Mo. App. 1.

3. But it is insisted that the defense of contributory negligence was not pleaded.

The answer sets forth: "That any damage suffered by the plaintiff, Catherine, was brought upon herself, either in whole or in part, by her own carelessness and negligence contributing thereto. This is sufficient. Facts do not have to be pleaded

nor evidence set forth in a case of this kind. *Bills Code Plead.*, § 211. And what would be sufficient in an allegation of negligence in a position ought to suffice in an answer. It is settled law in this State, that a general averment of negligence in a petition, without specifying the particular act complained of, will be sufficient. *Schneider v. R. R.* 75 Mo. 295; *Carlisle v. Keokuk*, 33 Mo. 40.

The judgment should be reversed, and as the evidence discloses no ground which would authorize a recovery, the cause should not be remanded. All concur.

NOTE.—A recent author has said that "to constitute contributory negligence there must be a want of ordinary care on the part of the plaintiff, and a proximate connection between that and the injury." Proceeding farther, he says: "Did the plaintiff exercise ordinary care under the circumstances? Was there a proximate connection between his act or omission and the hurt he complains of? These are the vital questions when contributory negligence is the issue."¹

In a Wisconsin case it is said that "if the plaintiff was guilty of any want of ordinary care and prudence (however slight), which neglect contributed directly to produce the injury, he cannot recover."²

In an Indiana case it was said that, "Where there is mutual negligence, if the defendant can avoid the accident by reasonable care and skill, we suppose the plaintiff cannot recover; so, where the negligence of the plaintiff is proximate, and the defendant cannot, by ordinary care, avoid the accident."³

In a New York case it was said that "the party injured must have been entirely free from any degree of negligence which contributed to the injury; i. e., of any negligence without which the injury would not have happened. The law says to the defendant, if you have, by simple negligence, caused this injury, so far as you are concerned the ground of action is complete. At the same time it says to the defendant, although, so far as the defendant's acts are concerned, the case is made out, and you cannot prevail, if you have, by your simple negligence, helped to bring about the injury."⁴

In another case it was said, which will serve as an illustration, "that although the plaintiff was guilty of negligence in not having a man at the helm of his boat, it was a matter of no consequence, unless the absence of a helmsman on the plaintiff's boat contributed to the injury, and that the want of a helmsman on the plaintiff's boat did not excuse the negligence of the defendant, which caused the injury."⁵

It is not necessary that the contributory negligence be an element or factor in producing the force causing the injury complained of, to defeat the action. "It is sufficient if the plaintiff's negligence materially contributes to this injury, whether it contributes to the force causing the injury or not."⁶

While "any want of ordinary care, even in a slight

¹ Beach on Contributory Negligence, 7.

² *Cramer v. Portland*, 36 Wis. 92.

³ *Indianapolis, etc. R. R. Co. v. Wright*, 23 Ind. 376.

⁴ *Wilds v. Hudson, etc. Co.* 24 N. Y. 430.

⁵ *Hoffman v. Union F. Co. of Brooklyn*, 47 N. Y. p. 185, referring to a previous case where the point is decided, viz: *Haley v. Earle*, 30 N. Y. 208; See *Butterfield v. Forrester*, 11 East. 58; *Davies v. Mann*, 10 M. & W. 546; *Evansville, etc. R. R. Co. v. Hiatt*, 17 Ind. 102; *Savage v. Corn Exchange Fire etc. Ins. Co.* 36 N. Y. 635.

⁶ *Abend v. Terre Haute, etc. R. R. Co.* (S. C. Ill.) 19 C. L. J. 350.

degree, which directly contributed to the injury" will bar the right to damages; yet "negligence" on the part of the plaintiff, "in the slightest degree," will not necessarily, and it is error to so charge the jury.⁷

In *Dreher v. Town of Fitchburg*,⁸ the court was asked to charge that "slight negligence" on the part of the plaintiff, which contributes directly to the injury, would prevent a recovery. This the court refused to do; and on appeal it was said: "To have given the instruction as drawn, would therefore have been equivalent to telling the jury that such a want of care on the part of the plaintiff, which contributed directly to the injury would have prevented a recovery. But such is not the law. To require of the mass of mankind that extreme degree of care which only persons of extraordinary prudence possess, would be to require an impossibility. It would be to deliver them up to the injury by the negligence, carelessness and recklessness of others, without redress."

The want of ordinary care in order to defeat the plaintiff's action, may be, in point of time, either before,⁹ or subsequent to the negligence of the defendant.¹⁰

It is not always easy to say when a negligence case should be taken away from the jury. Of course, if the case is such that the appellate court will reverse it because of contributory negligence as shown by the evidence, it is such a case as will justify the trial court in directing a verdict for the defendant.

There are but few instances in which the courts has declared that a party is guilty of contributory negligence, or few instances in which the courts have held a given state of recurring facts to show no right of recovery in a plaintiff, because of his lack of ordinary care. One of these is where a person is injured by a passing railway train and he has failed to look out for it before getting upon the track.

In a negligence case it was said that "the case, however, must be a very clear one to justify a court in taking upon itself this responsibility; (taking the case from the jury,) it must present some prominent and decisive act in regard to the effect and character of which no room is left for ordinary minds to differ. Accidents occur, and injuries are inflicted under an almost infinite variety of circumstances, and it is quite impossible for the courts to fix the standard of duty and conduct by a general and inflexible rule to all cases, so that a departure from it can be pronounced negligence in law."¹¹

In New York, Judge Folger said: "The rule established, and as I think the true one, is, that all the circumstances of each case must be considered in determining whether, in that case, there was contributory negligence or want of ordinary care, and that it is not

ground to select one prominent and important fact which may occur in many cases, and to say, that being present, there must, as matter of law, have been contributory negligence. The circumstances vary infinitely, and always affect, and more or less control each other. Each must be duly weighed and relatively considered before the weight to be given to it is known."¹²

Judge Cooley, with his usual clearness and conciseness, has given the following rule: "When the question arises from a state of facts on which reasonable men may fairly arrive at different conclusions, the fact of negligence cannot be determined until one or the other of these conclusions have been drawn to the jury. The inference to be drawn from the evidence must either be certain and incontrovertible, or they cannot be decided upon by the court. Negligence cannot be conclusively established by a state of facts upon which fair-minded men may well differ."¹³

After giving some examples of extreme cases in which a court will direct the jury in negligence cases, Mr. Justice Hunt, in the often cited case of *Railroad v. Stout*, 17 Wall. 657, said: "But there are extreme cases, the range between them is almost infinite in variety and extent. It is in relation to these intermediate cases that the opposite rule prevails. Upon the facts proven in such cases, it is a matter of judgment and discretion, of sound inference, what is the deduction to be drawn from the undisputed facts. Certain facts we may suppose to be clearly established, from which one sensible, impartial man, would infer that proper care had not been used, and that negligence existed; another man, equally sensible and equally impartial, would infer that proper care had been used, and that there was no negligence. It is this class of cases and those a-kind to it that the law commits to the decision of a jury."¹⁴

"The fact of negligence is generally an inference from many facts and circumstances, all of which it is the province of the jury to find. It can very seldom happen that the question is so clear from doubt that the court can undertake to say, as matter of law, that the jury could not fairly and honestly find for the plaintiff. It is not the duty of the court in such cases, any more than in any other, to usurp the province of the jury and pass upon the facts. And the non-suit should only be granted in such cases where the evidence of the misconduct on the part of the injured party is so clear and irresistible as to put the case on a par with those cases where a non-suit is granted for a failure to introduce evidence sufficient to go to the jury upon some point essential to the plaintiff's case. The fact must be so clear that, looking upon the plaintiff's case in the most favorable light, and giving him the benefit of all contravened questions, the court can see that a verdict in his favor must necessarily be set aside."¹⁵

"It by no means necessarily follows, because there is no conflict in the testimony, that the court is to decide the issue between the parties or a question of law. The fact of negligence is very seldom established by such direct and positive evidence, that it can be taken from the consideration of the jury and pronounced upon as a matter of law. On the contrary it is almost to be reduced or an inference of fact from several facts and circumstances disclosed by the testimony, after their

⁷ *Ranon v. Uttech*, 45 Wis. p. 590; *Dreher v. Town of Fitchburg*, 32 Wis. 675; *Walker v. Westfield*, 39 Vt. 246; *Brownell v. Flagler*, 5 Hill. 383; *Inman v. Galt*, 7 B. Mon. 538; *Davies v. Mann*, 10 M. & W. 546; *New Haven Steamboat, etc. Co. v. Vanderbilt*, 16 Conn. 420; *Wright v. Brown*, 4 Ind. 95.

⁸ 32 Wis. 675.

⁹ *Illinois, etc. R. R. Co. v. Hall*, 73 Ill. 223; *Carroll v. Minnesota, etc. R. R. Co.* 13 Minn. 390; *Pennsylvania R. R. Co. v. Morgan*, 83 Pa. St. 134; *Illinois, etc. R. R. Co. v. Hetherington*, 83 Ill. 510.

¹⁰ *Butterfield v. Forrester*, 11 East. 60; *Jackson v. Co. Comr's*, 78 N. C. 292; *Martensen v. Chicago, etc. R. R. Co.* 60 Iowa, 705; *Brown v. Milwaukee, etc. R. R. Co.* 22 Minn. 165; or cotemporary therewith: *O'Brien v. McGlinchy*, 68 Me. 552; *Chicago, etc. R. R. Co. v. Beeker*, 76 Ill. 26; s. c. 84 Ill. 483; *Doggett v. Richmond, etc. R. R. Co.* 78 N. C. 305.

¹¹ *Cumberland Valley R. R. Co. v. Mangans*, 61 Md.; — s. c. 23 Am. L. Reg. 518.

¹² *Morrison v. Erie R. R. Co.* 56 N. Y. 302.

¹³ *Van Stimburch's Case*, 17 Mich. 39.

¹⁴ See *Robson v. The N. E. Ry. Co.*, L. R. 10 Q. B. 371; & c. 13 Moak's Rep. 302.

¹⁵ *Schierhold v. North Beach & Mission R. R. Co.* 40 Cal. 447; See *Jamison v. San Jose & Santa Clara R. R. Co.* 55 Cal. 593; s. c. 3 Am. & Eng. R. R. Cas., 350.

connection and relation to the matter in issue have been traced, and their weight and force considered. In such cases the inference cannot be made without the intervention of a jury, although all the witnesses agree in their statement, or there be but one statement, which is consistent throughout."¹⁶

Courts, however, have adopted the rule that if one fails to look for the train at a railroad crossing before he enters upon the track, and which he would have seen if he had looked, or would have heard if he had listened, in time to have avoided injury, he is guilty of such contributory negligence as precludes a recovery.¹⁷ And the neglect of the engineer of the train, to give proper signals, does not excuse the person injured.¹⁸

In such instances, where the facts are undisputed, the court may direct a verdict for the company.¹⁹

Crawfordsville, Ind.

W. W. THORNTON.

¹⁶ Ireland v. Plank-road Co. 13 N. Y. 533; See Pennsylvania R. Co. v. Barnett, 59 Pa. St. 263; T. & R. Ry. Co. v. Murphy, 46 Tex. 366; Wilson v. Southern Pacific R. R. Co., 9 Am. & Eng. R. R. Cas. 161; s. c. 7 Id. 400; Dolfinger v. Fishback, 19 Bush. 478; Paducah & Elizabethtown R. R. Co. v. Letcher, 12 Am. & Eng. R. R. Cas. 61; Patterson v. Wallace, 1 McQueen, H. L. Cas. 748; Mangum v. Brooklyn R. R. 38 N. Y. 456; Quinby v. Vermont Central R. R. 23 Vt. 387; Pfau v. Reynolds, 53 Ill. 212; Catawissa R. R. Co. v. Armstrong, 52 Pa. St. 382; Treat v. Boston, etc. R. R. Co. 131 Mass. 371; Wohlfahrt v. Beckert, 27 Hun. 74; Cotton v. Wood, 98 E. C. L. 586.

¹⁷ Wilds v. Hudson R. R. Co., 24 N. Y. 430; Salter v. Utica, etc. R. R. Co. 38 N. Y. 42; Chicago, etc. R. R. Co. v. Adler, 56 Ill. 344; Sweeney v. Old Colony R. R. Co. 10 Allen, 368; Poole v. North Carolina R. R. Co. 8 Jones (N. C.) 340; Cleveland, etc. R. R. Co. v. Terry, 8 Ohio St. 570; Central R. R. Co. v. Dixon, 42 Ga. 327; Dodge v. R. R. Co. 34 Iowa, 279; Ormsbee v. Providence R. R. Co. 14 R. I. 1. If the eye-sight or hearing of the person injured is defective, the greater care is required of him. Evansville, etc. R. R. Co. v. Hiatt, 17 Ind. 102.

¹⁸ Chicago, etc. R. R. Co. v. Houston, 97 U. S. 542; (cited 19 Blatchf. 537; 2 McCrary, 273; 30 N. J. Eq. 241, 243, 609; 67 Mo. 676; 71 Mo. 489; 69 Ala. 109; 44 Am. Rep. 506;) Gorton v. Erie R. R. Co. 45 N. Y. 680; Hevins v. Erie R. R. Co. 41 N. Y. 296; Hill v. Louisville, etc. R. R. Co. 9 Heisk. 823; Chicago, etc. R. R. Co. v. Triplett, 38 Ill. 482; Peoria, etc. R. R. Co. v. Stiltman, 38 Ill. 529; Memphis, etc. R. R. Co. v. Copland, 61 Ala. 376; St. Louis, etc. R. R. Co. v. Mathias, 50 Ind. 65; Karle v. Kansas City, etc. R. R. Co. 55 Mo. 476; Com. v. Fitchburg R. R. Co. 10 Allen, 189; Pennsylvania R. R. Co. v. Beale, 73 Penn. St. 504; Wilcox v. Railroad Co. 79 N. Y. 358; Railroad Co. v. Crawford, 24 Ohio St. 631; Dacomb v. Buffalo, etc. R. R. Co. 27 Barb. 221; Cook v. Central R. R. Co. 67 Ala. 533; Murray v. Pontchartrain R. R. Co. 31 La. Ann. 490; Indianapolis, etc. R. R. Co. v. McLin, 32 Ind. 435; Bunting v. Central Pacific R. R. Co. 16 Nev. 277; Kansas Pacific R. R. Co. v. Richardson, 25 Kan. 391.

¹⁹ Chicago, etc. R. R. Co. v. Van Patten, 64 Ill. 510; Chicago, etc. R. R. Co. v. Damerell, 81 Ill. 450; Allyn v. B. & A. E. R. Co. 105 Allen, 77; Morse v. Erie R. R. Co. 69 Barb. 490; C. C. C. & I. R. R. Co. v. Elliott, 28 Ohio St. 340; Lake Shore, etc. R. R. Co. v. Miller, 25 Mich. 274.

WILL — CONSTRUCTION — LIFE ESTATE — LIMITED POWER TO DEVISE.

WRIGHT v. WRIGHT.*

New Jersey Court of Chancery, May Term, 1886.

A husband, by his will, provided as follows: "I give and bequeath all my property, both real and personal,

• • • • to my wife, Elizabeth, to use or dispose of in any manner that she may think proper during her lifetime, and at her death may by will dispose of the same between my children and grandchildren as she may think proper." Held, that her interest in the property so given was a life estate, with a discretionary power of testamentary disposition among testator's children and grandchildren, but without power to entirely exclude any of them.

Bill for construction of will, etc.

Mr. E. M. Colte, for complainants.

THE CHANCELLOR.

The question presented for decision is whether the complainants, who are executors of the will of Elizabeth Richards, deceased, can lawfully execute the power to sell land given to them by the will. The land was owned by William Richards, the husband of the testatrix. He predeceased her and died seized of it. By his will he disposed of his estate as follows:

"I give and bequeath all my property, both real and personal, that I die possessed of, both in the State of New Jersey and the city of New York (after my funeral expenses and debts shall be paid), to my wife, Elizabeth Richards, to use or dispose of in any manner that she may think proper during her life-time, and at her death may by will dispose of the same between my children and grandchildren as she may think proper."

By her will she ordered her executors to sell all her estate, both real and personal, within one year from the date of her decease; she charged her estate with the payment of her debts, and a sum sufficient for the erection of a suitable tombstone over her grave, and directed that out of the remainder of the property a legacy of \$100 be paid to her daughter-in-law, the widow of Thomas Richards. She then directed that the residue of the property be divided into six equal shares, and gave one of them to each of her three daughters "or to their respective" descendants; another to her grand-daughter, Frances, daughter of William Richards, "or her descendants;" a half share to each of her grand-children, Abby Ann and Ira L., children of Thomas Richards, or "to the descendants of each" of them, and a half share to each of her grand-children, Frances and Peter, children of Mary Garrison, "or to the descendants of each" of them. The testatrix had no real estate upon which the will could operate. Her estate in the real property devised to her by her husband's will was a life estate only. The property was given to her to use or dispose of in any manner she might think proper during her lifetime, with provision that she might dispose of it between [among] the testator's children and grand-children as he might think proper. The gift is not of an unlimited interest with a superadded power to dispose of the property by deed or will, but it is for life merely, with a power of appointment by will. In *Bradley v. Westcott*, 13 Ves. 445, where there was a personal estate to the sole use of the testator's wife for life, to be at her full, free, and

*Advance Sheets.

absolute disposal during her life, without liability to account, and after her decease certain specified articles and £500 were to go according to her appointment by will, and in default of appointment they were to fall into the residue, which was disposed of, it was held that the widow took an interest for life only, with a limited power of appointment. It was also held that the power given to her to dispose of the property was merely such power of disposition as a tenant for life might exercise. So, also, in *Scott v. Josselyn*, 26 Beav. 174, where the bequest was of the residue in trust to permit the testator's wife to receive the annual produce of the property for life, and also to apply to her own use such parts of the capital as she should think proper, and after her death to stand possessed thereof in trust for such persons as she should by will appoint, and in default of appointment, in trust to pay certain legacies—it was held that the widow took a life estate only, with power of disposition of the capital during her life and of appointment by will. And in *Pennock v. Pennock*, L. R. (13 Eq.) 144, where the gift was to the testatrix's husband in trust to stand possessed thereof and to enjoy the rents, profits and income for his own absolute use and benefit for life, with power to take and apply the whole or any part of the capital (the will gave him full power of sale) to and for his own benefit, and from and after his decease the property was to go over—it was held that the husband took a life estate only, with power of appointment, and that on his death without having exercised the power, the gift over took effect. In the case under consideration the gift was of the property to use and dispose of it as the donee might think proper during her life, and at her death she was to dispose of it among the testator's children and grand-children as she might think proper. The devise is expressly for life. Where the devise is expressly for life, with power of disposition annexed, an estate for life only passes. *Bradley v. Westcott*, *ubi supra*; *Downey v. Borden*, 7 Vr. 460.

Inasmuch as the testatrix had no real estate upon which her devise of real property could operate, it is to be presumed that she intended to execute the power by the devise. But she has not made the appointment according to the requirements of the power. She was to appoint the property among the donor's children and grandchildren as she might deem proper. Under such a provision both the children and grandchildren take. *Barnaby v. Tassell*, L. R. (11 Eq.) 363; *Law v. Thorp*, 4 Jur. (N. S.) 447; *Fox's Will*, 35 Beav. 163. She has appointed a share to each of her daughters "or their descendants." At least one of them, Sarah Jordan (or Jardine), had a child living at the death of the testatrix. He is named as one of the executors, and is one of the complainants. Under the terms of her husband's will, the testatrix was not at liberty to exclude any of the children or grandchildren; the power was not an exclusive one. While she had a discretion

as to the shares to be given to them, she was bound to give each child and each grandchild a portion. *Lippincott v. Ridgway*, 2 Stock. 164. The word "grandchildren" is not used in a substitutionary sense, but as a word of purchase. The direction is "to dispose of the same between 'the testator's children and grandchildren as she may think proper.'" The words must, in the absence of anything in the context to lead to a different construction, be construed according to their natural import. There is nothing in the context in this case to control the meaning. The gift to the wife and the appointment of executors are all the provisions contained in the will. Nor is the case of *Lippincott v. Ridgway*, above cited, in anywise opposed to this view. There the power was to dispose of the trust funds by will among the donee's brothers and sisters and their children, in such proportions as the donee might think fit. The court, indeed, did not recognize the right of the children to participate, except in substitution for deceased parents, but it will be seen, by reference to the will by which the power was conferred (and which will be found in *Lippincott v. Stokes*, 2 Hal. Ch. 122), that it appeared from the context that the gift to the children was merely substitutionary.

The appointment being invalid, it follows of course that the executors have no power to sell the property.

NOTE.—Where the power is merely to appoint among several, each must have a share.¹ But if the trustee has a discretion, then he may exclude any of the specified beneficiaries.

As a gift to one or more of the children then living, in such manner as testator's executrix should think fit,² "To such of my children as she [testator's wife] shall think fit,"³ "Amongst all or such of his children as by their conduct should deserve it,"⁴ "To be at her disposal, provided it be to any of his children,"⁵ "For the use of her younger children as she should appoint,"⁶ "To be by her disposed of to and amongst his three daughters, in such proportion, and payable in such manner as she shall think fit to give it in her life,"⁷ "To and for the use of such child and children of the said J. G. * * * as the said J. G. should at

¹ *Gibson v. Kniven*, 1 Vern. 66; *Alexander v. Alexander*, 2 Ves. Sr. 640; *Vanderzee v. Aclom*, 4 Ves. 772; *Kemp v. Kemp*, 5 Ves. 849; *Butcher v. Butcher*, 9 Ves. 332, 1 V. & B. 79; *Marsden's Trust*, 4 Drew. 594; *Melvin v. Melvin*, 6 Md. 541, 550; *Michau v. Crawford*, 3 Hal. 90, (109); *Russell v. Kennedy*, 66 Pa. St. 248; *Little v. Bennett*, 5 Jones Eq. 156; *Stuyvesant v. Neil*, 67 How. Pr. 16; See *Pocklington v. Bayne*, 1 Bro. C. C. 450; *Harley v. Mitford*, 31 Beav. 280; *Booth v. Allington*, 39 Eng. L. & Eq. 250; *Brook v. Brook*, 3 Sm. & Giff. 280; *Howorth v. Dewell*, 29 Beav. 18; *Hawley v. James*, 5 Paige, 333; *Haynesworth v. Cox*, Harp. Eq. 177; *Fronty v. Fronty*, Ball. Eq. 517; *Wickscham v. Savage*, 58 Pa. St. 865; *Loring v. Blake*, 98 Mass. 253; *Cruse v. McKee*, 2 Head, 1; *Gilbert v. Chapin*, 19 Conn. 343.

² *Thomas v. Thomas*, 2 Vern. 513.

³ *Leafe v. Saltington*, 1 Mod. 189, 3 Lev. 104.

⁴ *Macey v. Shurmer*, 1 Atk. 889.

⁵ *Tomlinson v. Dighton*, 1 P. Wms. 149.

⁶ *Coleman v. Seymour*, 1 Ves. Sr. 209.

⁷ *Maddison v. Andrew*, 1 Ves. Sr. 57.

any time * * * limit, direct or appoint."⁸ The residue to E. for her life, "and after her decease the same unto his children, to be parted among them as she should think proper."⁹ "In such shares and proportions as she should by her will direct, limit or appoint."¹⁰ "To any one of my own family she may think proper."¹¹ "To such of his mother's poor relations as W., his heirs, executors and administrators for the time being should think objects of charity."¹² "Unto and amongst of her relations, at such times and in such manner and proportions as he is his discretion should judge most proper."¹³ "Unto and amongst all such child or children of S., in such parts, shares and proportions, manner and form, as J., should appoint."¹⁴ "To divide among A.'s children, in such proportions as A. should appoint by will."¹⁵ "To and amongst my other children or their issue, in such parts, shares and proportions, manner and form as my said daughter shall by deed or will appoint."¹⁶ "For such child or children" of the marriage, and if more than one, in such shares as the survivor should appoint."¹⁷ To testatrix's wife, that she might, "give her children such fortunes as she should think proper, or they deserve."¹⁸ "To the heirs of his body, in such manner and shares as he may see fit to divide it among them, which he shall have full power to do as he pleases."¹⁹ "With full power to devise and bequeath the same, or any part thereof, to my relations of the H. family, as she shall in her discretion select."²⁰ Among the children of the testator's two brothers, "in such manner and proportion as he shall think proper."²¹ "To pay and distribute the principal among such of M.'s children as the said M. by her last will should appoint."²² "At their death to have the privileges to will to my daughter S.'s children or my son T.'s children, just as they see proper."²³ For the benefit of the testatrix's brothers and sisters, as the trustee might from time to time judge the testatrix would have done if she could have foreseen the circumstances.²⁴ The cases of *Garthwaite v. Robinson*,²⁵ which held that under this trust, viz., "to dispose of the same, in such manner as she thinks fit, amongst all or one or more of her children, if she should have any, and if she hath none, then amongst my present or future grandchildren, or their respective issue, as she like best," the tenant for life could not, wanting issue of her own, exclude the children of a deceased grandchild, who were living at testator's death; and *Stolworthy v. Saneroff*,²⁶ "to dispose of his said estate in such manner and amongst

such issue as A. should appoint," holding that A.'s appointment amongst some only of her issue living at her decease was void for exclusiveness, were disapproved in *Vale's Trusts*.²⁷ JOHN H. STEWART.
Trenton, N. J.

²⁷ L. R. (4 Ch. Div.) 61, 36 L. T. (N. S.) 634, (5 Ch. Div. 632.

COMMON CARRIER—DISCRIMINATION—INTER-STATE COMMERCE—CONSTITUTIONAL LAW.

PROVIDENCE COAL COMPANY v. PROVIDENCE ETC. R. R. COMPANY.

Supreme Court of Rhode Island, May 5, 1886.

The provisions of Public Statute, Rhode Island, chapter 129, which forbid discrimination by a common carrier in his charges for transportation, apply to contracts made in this State for transportation to points beyond the State, and are not in conflict with the clause of the Constitution of the United States, art. 1, § 8, "Congress shall have power . . . to regulate commerce . . . with foreign nations and among the several States."

When a railroad is built by corporations located in and chartered by different States and these corporations consolidate, they make but one corporation whose acts and neglects are done by it as a whole.

Bill in equity for an account and an injunction. On exceptions to the answer.

The charter of the respondent corporation granted at the May session of the general assembly, A. D. 1844, contains the following provisions:

§ 15. The said Providence and Worcester Railroad Company are hereby authorized to unite with a railroad company which may be empowered by the legislature of the State of Massachusetts to construct a railroad from the northern terminus of the railroad authorized by this act, to the town of Worcester. And when the two companies shall have so united, the stockholders of one company shall become stockholders in the other company. And the two companies shall constitute one corporation, by the name of the Providence and Worcester Railroad Company, and all the franchises, property, powers and privileges granted or acquired under the authority of the said States, respectively, shall be held and enjoyed by all the said stockholders in proportion to the number of shares or amount of property held by them respectively, in either or both of said corporations.

§ 16. One or more of the directors or other officers of said Providence and Worcester Railroad Company, as is provided in the preceding section, shall at all times be an inhabitant of this State, on whom processes against said company may be le-

⁸ *Swift v. Greyson*, 1 T. R. 482.

⁹ *Morgan v. Surman*, 1 Taunt. 289.

¹⁰ *Mocatta v. Lousada*, 13 Ves. 123.

¹¹ *Grant v. Lynam*, 4 Russ. 292; *Harding v. Glyn*, 1 Atk. 469.

¹² *Brunsdon v. Woolredge*, Amb. 508; *Atty.-Gen. v. Price*, 17 Ves. 371. See *Bennett v. Honeywood*, Amb. 708.

¹³ *Supple v. Lawson*, Amb. 729.

¹⁴ *Wollen v. Tanner*, 5 Ves. 218.

¹⁵ *Abbott v. McGibbon*, Low. Can. (Q. B. Div.) (1884), 18 Cent. L. J. 406.

¹⁶ *Veale's Trusts*, L. R. (4 Ch. Div.) 61, 36 L. T. (N. S.) 634, (5 Ch. Div.) 632.

¹⁷ *Chamberlain v. Napier*, L. R. (15 Ch. Div.) 614.

¹⁸ *Buller v. Buller*, Amb. 660.

¹⁹ *Graeff v. De Turk*, 44 Pa. St. 527.

²⁰ *Huling v. Fenner*, 9 R. I. 410.

²¹ *Cowles v. Brown*, 4 Call. 477; *Hudson v. Hudson*, 6 Munf. 352.

²² *Ingraham v. Meade*, 3 Wall. Jr. 32.

²³ *Kerr v. Verner*, 66 Pa. St. 326.

²⁴ *Portsmouth v. Shackford*, 46 N. H. 423.

²⁵ 5 Blm. 43.

²⁶ 10 Jur. (N. S.) 762.

* s. c. 6 Eastern Reporter, 677.

gally served; and said company shall be held to answer in the jurisdiction where the service is made and the process is returnable.

§ 17. The said company shall keep separate accounts of their expenditures in the States of the Rhode Island and Massachusetts respectively; and two commissioners shall be appointed, one by the governor of each of said States, to hold their offices for the term of four years; and to be reasonably compensated by said company, who shall decide what portion of all expenditures of said company and of its receipts and profit, properly pertain to that part of the road lying in said States respectively, and the annual report required to be made to the legislature of this State shall be approved by said commissioners.

§ 18. The said company and the stockholders therein, so far as their road shall be situated in this State, shall be subject to all the duties and liabilities of the Providence and Worcester Railroad Company created by the provisions of this act, and to the general laws of this State to the same extent as the said Providence and Worcester Railroad Company and the stockholders therein would have been had the whole line of said railroad been located within the limits of this State.

§ 19. The provisions contained in the four preceding sections shall not take effect until said provisions shall have been accepted by the stockholders of the said two corporations respectively, at a legal meeting called for that purpose.

And the charter granted by the general court of the State of Massachusetts, in A. D. 1844, contains similar provisions.

James Tillinghast, for complainant. *Charles Hart* and *Edwin Metcalf*, for respondent.

TILLINGHAST, J., delivered the opinion of the court.

The main questions presented for our consideration by the numerous exceptions to the defendants answer to the bill are, first, whether the provisions public statutes R. I., chapter 139, which prohibit discriminations being made by common carriers in the transportation of goods and merchandise, can be construed to affect contracts made in this State for transportation of goods and merchandise to points beyond the limits thereof; and, second, if they can be so construed, whether they are not to that extent in conflict with the "commercial clause" of the Constitution of the United States, which provides that "the congress shall have power to regulate commerce with foreign nations and among the several States." The defendants are common carriers owing and operating the Providence and Worcester railroad, which is situated partly in Rhode Island and partly in Massachusetts. The corporation has been consolidated under the statutes of both States. The bill seeks relief against the defendants for the discrimination alleged to have been made by them against the plaintiffs, both on contracts for the transportation of merchandise to points within the State, and also to points

without the State, on the line of their road. Most of the exceptions are to the refusal of defendants to answer the allegations of the bill as to business transacted by them on contracts made for the shipment of merchandise to points without the State. The defendants contend that they are not called upon to answer these allegations, because they are only a Rhode Island corporation, owning and operating a railroad wholly in this State; that part of the road beyond the limits thereof being owed and controlled by another and distinct corporation, created by and only amenable to the laws of another State. By the express provisions of the defendant's act of incorporation in this State, of May, 1844, sections 15 to 18, the consolidated company forms but one corporation; and by section 18 it is expressly made subject to all the duties and liabilities of the Providence and Worcester Railroad Company created by the provisions of this act and to the general laws of this State to the same extent as said Providence and Worcester Railroad Company; and the stockholders therein would have been had the whole line of said railroad been located within the limits of this State. The defendants, then, are a consolidated railroad company owning and operating a railroad extending, as alleged in the bill, from Providence, Rhode Island, to Worcester, Massachusetts; and we think it is well settled that such a corporation is but one entity, "and that the acts and neglects of the corporation are done by it as a whole." In *Boston, etc., R. R. Co. v. New York, etc., R. R. Co.*, 13 R. I. 260, 262, this court, speaking of the Boston, Hartford and Erie Railroad Company, which was chartered by the State of Connecticut, says that it "was not a Rhode Island corporation except so far as it became, by virtue of the sale and action of the legislature, the successor of the Hartford, Providence and Fishkill Railroad Company. Yet as a foreign corporation it might be empowered to own and operate a railroad within this State, the policy of such authority being wholly within the discretion of the legislature."

"But the Boston, Hartford and Erie Railroad Company can hardly be regarded as a foreign corporation. True, it was not a Rhode Island corporation in the sense that it was chartered here, but it was subject to Rhode Island laws and control as fully as a domestic railroad company." And then, after reciting the legislative action concerning it, the court further says, "it was thenceforth a corporation in this State, though not of this State."

In *Scofield v. Lake Shore, etc., R. Co.*, 43 Ohio St.; S. C., 54 Am. Rep., wherein this question has recently been fully considered by the Supreme Court of Ohio, the court says: "A further question is presented, whether the decree for plaintiffs should be limited to and enforced only in this State, or should it extend to and be enforced against the defendant at all points reached by defendant's railroad, its branches and connecting lines?" "The district court finds that the defend-

ant is a consolidated company, its lines of road extending to various points in Pennsylvania, New York, Ohio, Indiana, Michigan and Illinois. It is an artificial person and the same person in all this territory, and this court has acquired jurisdiction of the person of the corporation and the right to enforce all proper decrees against it."

"The railroad is an entirety, whether within the State or without; and the artificial person, by the acts of the several States authorizing consolidation, has been created one and not two or more, and no reason is perceived why it may not be dealt with by the courts of either State that has procured jurisdiction." "This artificial person not only holds itself out, but does make contracts for the transportation of freight over its connecting lines as well as its own line, and it makes rates to points only reached by connecting lines. No reason is perceived why it should not be ordered to make no discriminations to the injury of the plaintiff in its rates to points thus reached. Of course it may, at any time, refuse to make any rates beyond its own lines; but if it makes rates to points on connecting lines, the rates should be equal to all." See also *McDurfee v. Portland etc. R. Co.*, 52 N. H. 430; *Peik v. Chicago, etc., R. Co.*, 94 U. S. 164, 176; *Horne v. Boston, etc., R. Co.*, 18 Fed. Rep. 50.

This doctrine is now so fully settled that a review of the cases is quite unnecessary.

Construing the statute, then, to include contracts for the transportation of merchandise to points without the State on the line of the defendants' road, is it obnoxious to the constitutional provision before mentioned? We do not think it is. It is not, in our judgment, a regulation of commerce, within the meaning of the "commercial clause" as heretofore construed, either by the State courts or by the final arbiter of questions of that sort—the Supreme Court of the United States. It opposes no obstruction and causes no delay to commerce. Neither does it lay any tax thereon so as to make it abnoxious to the rule as laid down by the Supreme court of the United States in *Hays v. Pacific Mail Steamship Co.*, 17 How. 596; *Morgan v. Parham*, 16 Wall. 471; *Steamship Co. v. Port Wardens*, 6 id. 21; *Case of the State Freight Tax*, 15 id. 232; *Henderson v. Mayor of New York*, 92 U. S. 259; *Walling v. Michigan*, 116 id. 446; *Gloucester Ferry Co. v. Pennsylvania*, 114 id. 196, and many others of the same class. It simply prohibits discriminations being made in favor of one, and against another, having occasion to use the facilities afforded for the transportation of goods, by common carriers under like circumstances, a substantial declaration of the common law doctrine upon this subject. *Messenger v. Pennsylvania R. Co.*, 37 N. J. Law, 531: s. c., 18 Am. Rep. 754; *Chicago, etc., R. Co. v. People*, 67 Ill. 11. And although a statute of this sort may doubtless be properly said to effect commerce, yet, as held in the *State Tax Railway Gross Receipts*, 15 Wall. 284, 293, "it is not every thing

that affects commerce that amounts to a regulation of it within the meaning of the Constitution." In *Peik v. Chicago, etc., R. Co.*, 94 U. S. 164, in which the power of the Legislature of Wisconsin, to provide by law for a maximum charge to be made, for fair and freight, for the transportation of persons and property carried within the State, or taken up outside the State and brought within it, or taken up inside and carried without, was considered, the Supreme Court of the United States says:

"As to the effect of the statute as a regulation of inter-state commerce, the law is confined to State commerce, or such inter-state commerce as directly affects the people of Wisconsin. Until Congress acts in reference to the relations of this company to inter-state commerce, it is certainly within the power of Wisconsin to regulate its fares, etc., so far as they are of domestic concern. With the people of Wisconsin this company has domestic relations. Incidentally these may reach beyond the State. But certainly, until Congress undertakes to legislate for those who are without the State, Wisconsin may provide for those within, even though it may indirectly affect those without."

In the case of *Chicago, etc. R. R. Co. v. Iowa*, 94 U. S. 155, 161, the same doctrine was maintained.

The conclusion deducible from the numerous decisions bearing upon this subject, as well stated by the Supreme Court of Indiana in *Western Union Telegraph Co. v. Pendleton*, 95 Ind. 12; S. C. 48 Am. Rep. 692, "is, that the States cannot embarrass commercial communication, abridge the freedom of commerce, discriminate in favor of the products of one State, lay burdens upon the instruments of commerce, or exact licenses from persons, natural or artificial, engaged in inter-State commerce." See cases there cited.

Accepting this as a summary of the law applicable to the case before us, we do not see that the statute under consideration is obnoxious thereto. Commercial intercourse is not thereby abridged or fettered, and no new duty or burden is imposed thereon. The defendants are only called upon to do, under a certain penalty, precisely what the common law declares it to be their duty to do without the statute, viz.: to treat all alike under similar circumstances—a mere police regulation.

The Supreme Court of Illinois has recently had occasion to construe a similar statute, and in so doing *inter alia*, says: "It is no doubt true that the statute to prevent unjust discrimination in the rates of charges of railroad companies, under which this action was brought, may affect commerce, but in our judgment it cannot be said to be a law regulating commerce among the States, within the meaning of the Federal Constitution. The law does not purport to exercise control over any railroad corporation except those that own or operate a railroad in the State, such corporations as have domestic relations with the people of the

State; and as we understand the decisions of the Supreme Court of the United States, similar laws enacted by State authority have been upheld and sustained, although such laws may affect commerce." *The People v. Wabash, etc.* R. R. Co. 104 Ill. 478. See, also, *Hall v. DeCuir*, 95 U. S. 485, 487; *Peik v. Chicago, etc.* R. R. Co. 94 id. 164; *Chicago, etc. R. R. Co. v. Iowa*, id. 155; *Munn v. Illinois*, id. 113.

The exceptions are sustained in so far as they are based upon the omission of the defendants to answer the allegations of the bill as to transactions reaching beyond the limits of the State.

WILL—CONSTRUCTION — "WITHOUT BODILY HEIRS."

THACKSON v. WATSON.*

Court of Appeals of Kentucky, September 11, 1886.

Will—Construction—"If He Lives so Long—"On Death Without Heirs."—Testator directed that his executor should control and manage the estate until his son was twenty-one years of age, and then, "if the son should live so long," the whole estate was "to be paid over and delivered up to him." The next clause of the will provided that, in case the "son should die without bodily heirs," the "real estate should be sold and converted into money, and distributed" among certain relatives. *Held*, 1. That the words "die without bodily heirs" were intended to refer back to the former clause, "if he should live so long," and that the son, having attained the age of twenty-one years, took the fee-simple. 2. That rules of construction will not be allowed to defeat the plain intention of the testator as gathered from the whole instrument.

Appeal from circuit court, Mason county.

This was an action brought by the plaintiff to cancel a mortgage given by him to the defendant. The mortgage was given to secure the defendant in the event of the plaintiff's title to certain lands, sold by him to the defendant, not being good. The lands sold were derived from the plaintiff's grandfather under the will set out in the opinion. Judgment for plaintiff, and appeal by defendant.

E. Whittaker and *L. W. Robertson*, for appellant, *W. D. Thackston*. *Cochran & Son* and *H. Wadsworth*, for appellee, *Henry D. Watson*.

PRYOR, J., delivered the opinion of the court.

William Watson, of the county Mason, died in the year 1870, leaving a last will and testament, and his widow and H. D. Watson, his only child, surviving him. His will is now before this court for construction. By various clauses of his will preceeding those from which this litigation has arisen, he made several special devises, and gave minute and specific directions to his executor as to the control and management of his estate for

the benefit of his widow and son. By the eighth clause of the will, the executor was directed to rent out the land of the testator to the best advantage until his son arrived at the age of 21 years, and by the ninth clause, directed his executor to pay one-third of the net proceeds to his widow, and appropriate the other two-thirds to the benefit of his son as thereafter directed. By the tenth clause, the testator devised the rest and residue of his estate, real and personal, to his son Henry Duke Watson, "to be paid over to him, and to be delivered up to him, by the executor when he should arrive at the age of twenty-one years, if he should live that long;" and then proceeded to direct the executor as to the manner of raising and educating him. The son having arrived at age, the executor delivered up to him the estate, and, being vested by the tenth clause just quoted, with an absolute fee, conveyed a part of the land devised to him by his father to the appellant, who now insists that his title is imperfect by reason of the eleventh and twelfth clauses of the will. In the eleventh clause of the will the testator provides that, in case his son should die without bodily heirs, then all testator's real estate shall be converted into money by the executor, and, out of the proceeds, make certain bequests to his relations then living, naming them. In the twelfth clause he provides that, in case his son should die without bodily heirs, the whole estate, after paying the particular bequests, shall be equally divided between certain of his relations therein named.

The appellant maintains that the tenth clause of the will, when construed with the eleventh clause gives to the son a fee-simple estate, subject to be defeated at any time by the happening of the event, viz., the death of the son without bodily heirs. On the other hand, counsel for the appellee insists that the son took the fee subject to be defeated upon the contingency only of his dying without bodily heirs before arriving at the age of 21 years.

The settled and well-understood construction in references to such devises seems to be that where an estate is given or devised with remainder over, but, in the event the remainder-man should die without a child or children, then to a third person, the words "dying without children or issue" are restricted or limited to the death of the remainder-man before the termination of the particular estate; and it is equally as well settled that if an estate is devised to one in fee, but if he die without issue, or without leaving a child or children, then to another, the first devisee takes a defeasible fee which is subject to be defeated in the event of his death, at any period, without issue. *Birney v. Richardson*, 5 Dana, 424; *Pool v. Benning*, 9 B. Mon. 623; 2 Jarm. Wills, 506.

Counsel for appellant argues, as no particular estate in interest preceded the devise to appellee, that under the last rule of construction, the appellant will be deprived of all title by the death of

*S. C., 1 Southwestern Reporter, 838.

the appellee at any time without leaving issue surviving him. The construction of a will, or any of its provisions, must be controlled by the intention of the party making it; and, when that intention is ascertained from the whole instrument, it should be adopted, and no rule of construction will be allowed to defeat the expressed or plain intention of the testator. General rules of construction will be followed when not inconsistent with the manifest intention of the testator: but, says Mr. Redfield, "the court will place themselves as far as practicable in the position of the testator, and give effect to his leading purpose and intention as indicated by the words of the will, construed with reference to all attending circumstances." The words contained in a particular clause of a will, when alone considered, may bring the devise within the operation of a general rule; but, when considered with reference to the whole will, a different construction must often prevail; otherwise the plain intention of the testator would be defeated. It is at least the intention of the testator that the court must look to in construing wills, and, when that intention is ascertained, the general rules of construction are to be applied.

Without, therefore, determining the nature of the devise to the executor,—whether he was vested with an interest in the estate or not,—he certainly had the control and management of the entire property until the son arrived at the age of 21 years, and then, by an express provision of the tenth clause of the will, the whole estate was "to be paid over and delivered up to him by the executor when he arrived at the age of 21 years, if he live that long." The eleventh clause of the will, following directly the provision of the tenth clause, under which the executor was to surrender the entire estate to the son, provides that, in case his son died without bodily heirs, then "I direct and will that all my real estate be sold by my executor, and converted into money, and distributed as therein directed;" and, when construing the two clauses together, as they should be, it is evident the plain meaning of the testator was that in the event the son died before the period at which the property was to be delivered to him, and all control over it surrendered by the executor then the executor was to sell the realty, and make distribution as provided by the subsequent provisions of the will. The two clauses, read together, direct, in substance, the executor "to pay over and surrender to the son all the estate when he arrives at the age of 21, if he live that long; but if he should die before that time without leaving bodily heirs, the estate is to go to his collateral kindred."

In the case of *Duncan v. Kennedy*, 9 Bush, 580, the testator devised his estate to five persons, naming them, directing his executors to take possession and control of the property devised, until January, 1872, when the same was to be divided between the devisees; but further provided that, if any one of the five should die, then in that event it was to

be divided between the survivors. It was held that, in order for the devise over to the survivors to take effect, it was necessary for the death of the first taker without issue to take place before January 1, 1872.

The testator, when having his will written, was evidently contemplating the death of his son before the period at which he was to have the complete control of the estate, because he directs the property to be delivered over to him if he is then alive; and, providing against the contingency of his dying before that time, proceeds to devise his estate to his collateral kindred in the event his son leaves no children. His executor is to sell, and make the distribution, and no such thought entered the mind of the testator as requiring the executor, after his son had arrived at age and taken the custody of the property, to regain the possession of it, if his son thereafter died childless, in order that he might sell, and distribute the proceeds to others. The remote devisees were living when the will was made, and they were to take in the event the contingency happened before the son reached the age of 21. The title of the son became indefeasible when he arrived at that age, and therefore the title to the land sold by him to the appellant is not incumbered by any claim that might be asserted under this will by the remote devisees.

Nor is the view of the question in conflict with the ruling of this court in *Parrish v. Vaughan*, 12 Bush, 97. In that case the devise to the grandson was these words: "But should he [the grandson] die before he arrives at the age of 21 years, or without lawful issue of his body, then, and in either of these events, the land shall revert back." It was held that, the grandson dying without children, the estate went back to the heirs of the original devisor. In order to vest the title, in that case, in the devisee, the grandson, it became necessary to substitute the conjunction "and" for the disjunctive "or," and, not only so, but to disregard the words "then and in either of these events." This the court refused to do, holding that the testator must have understood the meaning of the language used by him, and, having given an expression to his intention by using the language referred to, this court would not assume that such was not the meaning, and substitute other words with a view of showing a different intention than the face of the will presented.

In our opinion, the appellant has no cause to complain of his title, and the judgment is therefore affirmed.

WEEKLY DIGEST OF RECENT CASES.

ALABAMA,	20
CONNECTICUT,	4
ILLINOIS,	15
IOWA,	6
MAINE,	25, 32
MARYLAND,	11, 12, 26
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PENNSYLVANIA,	16, 23, 28, 30
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TENNESSEE,	10
TEXAS,	14, 19, 36
VERMONT,	13
WISCONSIN,	33

1. AGISTMENT—*Lien of Agister on Foreclosure of Chattel Mortgage*.—Where S. placed a chattel mortgage executed to him by G. M. on a certain horse in the hands of I. M. to foreclose I. M. placed the horse in his own stable to be fed and cared for, and proceeded to advertise the horse for sale on foreclosure. Pending the sale, S. M., a personal security on the note to secure which the mortgage was given, tendered to S. the amount due on the note and mortgage, principal and interest. S. accepted the tender, and delivered up to S. M. the note and mortgage, and ordered I. M. to proceed no further in foreclosing the mortgage. *Held*, that I. M. had nollen on the horse for his feeding and care. (*Quere*—Editor C. L. J.) *Hale v. Wigton*, S. C. Neb. Sept. 8, 1886. 29 N. W. Rep. 177.

2. ATTORNEY AND COUNSELOR—*Contracts with Client—Onus as to Good Faith—Termination of Relation*.—An attorney who contracts with his client is subject to the onus of proving that, as respects the contract, no advantage was taken of the client's situation. But where a previously existing relation of attorney and client has come to an end, so that the parties are dealing, each for himself, at arms-length, this strict rule does not apply; but, to avoid the contract, (otherwise unobjectionable,) the client must show that it was procured by actual fraud. *Held*, that, upon the evidence in this case, a request for an instruction to the effect of this latter proposition was erroneously refused. *Tancere v. Pullman*, S. C. Minn., July 26, 1886. 29 N. W. Rep. 171.

3. BAIL AND RECOGNIZANCE—*Recognizance Defective—Common-Law Bond*.—A recognizance of the appearance of an accused person to answer to an indictment for felony, taken before and approved by an officer or person unauthorized by law, or where, under the facts of the case, the taking thereof is unauthorized by law, so that the same falls to be binding under the statute, *held*, also, to be void as a common-law obligation. *Dickinson v. State*, S. C. Nebraska, Sept. 8, 1886. 29 N. W. 184.

4. CONTRACT.—Where an employee is discharged because he will not continue to work for less than the agreed price, the employer cannot invoke a

rule compelling the employee to forfeit wages already earned on his leaving the employ of the master. *Schietenger v. Bridgeport etc. Co.*, S. C. Conn. April 24, 1886. 6 East. Rep. 118.

5. ———. *Agreement to Pay Note and Mortgage Held by Third Party—Assignment*.—A. entered into a parol agreement with H., upon a sufficient consideration moving from the latter, to pay the amount of a note and mortgage held by L. against H. and subsequently L. sold the mortgage and the debt thereby secured to the plaintiff. *Held*, that that such agreement constituted a valid and binding obligation in favor of L.; and, being in the nature of additional security for the payment of the mortgage debt, passed with the assignment thereof as an incident, and the plaintiff could enforce the same action against A. *Lahmers v. Schmidt*, S. C. Minn., July 14, 1886. N. W. Rep. 169.

6. ———. *Wagers—Grain Contracts for Future Delivery*.—A contract for grain for future delivery is not, as matter of law, void as a gambling transaction; it must be shown to be but a bet to avoid it; and the mere payment of "differences" in settlement, is not sufficient to establish it to have been a wager. *Tomblin v. Callen*, S. C. Iowa, June 18, 1886. 22 Rep. 367.

7. CORPORATION—*Foreign Corporation—Stockholders*.—The liability of stockholders, or of the subscribers for stock of a corporation, to the creditors of the company, is governed by the laws of the State under which it is created. It is the settled law of this State that, in the absence of an express promise to pay for shares in a corporation, none is created by a mere subscription therefor. Nor is any created by the mere agreement to take shares. Where by the local laws of the State under which the corporation is created, a liability is imposed on stockholders which is wholly at variance with the laws of this State, the courts of this State are not required to enforce such liability. *New Haven etc. C. v. Linden etc. Co.*, S. J. C. Mass., July 6, 1886. 6 East. Rep. 663.

8. COVENANT—*Warranty—Eviction—Pleadings—Evidence—New Trial—Motion, when Made—Covenant of Seizin Defined*.—In an action on a warranty deed for a breach of the covenant for quiet enjoyment, the plaintiff must allege and prove that he has been turned out of the possession of the granted premises, or of some part thereof, or has yielded the possession thereof to the paramount title. A motion for a new trial must be made in the terms, substantially, in which it may be allowed within the rules of law, or it will be denied. The covenant for title or of seizin is an assurance to the purchaser that the grantor has the very estate, in quantity and quality, which he purports to convey. If he has not such title, his covenant is broken immediately upon its being made. *Real v. Hollister*, S. C. Neb. Sept. 8, 1886. 29 N. W. R. 189.

9. CRIMINAL LAW—*Assaults with Intent—Indictment—Assault with Dangerous Weapons*.—An indictment for an assault with dangerous weapons, with intent to kill, under section 29, art. 2, c. 43, Wag. St. 449, providing for the punishment of an assault with a deadly weapon, or with any other means or force likely to produce death or great bodily harm, is sufficient if it alleges that the assault was made with an ax and a gun, with intent to kill, and that they were "deadly weapons" without the further allegation that they were "likely to

produce death." This allegation is only necessary when other means than deadly weapons are employed in making the assault. *State v. Painter*, 67 Mo. 84, followed. *State v. Pecora*, S. C. Mo. June 7, 1898. 1 S. W. Rep. 304.

10. ———. *Pleading—Indictment—Place.*—An indictment alleging, generally, an offense to have been committed in the county where it is found, if otherwise valid, is sufficient without any more particular designation of the precise locality. *State v. Sneed*, S. C. Tenn. June 10, 1898. 1 S. W. Rep. 282.

11. *DAMAGES—Depriving of Use of Mill.*—The rule of damages for wrongfully depriving a party of the use and possession of a portable saw-mill is the rental value or hire of the mill, or one of similar capacity, during the time it is thus withheld. Where the mill-owner has been compelled to pay a foreman under a subsisting contract during the time the mill was kept idle, and a watchman to take care of the same, he may recover such items of damages in addition to the rental value. *Wood v. Maryland*, Maryland Court of Appeals, July 15, 1896. East. Rep. 745,

12. *DEED—For Benefit of Creditors—Attorney and Client—Waiver.*—A creditor who participates in proceedings in equity for distribution of property sold under a deed of trust so far makes himself a party to the deed as to waive his right to deny its validity, and to have elected to surrender any lien he may have had upon the property, and to look to the proceeds of sale instead. But the attorney who recovered the judgment cannot, without express authority from his client, file the claim in the equity proceedings and thus waive his lien. *Horsely v. Chew*, Maryland Court of Appeals, June 24, 1896. 6 East. Rep. 748.

13. ———. *In Fraud of Creditors—Subsequent Mortgage—Foreclosure.* R. L. 4155.—A deed of land executed by a debtor to keep it from attachment, cannot be attacked by a petition under the statute to foreclose a subsequent mortgage executed by the debtor on the same land. The titles of adverse claimants cannot be litigated in a foreclosure suit. *Kinsley v. Scott*, S. C. Vt. August 7, 1896. 6 East. Rep. 775.

14. ———. *Registration—Quitclaim Deed—Construction.*—Where a quitclaim deed, conveying property, was made in 1848, and lost before record, but was substituted by a decree of court filed in 1881, and the same property was conveyed by the heirs of the grantor in 1874, held, that the claim of persons deriving title from the heirs of the grantee of the original quitclaim deed was good as against a purchaser in 1882 from persons claiming title from the heirs of the grantor. Words which are added in the latter part of a deed, for the sake of greater certainty, may be resorted to, to explain preceding parts which are not entirely clear. *Wallace v. Crow*, S. C. Texas, June 25, 1896. 1 S. W. Rep. 372.

15. *EASEMENT—Alley—Laid out between Lots of Same Owner—Purchaser—Rental Value—"Private Alley"—Designation by Common Owner.*—Where an alley-way has been laid out between the lots of the same owner, though it has been taken from the length of some of the lots, only, if its use is beneficial to another of the lots, and manifestly increases its rental value, the purchaser of such

lot will take an easement in it. Where the common owner of lots has laid out an alley-way between them, that she has designated the way as a "private alley," must be construed, in an action to deprive one of the lot owners of its use, as intended to show its use for her lots, only; but for all of them. *Cihac v. Kleke*, S. C. Ill. May 15, 1896. 22 Rep. 398.

16. *EQUITY—Bill of Review—Opening Decree of Orphans' Court Confirming Trustees' Accounts—New Matter.*—An account of executors, who are also trustees under the will, confirmed by a decree of the orphans' court, can be reviewed, as a matter of right, only for error of law apparent on the face of the record, or for new matter which has arisen since the decree. As a matter of grace, a review may be granted for new proof discovered after the decree, which proof could not possibly have been used at the time when the decree was made. *Scott's Appeal*, S. C. Penn. May 3, 1896. 5 Atl. Rep. 671.

17. *EVIDENCE—Weight of Evidence—Record—Parol.*—Where, upon the trial of a cause, facts are proved on the part of the plaintiff, by parol testimony, within the pleadings, sufficient to establish plaintiff's case *prima facie*, none of such testimony being contradicted, and the defendant proves by record evidence, also within the pleadings, such facts as establish a complete defense, such evidence taken together, will not sustain a finding for the plaintiff. *Dickinson v. State*, S. C. Neb. Sept. 8, 1896; 29 N. W. Rep. 184.

18. *EXECUTORS AND ADMINISTRATORS—Will not Probated—Debts Paid—Title to Assets—Evidence Possession—Dying Declarations—Creditors—Administration—Estoppel by Conduct.*—Debts of a testator, paid in good faith by his executrix and residuary life legatee, will be allowed against his estate, although the legatee took possession of the estate without proving the will. Where there is an issue as to title as between the estate of a husband and the estate of his widow, who was executrix and residuary life legatee under the husband's will, that will not having been probated until after the widow's death, it is error to admit testimony tending to prove that a certain sum of money was in the widow's possession at the time of her death, and that she made a dying declaration that it was intended to pay her debts. Creditors of a decedent who have failed to compel an administration of his estate cannot take advantage of the confusion resulting from such failure. *Jenks v. Breen*, Court of Chancery of New Jersey, Sept. 8, 1896; 5 Atl. Rep. 647.

19. *FALSE IMPRISONMENT—Damages—One Person Mistaken for Another—Execution of Warrant for Arrest Against Wrong Person.*—Where a person was imprisoned by mistake for another, such mistake may be considered in mitigation of damages and on the question of malice; but it will not justify the imprisonment, unless the mistake was caused or contributed to by the words or acts of the one imprisoned. An officer who executes a warrant against one person by arresting another is a trespasser. *Formwalt v. Hylton*, S. C. Texas, June 1, 1896; 1 S. W. Rep. 376.

20. *GARNISHMENT—Inter-State Garnishment.*—A debt by a foreign corporation to one of its employees at the place of its domicile, not being within the jurisdiction of our courts, can not be reached and subjected by a creditor here, by process of

- garnishment against the corporation. Reversed; garnishee discharged. *Louisville, etc. Co. v. Dooley*, S. C. Ala. Dec. Term, 1885-86.
21. **GIFT OF CORPORATE STOCK—Agreement Against Public Policy.**—In an action for breach of contract for non-delivery of corporate stock, the defendant may show, as matter of defense, that the contract sued upon was part and parcel of a prior secret agreement between the plaintiff and the company, whereby the plaintiff was to subscribe for a large amount of the stock for the purpose of inducing others to subscribe, and that for so doing he was to receive, in addition to his subscription, the amount of stock in question as a gift from the company. *Nickerson v. English*, S. Jud. Ct. Mass. July 3, 1886; 6 East. Rep. 551.
22. **INJUNCTION—Actions at Law—Cross-Bill—Equity—Pleading—Answer—Striking Out.**—A cross-bill, after simply stating that two writs of attachment had issued and were served in an action of law, prayed for an injunction restraining such action pending a decision on a suit between the same parties in this court. Held that, while the facts in the chancery suit would justify an injunction, yet the omission to show in the cross-bill anything inferring that the action at law is still pending would be such an uncertainty as to prevent the awarding of the injunction. Portions of an answer that are merely amplifications or enlargements of what has already been sufficiently stated, or are statements that do not pertain to the issue between the parties, will be stricken out. *Heckscher v. Trotter*, N. J. Ct. Ch. Sept. 11, 1886; 5 Atl. Rep. 652.
23. **INSURANCE COMPANY—Charter—Powers—Policy.**—Under a power in its charter to insure "hay, grain, and other agricultural products in barns, stacks, or otherwise, against loss by storms or hurricanes," an insurance company may insure a growing crop. An insurance of "stocks, crops, and farming implements" embraces a growing crop. *Mutual, etc. Co. v. DeHaven*, S. C. Penn. May 3, 1886; 22 Rep. 407.
24. **INSURANCE—Evidence.**—Evidence to show knowledge on the part of an alleged agent of the insured of other insurance was rightly excluded where no agency had been shown to exist. The policy provided that if the insured should have or afterwards make another contract of insurance whether valid or not, it should be void. Held, that insurance procured by a mortgage on the interest of the insured, without the knowledge of the latter, in conformity with a mortgage clause, was not other insurance within the meaning of the policy. Held, that where after knowledge of such other insurance the company without dissent proceeds to adjust the loss, this is a waiver of the alleged forfeiture. *Carpenter v. Continental, etc. Co.* S. C. Mich. June 17, 1886; 15 Ins. Law Journal, 667.
25. **INTOXICATING LIQUOR—Search and Seizure—Criminal Practice.**—On a complaint for search and seizure, if the evidence at the trial shows that the search and seizure were made in the night-time, the respondent should ask the court to instruct the jury as to the effect of such evidence. The State is not required to prove that the unlawful intent as to the particular liquor seized existed at the moment of seizure. It is sufficient if it existed at the time of making the complaint. *State v. McGowan*, S. C. Me. Aug. 5, 1886; 6 East. Rep. 626.
26. **NEGLIGENCE.**—At a point where a railroad crosses a highway, travelers on either have a right to cross the other. A train has a preferential right of way over a person traveling on the highway, but is bound to give timely notice of its approach and to moderate its speed enough to allow the highway traveler to avoid collision. The duty of a vehicle or foot traveler on the highway to give precedence to the train is founded on the obligation of the train men to give due warning of the train's approach. A foot traveler crossing a railroad track, by a foot-path near a highway crossing, who stops at the track to look and listen for an approaching train, but cannot perceive one or signals of one, and begins to cross but is struck by a train approaching suddenly, and without warning, and who is otherwise in the exercise of due care, is not chargeable with negligence contributing to the collision. *Baltimore, etc. Co. v. Owings*, Md. Ct. App. June 23, 1886; 3 Cent. Rep. 847.
27. **Children in Public Street.**—The driver of a horse car is required to manage his car with reference to all the risks that may reasonably be expected, including the risks arising from the heedlessness and indiscretion of children. The degree of care which the law requires of a child old enough to be intrusted alone in a dangerous place, or as the custodian of a younger child, is that which may reasonably be expected of children of his age, or which children of his age ordinarily exercise. *Collier v. South Boston, etc. Co.*, S. Jud. Ct. Mass., July 3, 1886; 6 East. Rep. 648.
28. **NOTES—Application of Payments—Principals.**—A. and B. were jointly liable to C. upon a judgment note given by them, and all three agreed that the production of B.'s gold wells should be turned over to C. to pay the amount for which A. and B. were jointly liable. B. afterwards directed the yield of the wells to be applied to the payment of other debts due by him to C., and for other purposes, which was done accordingly. In an issue to determine whether or not the judgment note was paid by the yield of the wells. Held, that as A. and B. were both principals in the obligation, it was within the power of either of them (without the knowledge or consent of the other) to change the application of the proposed payment, and that the judgment note could not therefore be treated as paid. *Tait v. Hackett*, S. C. Penn. May 12, 1886; Weekly Notes of Cases, Vol. 18, p. 145.
29. **PARTNERSHIP—Attachment—General Assignment.**—The individual interest of a co-partner in the co-partnership effects is attachable. The attachment may be made by seizure of the effects, and the attaching officer may remove them for safe-keeping. That the defendant co-partner has overdrawn his account with the co-partnership does not invalidate the attachment. But the execution and record by the defendant co-partner of a general assignment for the benefit of his creditors under Public Statutes, R. I. chapter 237, section 12, at once dissolves the attachment. *Traford v. Hubbard*, S. C. R. I., June 11, 1886; 6 East. R., 693.

30. —. *Equity—Injunction and Account—Obscure and Irregular Accounts*.—A bill for account and provisional injunction to prevent interference with partnership assets will lie at the suit of one partner, notwithstanding the accounts of the partnership are irregular, and the evidence concerning them is obscure and conflicting. *Siobig's Appeal*, S. C. Penn. May 8, 1886; 5 Atl. Rep. 670.

31. *PLEADINGS.—Amendments—When Allowed—Striking Out.*—Where the filing of an amended pleading is necessary to enable a party to prove any cause of action or matter of defense in his case, it is error in the trial court to deny the application of such party to file such amended pleading at any time after the filing of a defective pleading, before or after trial. But otherwise where such amended pleading is not necessary to the admission of material testimony. Words in a pleading, other than the formal parts thereof, which are not necessary as the foundation of pertinent and proper testimony to prove the action or defense, or some part thereof, of the party filing such pleading, may be stricken out on motion at any time before the trial. Otherwise where such words are necessary as a foundation for such testimony. *Hale v. Wigton*, S. C. Neb., Sept. 8, 1886; 29 N. W. R., 177.

32. *PRACTICE.—Withdrawing Exceptions—Motion for New Trial.*—An agreement of parties, withdrawing a pending bill of exceptions and providing that judgment shall be rendered on the verdict, does not prevent the excepting party from availing himself of a motion for a new trial on the ground of newly-discovered evidence. *Emery v. Mayberry*, S. C. Maine, Aug. 5, 1886; 6 East. Rep., 625.

33. *SALE.—Pleading—Article or Machinery to be Satisfactory—Discretion of Purchaser.*—Where a purchaser of an article or machine is sued for the agreed price, it is a sufficient answer to the complaint that the thing to be delivered under the contract was to work satisfactorily to him, and that he refused to accept it, as he knew, upon investigation, that it would not work to his satisfaction. *Exhaust, etc. Co. v. Chicago, etc. Co.*, S. C. Wis., May 15, 1886; 22 Rep., 889.

34. *TRADE-MARK.*—Where marks, such as arbitrary combinations of figures, indicating style or quality also indicate origin, they may be a subject of trade-mark and their use as such protected. The sight of a familiar symbol inducing one to purchase goods to which the symbol does not properly belong, to the injury of him who devised it to mark his own goods, is the gravamen of the law of trade-marks. A complainant in a suit to restrain the use of a trade-mark cannot maintain an exclusive right to the use of certain numbers which had been used by a third person and become known to the trade as applied to the same styles of goods before complainant used them. *American, etc. Co. v. Anthony, etc. Co.*, S. J. C. Mass., July 3, 1886; 2 N. Eng. Rep., 630.

35. *TRESPASS.—Quare Clausum—Measure of Damages.*—In trespass *quare clausum* for felling the defendant's trees across the line fence, and covering the plaintiff's land with brush, the measure of damages is not confined to the expense of removing the brush, nor is it limited to the value of the land incumbered. *Hutchinson v. Parker*, S. C. of N. H., July 30, 1886; 5 Atl. Rep., 659.

36. *VENDOR AND VENDEE.—Vendor's Lien—How Created—How Waived—Vendor's Lien as Security for a Note—Title of Vendor.*—A vendor's lien is given by law when one person sells land to another on a credit, and may be waived by such facts as show that the seller relies on other security, or relinquishes his right to the security which the law gives him; but the absence of knowledge that the law gives such security, or a mere secret intention not to claim it, does not affect the right. To prove that a vendor's lien exists to secure the payment of a note, it must appear that the vendor has a valid title to the land. *Houston v. Dickson*, S. C. Texas, June 14, 1886; 1 S. W. Rep., 375.

37. *WAREHOUSEMAN.—Evidence.*—The implied undertaking of a warehouseman is, not that he will at all events keep the goods safely, but that he will use reasonable and ordinary care and diligence in keeping them. In an action brought to recover damages caused to goods while stored in a warehouse, the burden of proof is upon the plaintiff to show that the damage was caused by the negligence of the warehouseman. *Cass v. B. & L. R. R. Co.*, criticised. *Willett v. Rich*, S. J. C. Mass., July 6, 1886; 6 East. Rep., 660.

QUERIES AND ANSWERS.*

[Correspondents are requested to draw up their answers in the form in which we print them, and not in the form of letters to the editor. They are also admonished to make their answers as brief as may be.—Ed.]

QUERIES.

25. A., the owner of a newly erected building, leased the same to B. for one year. B., under arrangements with a gas company, had pipes laid connecting a portion of the building with the company's mains, and a gas meter put in; but also, without the knowledge or consent of either A. or the company, procured another pipe to be laid connecting other parts of the building with the company's main. During his term he used gas through all the pipes, but the pipe surreptitiously laid, passed the gas around the meter. At the end of the term A. entered into possession and consumed the gas in all parts of the building. This has continued for more than a year. At the end of each month the company has regularly presented its bill for gas consumed by A., according to the meter, and all were paid by A. Both parties being ignorant of the fact that any gas, not registered by the meter, had been consumed, no payment has been made therefor. But the company, having now learned the facts, sues A. in assumpsit. *Queries:* Is A. liable? Does the law imply a promise when neither party, at the time, knew that the company was furnishing or that A. was using the gas? What, in this action, is the effect of the monthly settlements? If the form of the action be inappropriate, what kind of suit would be proper? Please give authorities. B. L.

QUERIES ANSWERED.

Query 38. [22 Cent. L. J. 334.]—A., B., C., D., & E. employ a lawyer, G., to render certain professional services. After the work is done, G., the lawyer, asks A., B., C., & D. for their joint and several note in payment. This they refused to give. But he urges and tells them that he will procure E's signature, and in no event shall they, A., B., C. & D., be liable for more than a fifth (1-5) each, of the whole amount. They

pay the one-fifth each. E. never signs. In a suit by G., the lawyer, v. A., B., C. & D., for the other fifth, can they show the collateral agreement by oral evidence? I can find no cases exactly in point, the nearest being *Miller v. Gamble*, 4 Barb. 146; *Ely v. Kilborn* 5 Denio, 514; *Ande v. Dixon*, 6 Exch. 869. Please cite cases, or authorities. N. B. JONES.

Athens, Ga.

Answer.—The inference from the latter part of the query and the citations is, that the note was signed, though it is stated that the parties refused to sign, and that the suit is on the note. The case cited of *Miller v. Gamble* seems to sustain the proposition. It is there decided that if a party signs a note upon condition that another person shall also sign it, he is not liable on it as between the original parties unless the condition is complied with. It has been held in a number of cases that if the delivery was conditional, that is, if the written instrument was not to take effect till the happening of a certain event, such as the signing by another party, the suit thereon may be defeated by showing that such event has not happened, the agreement being by parol. But evidence of a parol agreement to avoid a written instrument by a subsequent event is not admissible. *Goddard v. Cutts*, 11 Maine, 440; 2 Phil. Ev. (Cowan, Hill & Edwards, notes), notes 495 and 502. This seems to be approved in the cited case of *Ely v. Kilborn*, 5 Denio, 514. The consideration in such cases may always be examined into, and this is held to involve an examination of all the facts and circumstances attending the transaction, so far as the point of consideration is concerned. *Bernhard v. Brunner*, 4 Bos. 528. The terms on which a check was received were allowed to be shown by a letter written by the holder four days before the note was made. *Denniston v. Bacon*, 10 Johns. 198. In a recent case in Pennsylvania it is stated, that the admissibility of such a defence is "so well settled as to preclude discussion." *Walker v. France*, 22 Rep. 218. S. S. M.

CORRESPONDENCE.

In the sub-joined communication, a correspondent criticises the answer of S. S. M. to Query No. 43, of Volume 22. The question, with the answer, appears on page 312 of the current volume. Our correspondent says:

"It seems to me that the answer of S. S. M. to Query 43 is not good. His statement of a general proposition of law is correct, but he fails to observe that the agreement to take a less sum than the face of the note, is based upon the ground of a partial failure or want of consideration. Here is an agreement as to the actual amount due, and not an agreement to take less than the amount due and owing." W. H. B.
Lawrenceburg, Ind.

To this S. S. M. replies as follows:

"A claimed one amount and C's father alleged that a less amount was due. A. agreed to take the less amount. It then became a case of accord and satisfaction, which is defined as the settlement of a dispute or the satisfaction of a claim by an executed agreement between the party injuring and the party injured. *Bull v. Bull*, 43 Conn. 453; 6 Wait's Act. & Def. 408. The money was to be paid to A. in a few days, which was not done. So the satisfaction was not made, and A. was not bound by the accord (see authorities cited in answer), and was relegated to his original rights on the note. We cannot see, from the case stated, that A.

consented that he was not entitled to the face of the note; on the contrary, he only consented to the terms proposed to avoid a law suit. The case seems to fall under all the rules applicable to an accord satisfaction."

RECENT PUBLICATIONS.

TACT IN COURT.—Containing sketches of cases won by by skill, wit, art, tact, courage and eloquence. With practical illustrations in letter of lawyers giving their best rules for winning cases. Third Revised Edition. By J. W. Donovan, Authors of "Modern Jury Trials," "Trial Practice," and "Trial Lawyers." Rochester, N. Y. Williamson & Higbie Laws Booksellers and Publishers, 1886.

This little volume, now in its third edition, is well worthy of the favor it has met at the hands of the profession.

There are more than sixty separate articles each one replete with that practical wisdom, and peculiarly shrewd hard sense for which the author, as most of our readers know, is so remarkable. Each of these several essays teaches at least one, and often many more lessons in the practical conduct of professional life which can be learned nowhere else, except in the costly and disastrous school of actual personal experience. And those lessons are taught in such a manner that no one who takes up the book can fail to read it, and no one who reads it can fail to remember much that will be of great service to him throughout his professional career.

Mr. Donovan as might be supposed addresses himself chiefly to the young practitioner, but there are few men in the profession so old or so experienced that they cannot learn much from this unpretentious little volume.

The articles are, from the necessity of the case and the character of the subject matter unconnected with each other, but each is complete in itself and none fail to teach in apt language the lessons it was intended to inculcate. Mr. Donovan's style is good, his anecdotes, which are frequent, are well told, and pertinent to the subject under discussion.

"The cheerful sage when graver methods fail,
Conceals the moral in a pleasing tale."

JETSAM AND FLOTSAM.

HE KNEW THE LAW.—A Scotch cobbler, described briefly as a "notorious offender," has passed his life in a certain "Auld Licht" village without being converted. Last week a Farfar magistrate sentenced him to a fine of half a crown or twenty-four hours' imprisonment. If he chose the latter he would be taken to the jail at Perth. The cobbler communed with himself. "Then I'll go to Perth," he said; "I have business in the town at any rate." An official conveyed him by train to Perth, but when the prisoner reached the jail, he said that he would now pay the fine. The governor found that he would have to take it. "And now," said the cobbler, "I want my fare home." The governor demurred, made inquiries, and discovered that there was no alternative; the prisoner must be sent at public expence to the place he had been brought from. So our canny cobbler got the two shillings and eight and one-half pence, which represented his fare, did his business, and went home triumphant—two and one-half pence and a railway ride better for his offence.

The Central Law Journal.

ST. LOUIS, OCTOBER 15, 1886.

CURRENT EVENTS.

JURY TRIALS IN CIVIL CASES.—The ancient conservatism of the profession seems to be deserting it. Lawyers, no longer controlled by such cautious maxims as *Stare decisis*, *quieta ne movere*, and the like, have become as the Athenians of old, seekers for new things, and clamor for reforms, as well of the fundamental principles of the law, as of the most immaterial of its processes.

Among other time-honored institutions threatened by the hand of innovation is trial by jury, not, *as yet*, in criminal cases, but in those which involve merely property, money and character. It seems to be conceded by the reformers that the time has not yet come to withdraw, from him who is accused of felony, or even misdemeanor, such protection as has been supposed, for a thousand years, to be afforded by a jury of his peers. It is said, however, that the powerful and oppressive baron, and the greedy bishop, against whom, in old times, it served to protect the poor man's heritage, are now extinct, and that, so far as civil actions are concerned, trial by jury has outlived its usefulness.

We do not, of course, propose to argue this question at length, the space at our command is wholly inadequate, even if we desired to do so. We suggest, however, a few considerations which have recently occurred to us.

The arguments, against the present system, are chiefly drawn, *ab inconvenienti*, the most fallacious and inconclusive of all arguments. It is said, for example, that trial by jury is expensive. Suppose it is, but if, notwithstanding that fact, and considering all the circumstances, the history of the institution, and its present operation, it is to the interest of the people that it should be preserved, the expense should not be regarded, for if there is one thing, more than another, in all the affairs of men, which is worth the money it costs, it is the due, just and impartial administration of the law. It is further

said that it prolongs litigation. Concede that for a moment, and yet the answer is sufficient that, within reasonable limits, time is essential to the administration of justice. The most expeditious courts are those of semi-barbarians. The Turkish Cadi, or the Chinese Mandarin, hears, decides, and executes judgment at a single sitting, very satisfactory, no doubt, to the prevailing party; but whether there is either law or justice in the ruling is altogether another matter. We withdraw our concession, however, and say, that the only court in Christendom which has ever made itself a reproach, and a hissing, and a by-word among the nations of the earth, because of the excessive and inexcusable delays of its decisions, and consequent and absolute denial of justice, was a court in which no jury was ever empanelled. It will be found that in our country very little of the delays of justice, in civil cases, can fairly be attributed to mistrials, or new trials, or otherwise, to the juries; it can be much more properly charged to the *laches* of masters, referees, and receivers, on the equity side of the courts, and to crowded dockets which, in the appellate courts of most of the States, have become the rule, and are no longer exceptional.

Trial by jury was, in the Middle Ages, a safeguard for the private suitor against his political superiors, we have no use for it in that respect, having no political superiors; whether we need, or will need, it as a protection against our financial superiors, in the shape of concrete capital, is a question we will not discuss. It is sufficient, perhaps, to say that, having it, we should not part with it, for if we do, we can never recall it, however urgent may be our need.

Upon the whole subject we think that any litigant who desires it, should have his case tried by a jury, and that those States in which that is the rule have gone quite as far in that direction as policy justifies.

THE PROGRESSIVE CAPACITY OF UNWRITTEN LAW.—This is the title and subject of a lecture, delivered on the first day of October, 1886, before the Law Class of the University of Pennsylvania, by Professor Geo. Tucker Bispham. The learned professor demon-

strates that, for some centuries past, the unwritten or judge-made law has kept even pace with the general progress of the country, and that whenever, in the development of the better and higher conditions of modern society, there appeared a need for a new legal principle, or a new remedy, the courts were always ready with the new principle, or a new application of an old one. Thus, by the action of the courts alone, was developed the whole system of equity jurisprudence and practice, and the great body of commercial law. He says: "In glancing, therefore, over the whole field of Substantive Law, I think that we can plainly see that in many portions of it, at all events, unwritten law has been found not only quite capable of progress without any statutory aid, but that its progress has been of a practical and adaptive kind, and has always been ready to conform to any changes which have taken place in the social relations or business affairs of men."

The inference from this line of reasoning would seem to be that the courts can well be trusted with the task of effecting all the reforms in the law, which have been so persistently sought by the advocates of a general code, or, as it has been styled, reducing the common law "to the form of a statute."

We do not propose to go fully into that subject but merely to express two or three ideas that have occurred to us in this connection. The "progressive capacity of the unwritten law" is the precise quality which most strongly tends to authorize an attempt to reduce the whole body of the law to the form of a code or statute. Is not the unwritten law *too* progressive? Does it not multiply distinctions to such an extent as to justify an effort to consolidate them? Adjudged cases in a thousand volumes of reports bear witness to the industry of judges in *making* the law, for in effect it is making, not interpreting. Would it not be better to boil down, consolidate and condense the law now so diffused, so shifting and variable, into a solid body of distinct, definite and unambiguous precepts adapted to every phase of human affairs, and applicable to any possible emergency or combination of circumstances that can arise in the infinite variety of our political, social, domestic and industrial relations? Would it not be better to have such a code,

and to make it so distinct and definite that it would need no interpretation, that it would explain itself? This is the ideal code; what the actual code would be, even if exploited by the greatest legal and legislative talent of the nation, might well be altogether a different matter. It might need interpretation from the very beginning, and substantial amendments before it had been six months in operation. A really good code would doubtless be an improvement upon the existing *status*, but such a compilation is rather to be desired than expected. The first work of the courts would be to expound the code, and to that end the infinite mass of ante-code precedents would be brought into requisition, and the most probable result would be that the uncertainty of the law, so much deprecated, would be rather increased than diminished.

NOTES OF RECENT DECISIONS.

IS AN INTENTION AN EXISTING FACT?—DECEIT—FRAUD—FALSE REPRESENTATION.—In a recent English case,¹ there is a somewhat new development of the law of deceit, false representations and fraud. The facts were that a joint stock company, limited, being in want of money, issued circulars asking subscriptions for debenture bonds to the amount of £25,000. The circulars stated the object of the company to be to enlarge its facilities for doing business, and, by diminishing expenses to increase its profits, and stated in detail how these desirable objects could be accomplished. The result showed that the true object of raising the money was to prop a failing concern, and tide over an emergency. In a few months after the plaintiff had taken the bonds and paid the money, the company failed and paid a very scanty dividend. The suit was brought to charge the directors personally, because in their circular they had made misrepresentations, whereby plaintiff had been induced to become a subscriber. The case turned upon two questions, first, whether the objects for which the money was required by the company were "existing facts," within the meaning of the phrase

¹ Edgengton v. Fitzmaurice, 55 L. J. Rep. Chan. 650.

when applied to the action of deceit. The second question was whether it was necessary that the statement should be the primary inducement to the plaintiff to part with his money, or whether it was enough that it should be one among many inducements. The court decided, without division of opinion, that the statement of the objects for which a loan was solicited, or, in other words, of the intention of the borrower, is a statement of an existing fact, Lord Justice Bowen adding: "The state of a man's mind is as much a fact, as the state of his digestion." The court also decides that it is enough that the misrepresentation complained of should be a contributory part of the inducement; it need not be the sole or main fact.

The *London Law Journal*, commenting on this case, remarks: "The weakness of the decision consists in the fact that it is a question of pure common law decided after argument by equity counsel only, and by the judgment in the main of equity judges." After some discussion, however, it concludes: "On the whole, common lawyers may fairly accept this latest extension of the action of deceit."

QUO WARRANTO—INFORMATION—BY WHOM AND UPON WHAT GROUNDS IT MUST BE FILED.—In a very recent case,² the Supreme Judicial Court of Massachusetts has discussed the functions and operation of the writ of Quo Warranto, or of the nature thereof, and refused to apply that remedy to the relief of a private person upon whose relation the information was filed.

The facts were that Kenney, finding the operations of the gas company in digging up the street and laying pipes, inconvenient to his business as a brewer, caused the information to be filed upon his relation by the Attorney General.

The court held, that the plaintiff had mistaken his remedy, that the law will not accord the benefit of this extraordinary writ unless it shall appear that the desired relief cannot be obtained through ordinary processes. On the general subject the court says:

"We have no doubt that the court has jur-

isdiction, in proper cases, to restrain acts like those now complained of, upon the information of the attorney general, either on behalf of the commonwealth, or at the relation of a private individual.³ But in determining whether a proper case has been made out, all the circumstances are to be looked at. In England, in cases like the present, where the court has refused to interfere by way of injunction, special significance has been attached to the circumstance that the informations were not brought in behalf of the public, but merely at the relation of parties privately interested, who might themselves have instituted legal proceedings if any special damage had been inflicted upon them.⁴ In the former case,⁵ Lord Cranworth went so far as to say: 'I cannot but come to the conclusion that the attorney general and the public here are a mere fiction, and that the real parties concerned are only those that were parties to the first suit.' Page 313. This, however, is not a controlling consideration; and, if an information is brought, in cases where the principal interest involved is a private one, the introduction of a relator is proper, in order that he may be liable for costs.⁶ But, while not doubting that cases might exist in which the interposition of the court would be properly sought to restrain the digging up of streets, we see no occasion for such interference here. In a very recent case it has been declared that 'the court will not interfere when the obstruction to the rights of the public is of such a character that it may with equal facility be removed by other constituted authorities and public officers. There must be a want of adequate, sufficient remedy, and the injury to public rights must be of a substantial character, and not a mere theoretical wrong.'⁷

By Pub. St. c. 106, § 77, it is provided

³ Attorney General v. Jamaica Pond Aqueduct Corp., 133 Mass. 361; District Attorney v. Lynn & B. R. R., 16 Gray, 242.

⁴ Attorney General v. Sheffield Gas Consumers' Co., 3 De Gex, M. & G. 304; Attorney General v. Cambridge Consumers' Gas Co., 4 Ch. App. 71. 81, 82, 84, 87.

⁵ Attorney General v. Sheffield, etc., Co., *Supra*.

⁶ Pub. St. c. 189, § 19; 1 Daniel, Ch. Pr. (4th Amer. Ed. 1416.

⁷ Attorney General v. Metropolitan R. R., 125 Mass. 515, 516.

² Kenney v. Consumers' Gas Co., and Attorney General v. Same, Sept. 11, 1886, 8 N. East. Rep. 138.

that "the mayor and aldermen or selectmen of a place in which pipes or conductors of such a corporation [i. e., gas-light companies] are sunk, may regulate, restrict, and control all acts and doings of such corporation which may in any manner affect the health, safety, convenience, or property of the inhabitants of such place." A convenient tribunal is thus provided with adequate authority to remedy all the grievances set forth in the information, which consist solely in the attempt to open and dig up Terrace street. There is no averment that any application has been made to the mayor and aldermen, and relief refused. The case thus falls directly within the principle of the decision in *Attorney General v. Metropolitan R. R.*⁸ In a case which, like the present, is brought to sustain private interests, there is no occasion for the interference of this court, at least until it appears that a real and substantial injury exists or is threatened, and that the mayor and aldermen have refused relief upon due application to them.

The information also prays that proceedings in the nature of a *quo warranto* shall be taken by the court to restrain the defendant from further use of its corporate power, and from usurping public franchises to which it is not entitled. But if the attorney general seeks such a remedy, it should be by an information *ex officio*, and not by an information brought primarily for the protection of private interests."⁹

In dismissing the bill and sustaining the demurrer, the court makes a further observation worthy of notice, that although the defendant failed to insist in the argument upon these objections it did not, and could not, thereby waive them, because cases not proper for equitable interference are not usually entertained even though parties consent.¹⁰

LIABILITY OF A HUSBAND FOR HIS WIFE'S TORTS.—Unexpected consequences some-

times follow radical changes in the law, as in other matters. The "Woman's Law" legislation of England (*Married Woman's Property Act of 1882*) has produced a notable consequence which is illustrated in a recent decision,¹¹ that under that act, although by it the wife is made a *feme sole* so far as her property is concerned, the husband may nevertheless be held to his old-time liability for her misuse of her tongue, her pen, or finger nails.

It seems that there was in England an impression to the contrary. The statute said that the wife might sue or be sued alone upon contract or in tort, and that her husband "need" not be joined, and people naturally imagined that what need not be done must not be done. The court, however, in the case cited dispelled the illusion by deciding that "need" meant what it said, that the act under consideration, was not an act for the emancipation of husbands, who, so far as torts committed by their wives were concerned, were held strictly to their common law responsibility. One aggrieved by the tort of a wife has under the act in question this advantage, he may sue both, and upon recovering a judgment may have it satisfied out of the separate estate of the wife, under the statute, or of the husband, under the common law, or out of both, and may exhaust both if necessary to satisfy the judgment.

¹¹ *Seroka and Wife v. Kattenberg and Wife*, 55 Law Gr. Rep. Q. B. 375.

CHARITABLE USES.

In Mr. Tilden's will—extracts from which were given in a recent number of the *CENTRAL LAW JOURNAL*,¹ there are certain bequests to charitable uses. While we do not intend to discuss the validity of these particular bequests, we propose to briefly consider some of the principles applicable to charitable bequests in general.

That the validity of such bequests has been, and still is, a fruitful source of litigation, both in England and in this country, is evidenced by the large number of reported

⁸ See, also, *Attorney General v. Bay State Brick Co.*, 115 Mass. 481, 438.

⁹ *Com. v. Union Ins. Co.*, 5 Mass. 230, 232; *Rice v. National Bank*, 128 Mass. 300.

¹⁰ *New England etc., Co., & Phillips* 141, Mass., 536, 546; *S. C., & N. E.*, Rep., 534; *Dunham v. Presby*, 120 Mass. 285, 289.

¹ *Ante* p. 217.

cases; and, that the question is an important and interesting one, is proven by the full consideration which a majority of the cases have received from the courts.

Charitable Use Defined.—A charity is a "gift to any general public use."² The familiar definition of a charitable use given by Mr. Binney in the famous Girard case, is, "Whatever is given for the love of God or the love of our neighbor—in the Catholic and universal sense."

The Statute of Elizabeth.—In Virginia and Maryland, the case of Baptist Association v. Hart,³ is relied on. This case was decided upon the theory that the English law of charitable uses had its origin in Stat. 43, Eliz. ch. 4. That theory has been held, in a well considered case, to be error.⁴ In Connecticut, in 1845, the Supreme Court decided that no such reasons as those upon which the Baptist Association case was decided, "exist here where we have by our statute of 1702 virtually re-enacted the Statute of Elizabeth."⁵ And, thirty years later,⁶ the court declared that that State had never adopted the Statute of Elizabeth, "but it has a substitute of its own," viz., the same statute of 1702, which is the statute now in force there.⁷ The Statute of Elizabeth is not in force in Maryland,⁸ nor its principles recognized as part of the common law of that State.⁹ It was repealed in Michigan in 1810. The Revised Statutes of 1847 abolished uses and trusts, with the exceptions specified therein. The same requisites are, there, as essential to the validity of trusts for charitable uses as any others.¹⁰ It is not in force in Mississippi.¹¹ It was repealed in New York in 1788,¹² where "The

statute abolishes all uses and trusts," and does "not include perpetual trusts for charity, or the benefit of classes or corporations;"¹³ and the rule which applies to trusts in general, governs charitable trusts.¹⁴ In North Carolina it was in force till superseded by the Revised Statutes.¹⁵ It is not in force *per se* in Pennsylvania, but its conservative provisions in force "By common usage and constitutional recognition."¹⁶ If ever in force in Virginia it was repealed by statute 1792.¹⁷ But the general provisions of the statute are in force in Maine,¹⁸ and declared to be a part of the common law of that State.¹⁹ In principle and substance it is a part of the law of Massachusetts.²⁰ So in Vermont.²¹ So in New Jersey.²² It is declared in Ohio that the principles of the statute, as embodied in cases decided in other courts, have ever been regarded with favor.²³ In Missouri see Chambers v. St. Louis.²⁴

Cy Pres Doctrine.—The *cy pres* doctrine has never been adopted in Alabama.²⁵ Nor in Connecticut.²⁶ It was repudiated in Georgia prior to Code of 1873.²⁷ Doctrine is not resorted to in Indiana.²⁸ Nor in Iowa.²⁹ Nor is it "To its full extent a judicial doctrine, and, so far as ultra-judicial," not re-

¹³ Holmes v. Mead, 52 N. Y. 339; Wetmore v. Parker, id. 450; Dutch Church v. Mott, 7 Paige Ch. 77.

¹⁴ Beekman v. Bonsor, 23 N. Y. 298.

¹⁵ State v. Gerard, 2 Ired. Eq. 210.

¹⁶ Zimmerman v. Anders, 8 Watts & Ser. 218; Meth. Church v. Remington, 1 Watts 218; Bethlehem Borough v. Perseverance etc. Co., 81 Pa. St. 445.

¹⁷ Gallego's Ex'rs. v. Atty. Gen'l. 3 Leigh. 450, relying upon Baptist Assoc.; Seaburn v. Seaburn, 15 Gratt. 426; Wheeler v. Smith, 9 How. (U. S.) 55.

¹⁸ Howard v. Amer. Peace Soc. 49 Me. 288; Tappan v. Deblols, 45 id. 122.

¹⁹ Drew v. Wakefield, 54 id. 291; Preachers Aid. Soc. v. Rich, 45 id. 552.

²⁰ Old South Society v. Crocker, 119 Mass. 1; Fellows v. Minor, id. 541; Burbank v. Whitney, 24 Pick. 146; Going v. Emory, 16 id. 107; Sanderson v. White, 18 id. 328.

²¹ McAllister v. McAllister, 46 Vt. 272; Burr v. Smith, 7 id. 241.

²² DeCamp v. Dobbins, 29 N. J. Eq. 43; Hesketh v. Murphy, 35 id. 29; But see Norris v. Thompson's Ex'rs. 19 id. 307.

²³ Miller v. Teachont, 24 Ohio St. 533.

²⁴ 29 Mo. 543. See Perry on Trusts, 698 and 699 for other States.

²⁵ Carter v. Balfour, 19 Ala. 814; Williams v. Pearson, 38 id. 299.

²⁶ Abye v. Smith, 44 Conn. 60.

²⁷ Adams v. Bass. 18 Ga. 130; See Code 1882, §§ 1700, 2468.

²⁸ Grimes v. Harmon, 35 Ind. 198.

²⁹ LePage v. McNamara, 5 Clark 147.

³ Perin v. Carey, 24 How. (U. S.) 506; Drury v. Natlek, 10 Allen, 169; Piper v. Moulton, 72 Me. 155; Jackson v. Phillips, 14 Allen, 539.

⁴ Wheat 1; See also Kain v. Gibboney, 101 U. S. 362.

⁵ Russell v. Allen, 107 U. S. 82 citing; Vidal v. Girard, 2 How. 127; Perin v. Carey, 2 How. U. S. 465; Ould v. Washington Hospital, 95 U. S. 308.

⁶ Amer. Bible Soc. v. Wetmore, 17 Conn. 189.

⁷ Abye v. Smith, 44 Conn. 60.

⁸ Rev. Stat. 1875, p. 352, § 2.

⁹ Dashiell v. Atty. Gen. 5 Harr. & J. 392; Beatty v. Kurz, 2 Pet. 566; Ould v. Washington Hospital etc., 95 U. S. 308.

¹⁰ State v. Warren, 28 Md. 353.

¹¹ Meth. Church of Newark v. Clark, 41 Mich. 741; Hathaway v. New Baltimore, 48 id. 254.

¹² Rev. Code 1871, §§ 2440, 2441, making gifts by will to such uses void.

¹³ Bascom v. Albertson, 34 N. Y. 602.

cognized in Kentucky.³⁰ Not resorted to in New York.³¹ It is repudiated in North Carolina.³² Is not in force in Wisconsin.³³ Nor in Pennsylvania.³⁴ In Massachusetts, see *Jackson v. Phillips*.³⁵

Jurisdiction of Courts of Equity.—The tendency of American decisions, is that courts of equity, independently of the Statute of Elizabeth, favor the doctrine of trusts for charitable uses, and have original and plenary jurisdiction over such trusts, and can maintain and enforce them by their own powers.³⁶

In Maryland, a court of chancery cannot, independently of the State, sustain and enforce a bequest to charitable uses, which would, if not a charity, be void on general principles.³⁷

In New York, courts of chancery possess only such powers as were exercised by the English court of chancery, irrespective of the Statute of Elizabeth and *cy pres* doctrine.³⁸ "Gifts to charitable uses are highly favored in law, and will be most liberally construed."³⁹

Descriptive Words — Beneficiaries.—"The beneficiaries in public charities must necessarily be described in general terms."⁴⁰

"Charity begins where uncertainty in the beneficiaries begins."⁴¹

"It is the number and indefiniteness of the object which is the essential element of a charity."⁴²

³⁰ *Curling's Admr's v. Curling's Heirs*, 8 Dana. 38; *Cromie v. Louisville Orphan House*, 3 Bush. 371.

³¹ *Bascom v. Albertson*, 34 N. Y. 590; *Beekman v. Bonson*, 23 N. Y. 298.

³² *Bridges v. Pleasants*, 4 Ired. Eq. 26; *McAuley v. Wilson*, 1 Dev. Eq. 276.

³³ *Hells' Exe'rs. to Murphy*, 40 Wis. 292; s. c. 3, *Central Law Jour.* 639.

³⁴ *Meth. Church v. Remington*, 1 Watts 218; *Bright Purd. Dig. Charities* 18; *Pa. Ann. Dig., Charities* 2.

³⁵ 14 Allen, 539.

³⁶ *Board of Comm'rs. v. Rogers*, 55 Ind. 297; *Williams v. Pearson*, 38 Ala. 299; *Miller v. Atkinson*, 63 N. C. 537; *Ould v. Washington Hospital*, 95 U. S. 308; *Dutch Church v. Mott*, 7 Paige Ch. 77; *Dodge v. Williams*, 46 Wis. 91; *Sowers v. Cyrenius*, 39 Ohio St. 29; *Howard v. Amer. Peace Soc.*, 49 Me. 289; *Tappan v. Deblols*, 45 Me. 122.

³⁷ *Buchanan J., in Dashiell v. Atty. Gen'l.* 5 H. & J. 392; See *Barnum v. Mayor etc.*, of Baltimore 62 Md. 275.

³⁸ *Owen v. Missionary Soc.* 14 N. Y. 380; Compare, *Dutch Church v. Mott*, 7 Paige Ch. 77.

³⁹ *Colt v. Comstock*, 51 Conn. 377; *Button v. American Tract Soc.* 23 Vt. 336; *Burr v. Smith's Exe'rs.* 7 Id. 241.

⁴⁰ *Park C. J. in Colt v. Comstock*, 51 Conn. 377.

⁴¹ *Dodge v. Williams*, 46 Wis. 98.

⁴² *Saltonstall v. Saunders*, 11 Allen 456; cited in New-

"Uncertainty, in the sense of the law of charities, is its daily bread. The greatest of all solecisms, in law, morals or religion, is the supposition of a charity to individuals personally known and selected by the giver."⁴³

"If the uncertainty of the persons to be relieved by a charitable fund could be available to destroy it, few charities could be sustained."⁴⁴

Selection.—There should be a mode of selection. "Relief must be administered according to the discretion and judgment of those who are to select the necessitous objects for whose benefits the use is created."⁴⁵

"The construction should be such as will preserve, rather than destroy, the gift."⁴⁶

The court will not suffer the gift "To fail when it can be made certain," notwithstanding the uncertainty of the object to be benefited, and although no particular person or persons are named who may demand the execution of the trust.⁴⁷

If a "charity does not fix itself on a particular object, but is general and indefinite, and no plan or scheme is prescribed, and no discretion is given in the will to select the beneficiaries, it does not admit of judicial administration." In addition to a definite class, the "will itself should prescribe some mode of selection, or give some person a discretionary power to select."⁴⁸

In Virginia such bequests cannot be sustained when the objects are uncertain or indefinite.⁴⁹

Abuse of Trust.—It is no "valid objection to charity that from a possible abuse in its administration, an injury might result to the

son v. Starke, 46 Ga. 93; *Burr v. Smith*, 7 Vt. 241; *Simpson v. Welcome*, 72 Me. 501.

⁴³ *State v. Griffith*, 2 Del. Ch. 392.

⁴⁴ *Chambers v. St. Louis*, 29 Mo. 589.

⁴⁵ *Burr v. Smith*, 7 Vt. 241; *Beavan v. Filson*, 8 Pa. St. 327.

⁴⁶ *Goodale v. Mooney* 60 N. H. 528; *Russell v. Allen*, 107 U. S. 82; *Bull v. Bull*, 8 Conn. 51.

⁴⁷ *McLain v. School Directors*, 51 Pa. St. 199, citing several cases; *Zelzweiss v. James*, 63 Id. 468, and cases cited; *Perry on Trusts*, § 782.

⁴⁸ *Loomis, J. in Fairfield v. Lawson* 50 Conn. 513, 514; relying upon *Grimes' Exe'r. v. Harman*, 35 Ind. 198; See *Beardsley v. Selectmen etc.*, 53 Conn. 491; *White v. Flak*, 22 Id. 53; citing, *Reformed Dutch Church v. Mott*, 7 Paige Ch. 77; *Inglis v. Sailor's Saug Harbor*, 3 Pet. 99.

⁴⁹ *Kain v. Gibboney*, 101 U. S. 362; *Wheeler v. Smith*, 9 How. (U. S.) 55.

interest of the society in which it is located." ⁵⁰

If the power of selection be abused, the State, by virtue of its visitorial power, will remedy it. ⁵¹

Time—Amount.—In New York, Georgia, Ohio and California, provision is made by statute, determining, relatively, the amount that may be devised or bequeathed to charity, where the testator leaves husband, wife, child or parent. The time, prior to death, within which the will or deed must be executed, etc., is also limited. ⁵²

Bequests held Valid.—"To the education and tuition of all the pauper and poor children" of a certain "beat" (or county) "whose parents are not able to support them." ⁵³ "For the promotion of education and science among the Indian and African children and youth of the United States of America." ⁵⁴ For a "home for aged, respectable, indigent women, who have been residents" of N. ⁵⁵ For the "charitable assistance and benefit of indigent, unmarried protestant females," &c., residing in B. ⁵⁶ To be "used discretionary by the acting selectmen" of B, for the "special benefit of the worthy, deserving, poor, white, American, Protestant, Democratic widows and orphans" residing in B, "until all is expended." ⁵⁷ "To and for the support, maintenance and education of the poor, white citizens of Kent county generally." ⁵⁸ For the education of the "poor children belonging to said county." ⁵⁹ "Poor of Madison county." ⁶⁰ For the "use of the orphan poor and other destitute persons of said county." ⁶¹ For "poor widows" and "women whose husbands have left them unprovided for and without any just cause," of and over "the age of fifty

years, and of irreproachable character," residing in certain limits. ⁶² For the "education of the colored children of the State of Indiana." ⁶³ "To the education of ——— children of this town." ⁶⁴ "To the support and management of such worthy, meritorious, charitable and educational and religious institutions" of a certain faith. ⁶⁵ "Poor orphans of this county." ⁶⁶ "Purely and solely for charitable purposes—for the greatest relief of human suffering, human wants and the good of the greatest number." ⁶⁷ For the "benefit of needy single women and widows." ⁶⁸ "To the "suffering poor of" A. ⁶⁹ To "provide and sustain a home for respectable, destitute, aged, native-born American men and women." ⁷⁰ "For charitable purposes, masses, &c." ⁷¹ To "assist, relief and benefit poor and necessitous persons." ⁷² To the City of St. Louis to "furnish relief to all poor emigrants and travelers coming to St. Louis on their way *bona fide* to settle in the West." ⁷³ To the "poor orphans of the State of North Carolina," to be selected by the trustees. ⁷⁴ To be divided by the trustees "among such Roman Catholic charities, institutions, schools, or churches," in N, as they deemed proper. ⁷⁵ To be "applied at discretion to alleviating the wants and sufferings of the deserving poor of" M. ⁷⁶ For the "advancement and benefit of the Christian religion," to be applied in discretion of the trustees. ⁷⁷ For the "education of

⁵⁰ DeBruler v. Ferguson, 54 Ind. 549.

⁵¹ *Ex parte* Lindley Exe'r., 32 id. 367.

⁵² Richmond v. The State, 5 Id. 334.

⁵³ Quinn v. Shields, 62 Iowa, 129, citing numerous cases.

⁵⁴ Moore v. Moore, 4 Dana, 357.

⁵⁵ Everett v. Carr, 59 Me. 334.

⁵⁶ Swazey v. Am. Bible Soc. 57 id. 523.

⁵⁷ Howard v. Am. Peace Soc. 49 id. 268.

⁵⁸ Odell v. Odell, 10 Allen, 1.

⁵⁹ Schouler Petitioner, 134 Mass. 426.

⁶⁰ Suter v. Hilliard, 132 id. 412; See also, Fellows v. Minor, 119, id. 542; Rotch v. Emerson, 105 id. 431; Bartlett v. King, 12 id. 536; Saltonstall v. Sanders, 11 Allen, 446; Going v. Emery, 16 Pick. 107; Sohler Exe'r. v. Wardens etc., 12 Met. 250; Brown v. Kelsey, 2 Cush. 243; Well's Exe'r. v. Doane, 3 Gray, 201; Atty. Gen'l. v. Old South Society, 13 Allen, 474.

⁶¹ Chambers v. St. Louis, 29 Mo. 543.

⁶² Miller v. Atkinson, 63 N. C. 587.

⁶³ Power v. Cassidy, 79 N. Y. 602.

⁶⁴ Goodale v. Union Assoc. etc., 29 N. J. Eq. (2 Stew.) 22; Hesketh v. Murphy, 35 N. J. Eq. (8 Stew.) 23.

⁶⁵ Miller v. Teachont, 24 Ohio St. 525; Sowers v. Cyrenius, 39 id. 29; Urney's Exe'rs. v. Wooden, 1 id. 160.

⁵⁰ Chambers v. St. Louis, 29 Mo. 443.

⁵¹ Dodge v. Williams, 46 Wis. 98, citing; Re Taylor Orphan Asylum, 36 Wis. 584; Perry on Trusts § 732.

⁵² Jarman on Wills (Rand. and Tal. notes) 741 and note; Stimson's Amer. Stat. Law, 349, § 2618, Pa.; Appeal of Carl 106, Pa. St. 635.

⁵³ Williams v. Pearson, 38 Ala. 299.

⁵⁴ Treat's Appeal, 30 Conn. 113.

⁵⁵ Colt v. Comstock, 51 Id. 377.

⁵⁶ Tappan's Appeal, 52 Conn. 412.

⁵⁷ Beardsley v. Selectmen of Bridgeport, 53 id. 489.

⁵⁸ State v. Griffith, 2 Del. Ch. 392.

⁵⁹ Newson v. Starke, 46 Ga. 88; See also, Jones v. Habersham, 107 U. S. 174.

⁶⁰ Heuser v. Harris, 42 Ill. 425.

⁶¹ Comm'rs of LaGrange v. Rogers, 55 Ind. 297.

scholars of poor people" in a certain district.⁷⁸ For the "education of the freedmen of this nation."⁷⁹ Bequest of personal estate to certain institutions for the "education and tuition of worthy, indigent females."⁸⁰

Bequests held Void.—"For any and all benevolent purposes" the trustees "may see fit."⁸¹ For a "Catholic Reformatory for boys." To the "most deserving poor" of N.⁸² For the "education of the freedmen."⁸³ To "such worthy persons and objects" as trustees should deem proper, for "such charitable purposes" as trustees should deem proper.⁸⁴ To the "orthodox, Protestant clergymen of" P, for the "education of colored children, both male and female, as they shall deem best."⁸⁵ To be distributed by the trustees to "persons, societies or institutions" in their discretion."⁸⁶ "Solely for benevolent purposes."⁸⁷ For the "establishment of a school," at M, for the "education of children."⁸⁸ To benevolent associations of a city for the "benefit of white and colored children."⁸⁹ To "benevolent, religious or charitable institutions," in trustees' discretion.⁹⁰ To "foreign missions and poor saints."⁹¹ "For all Christians who acknowledge the divinity of Christ," &c.⁹² To be

distributed "among such incorporated societies, organized under the laws of the State of New York and Maryland, having lawful authority to receive and hold funds upon permanent trusts for charitable and educational uses," to be selected by the trustees.⁹³ For the "support of indigent, respectable" females and orphans.⁹⁴ To any "other person or persons who may be in distress."⁹⁵ For such purposes as the trustees "consider as promising most to benefit the town and trade of" A.⁹⁶ For needy and respectable widows.—To the Roman Catholic congregation to build a chapel in R.—Devise of land to permit members of the Roman Catholic church, or those professing the Roman Catholic religion to build a church upon.⁹⁷ "The Roman Catholic orphans of the diocese" of L.⁹⁸ In conclusion we append a list of references to articles, text-books and notes, which treat of the subject of charitable bequests.⁹⁹

Bridgeport, Conn., JOSEPH A. JOYCE.

⁷⁸ Pritchard v. Thompson, 95 N. Y. 76; *Fontain v. Ravenel*, 17 How. (U. S.) 369.

⁷⁹ Beekman v. Bonsor, 23 N. Y. 298.

⁸⁰ Hill's Exe'rs. v. Bowman, 7 Leigh 657.

⁸¹ Wheeler v. Smith, 9 How. (U. S.) 55.

⁸² Gallego's Exe'rs. v. Atty. Genl. 3 Leigh 450.

⁸³ Heiss v. Murphy, 40 Wis. 276; s. c. 3 Central Law Jour. 639; commented upon in *Dodge v. Williams*, 46 Wis. 100, other cases; *State v. Prewett*, 20 Mo. 166; *Barnes v. Barnes*, 3 Cranch. C. C. 289.

⁸⁴ Words defined, "Orphan" *Soohan v. Philadelphia*, 33 Pa. St. 9; "Protestant" *Hale v. Everett*, 53 N. H. 9; s. c. 16 Am. Rep. 82; See also *Beardsley v. Selectmen of Bridgeport*, 53 Conn. 489; "American" v. "Democratic widows" *Beardsley v. Selectmen etc. id.*; See generally on the subject of bequests to charity; 2 *Williams on Exe'rs.* (Perkins' Am. Notes) bottom p.p. 1055, 1057 and 1070 *et seq.* and notes: 1 *Jarman on Wills* (Rand and Tal. Notes) 379 and note 382 *et seq.*; 2 *Comyns Dig.* (Rose) 399 Charitable uses; 6 *id.* 450 Uses, N. 1 *et seq.*; 3, *Wash. on Real Prop.*, (4th ed.) 515-521; 5 *Fields Lawyers Briefs* § 763; 2 *Story's Eq. Jur.*, 1136-1194; *Bispham's Eq.* 116-134; 2 *Wait's Act and Def.* 142-150; *Perry on Trusts*, §§ 687-748 and note *History of Charitable Bequests*, 17 U. S. (4 Wheat) Appendix, note 1; Note to *Hespeth v. Murphy*, 35 N. J. Eq. (8 Stew.) 23-30; Note to *Bridges v. Pleasants*, 44 Am. Dec. 98; Note to *Dashell v. Atty. Gen'l.* 9 Am. Dec., 577, where the subject is discussed under the following heads: Statute of Elizabeth Regarding uses, What are Charitable Uses, Charitable Uses in United States, Law of New York, Doctrine as Applied in United States, Certainty in the object, Statutory Provisions.

⁷⁸ *Clement v. Hyde*, 50 Vt. 716.

⁷⁹ *McAllister v. McAllister*, 46 Vt. 272; *Contra*, See *Fairfield v. Lawson*, 50 Conn. 501, cited post.

⁸⁰ *Dodge v. Williams*, 46 Wis. 70; See *Gould Admr. v. The Taylor Orphan Asylum*, *id.* 106.

⁸¹ *Adye v. Smith*, 44 Conn. 60.

⁸² *Hughes v. Daly*, 49 *id.* 34.

⁸³ *Fairfield v. Lawson*, 50 *id.* 501; *Contra*, See *McAllister v. McAllister*, 46 Vt. 272.

⁸⁴ *Bristol v. Bristol*, 53 *id.* 242.

⁸⁵ *Grime's Exe'rs. v. Harmon*, 35 Ind. 198; s. c. 9 Am. Rep. 690; The following cases were considered and relied on by the court; *Downing v. Marshall*, 23 N. Y. 386; *McCord v. Ochiltree* 8 Blackf. 15; *Beekmann v. Bonsor*, 23 N. Y. 298; *White v. Fisk*, 22 Conn. 31; *Fontain v. Ravenel*, 17 How. (U. S.) 368; *LePage v. McNamara*, 5 Iowa 124; *Barker v. Wood*, 9 Mass., 419; *Gallego's Exe'r. v. Atty. Gen'l.* 3 Leigh. 450; *Green v. Dennis*, 6 Conn. 293; *Wheeler v. Smith*, 9 How. (U. S.) 55; *Tripp v. Frazier*, 4 Harr. and J. 446; *Wildermann v. City of Baltimore*, 8 Md. 551; *Morse v. Carpenter*, 19 Vt. 613; *Presbyterian Church v. White*, Phila. Law Reg. 526; *Dashell v. Atty. Genl.* 5 Harr. and J. 392; *Morice v. Bishop of Durham*, 9 Ves. 399, 10 *id.* 522.

⁸⁶ *Nichols v. Allen*, 130 Mass. 211.

⁸⁷ *Chamberlain v. Stearns*, 111 Mass. 267.

⁸⁸ *Atty. Genl. v. Soule*, 28 Mich. 153.

⁸⁹ *Watson's Society v. Johnson*, 58 Md. 139; *Needles v. Martin*, 33 *id.* 609.

⁹⁰ *Norris v. Thompson's Exe'rs.* 19 N. J. Eq. 307.

⁹¹ *Bridges v. Pleasants*, 4 Ired. Eq. 26.

⁹² *White Exe'r. v. Atty. Genl.* 4 Ired. Eq. 19.

INSURANCE—FIRE INSURANCE—FRAUDULENT MISREPRESENTATIONS—ACTION TO RECOVER BACK MONEY—WAIVER OF TORT—ADMISSIONS—PARTNERSHIP—MEASURE OF DAMAGES.

WESTERN ASSURANCE CO. v. TOWLE.

Supreme Court of Wisconsin.

1. A party defrauded by false representations may waive the tort, and recover back as upon an implied contract the money so obtained from him.

2. In such an action an admission by one member of a partnership is evidence against the firm.

3. In such an action the measure of damages recoverable by the insurance company is the amount paid by it in excess of the actual loss, unless it appears to the satisfaction of the jury that the insured not only exaggerated the loss, but either directly or indirectly caused the fire by which the loss occurred.

TAYLOR, J., delivered the opinion of the court:

This action was brought by the insurance company to recover from the appellant and Swan about \$1,000, which the company had paid to them upon a policy of fire insurance issued by said company to Towle and Swan, as partners, upon an alleged loss by fire, of property covered by said policy. The complaint charges that the payment of the \$1,000 was procured by the defendants from the company by making false and fraudulent proofs of loss, and by false swearing on the part of the defendants, Towle and Swan, as to the extent of their losses, and that, relying upon such false statements and proofs of loss, and not knowing of their falsity at the time, they paid the said \$1,000 to the defendants; that afterwards, upon ascertaining the falsity of their statements and proofs of loss, and that they did not in fact sustain the losses claimed by them, and that there was, in fact, but a very small portion of said \$1,000 due to them for losses under said policy, they demanded of said defendants the \$1,000 so paid to them, by reason of said false and untrue proofs of loss and fraudulent representations; that the defendants have neglected and refused to pay the same; and demands judgment for the said sum of \$1,000, with interest from the 27th day of September, 1881, that being the date of the payment thereof to them by the company. The first complaint filed in the action was demurred to as not stating a cause of action, and thereupon the plaintiff filed an amended complaint, to which the defendant Towle answered, and Swan suffered a default. For the details of these complaints a reference must be had to the printed case.

After the summons was served, and before any complaint in the action was made or served upon the defendants, or either of them, the plaintiff procured to be made a sufficient affidavit for a writ of attachment against the property of the defendants, and upon such writ the property of

defendant Towle was attached. Towle thereupon, and before the service of any complaint in the action, gave an undertaking, as authorized by § 2742 Rev. Stat., conditioned as therein required, and the property attached was released from said attachment.

When the action was called for trial, and a jury empanelled to try the cause, the defendant Towle moved to dismiss the amended complaint, and strike it from the files for the reason that the action was begun as upon a contract, and the amended complaint sounds in tort. This motion was overruled, and defendant excepted. The defendant then objected to the reception of any evidence under the amended complaint on the ground that it did not state facts sufficient to constitute a cause of action, this objection was also overruled and defendant excepted. After trial the plaintiff had a verdict in its favor for \$1,205.36, upon which judgment was rendered against both defendants. Towle alone appeals from the judgment. The verdict was the amount paid by the company to the defendants on the 27th of September, 1881, with interest from that date of the verdict, and no more.

The appellant makes the following assignments of error, upon the argument in this court:

1. "That the court erred in refusing to dismiss and set aside the amended complaint.
2. "In admitting the evidence of Nelson as to Swan's admissions made to him after the fire.
3. "In instructing the jury in regard to such admissions.
4. "In submitting to the jury upon all the evidence admitted (including the proof of Swan's admission), whether the fire by which the stock of staves was burned was set by the defendants, or either of them.
5. "In instructing the jury 'that the plaintiff has offered some testimony tending to prove that the fire was caused by the act or procurement of the defendants, or one of them,' referring plainly to the proof of Swan's admission to Nelson.
6. "In refusing to grant a new trial.
7. "Other rulings and decisions set forth in the printed case."

Under the first assignment of error, it is urged by the learned counsel for the appellant, that the amended complaint should have been dismissed and set aside for two reasons: First, because the original complaint in the action, though held insufficient in not stating facts sufficient to constitute a cause of action, was clearly intended to state a cause of action upon an implied *assumpsit* or contract to return the money fraudulently obtained by the defendants from the plaintiff, and it is alleged that the amended complaint clearly states a cause of action in tort to recover damages for the injury sustained by the plaintiff, by reason of the false and fraudulent representations, made by the defendants, and which caused the plaintiff to pay them the sum of \$1,000. This objection is based upon the rule laid down by this court in the

cases of *Supervisors v. Decker*, 34 Wis. 378; *Lane v. Cameron*, 38 Wis. 603, and many others which might be cited. We do not think this objection is well taken. The nature of the transaction set out in the original complaint is precisely the same as that set out in the amended one, and if the amended complaint sets out a cause of action which must be treated as an action in tort, then it is clear to our minds, that there was an intention to set out the same cause of action in the original complaint, and there was no ground, therefore, for setting aside the amended complaint, under the rule stated in the cases cited.

Second, it is urged that, because the plaintiff sued out an attachment in the case and made an affidavit under the statute, stating that the defendants were indebted to the company in the sum of \$1,000 upon an implied contract, etc., we ought to construe the complaint first filed, as a complaint setting up facts, showing an indebtedness upon an implied contract, this consideration should have great weight in determining the real character of the complaint filed, when, upon the facts stated, there is any real doubt as to its character. Judged in the light of that fact, we think the counsel is right in holding that the plaintiff in the original complaint intended to allege facts which would show an implied contract on the part of the defendants to pay the company the money they had obtained from it by their false and fraudulent practices. And, testing the amended complaint in like manner, we think that should also be held to be a complaint to recover of the defendants for money had and received by them, which in law, and in equity and good conscience, they had no right to retain, and therefore, there was an implied promise to re-pay it to the plaintiff upon demand. The allegations of fraud, false swearing and deceit practiced by the defendants, alleged in both complaints, are alleged, not as the cause of action, but for the purpose of showing that the defendants have in their possession a certain sum of money, which, in law, they ought to pay to the plaintiff on demand. After setting up these facts a demand is alleged, a refusal to pay and a demand for judgment for the amount of the money so unjustly withheld from them, and not to recover damages on account of the tortuous acts of the defendants.

We think the claim of the learned counsel for the appellant, that the amended complaint must be treated as an action to recover damages for the tortuous acts of the defendants, and not an action upon an implied contract on the part of the defendants to pay the money received by them from the plaintiff wrongfully, was decided against them by this court in the case of *The Town of Fifield v. Sweeney*, 62 Wis. 204. In that case, as one cause of action, the complaint alleged that the defendant furnished teams to work for the town at three dollars per day; that the teams worked in fact 232 days, and "that the defendant falsely and fraudulently represented, by false

statements of account and bill rendered, that his teams had worked in the aggregate 265 days; that he knew such statements to be false, and that he made them for the purpose of deceiving the town officers; that said officers believed such false representations and by reason thereof paid the defendant for thirty-three days in excess of the time actually worked by his teams; that town orders were issued for said team work and paid by the town treasurer, before the error was discovered; and that the plaintiff has sustained damages herein in the sum of \$99 and interest." There was also in the complaint in that action an allegation of a demand for the amount of the money fraudulently obtained from the town, and a refusal to pay before the action was commenced, as in the case at bar. This case is, in all its general features, the same as the one at bar, and it was held that "The whole complaint goes upon an implied *assumpsit* to re-pay the money so had and received, and interest thereon, and no other damage by reason of the fraud or mistake is claimed. The complaint as for money had and received is even better by reason of the statement of the facts by which the *assumpsit* is implied, and these facts do not change the action into tort."

This court has repeatedly held that the plaintiff may waive the tort and recover upon an implied contract, when money or property has been obtained by the defendant from the plaintiff by the tortuous acts of the defendant. *Nordin v. Jones*, 23 Wis. 600; *Keyes v. Railway*, 25 Wis. 691; *Elliot v. Jackson*, 3 Wis. 649-654-5; *Grannis v. Hooper*, 29 Wis. 65; *Smith v. Schulenburg*, 34 Wis. 41-50; *Wells v. Express Co.*, 49 Wis. 224; *Graham v. R. R. Co.*, 53 Wis. 473-481. What was said in the last case cited, is not, we think, in conflict with the decision in the case of *The Town of Fifield v. Sweeney*, *supra*. Each complaint must be judged of upon the exact facts stated in it, in order to determine whether it be an action in tort or on contract. And in determining that question, the evident intention of the party in stating his facts must have effect in determining the question when the facts alleged might sustain a cause of action either in tort or on contract. As was said in the *Graham* case: "The original complaint was in tort, and as the second amended complaint stated facts sufficient in themselves to constitute an action for tort, the court would presume that the pleader intended to go upon the tort as his ground of action, and not upon the implied *assumpsit*. To hold that the amended complaint was intended to be an action of tort, would be consistent with the original cause of action stated, and would be a permissible amendment. To hold otherwise would be inconsistent with the original, and not permissible." So, in the case at bar, the plaintiff having caused an attachment to issue in the action, we must presume that he intended that his complaint should state a cause of action on contract, in order to sustain his proceeding by attachment, and the facts alleged being sufficient to

allow him to recover on the implied *assumpsit*, the complaint should be construed as an action upon contract, and not to recover damages for the tort.

Construing the amended complaint as one to recover upon an implied contract to re-pay the money wrongfully received from the plaintiff, the second objection now made, but which was not made on the trial, viz.: that the complaint should have been dismissed for the reason that it does not state a cause of action which would authorize the issuing of an attachment, would not seem to be well taken, had it been taken at the circuit. If it were admitted that the complaint was a complaint to recover damages for a tort, whether a motion to set it aside because an attachment had been issued in the case, should be granted, or whether the only remedy of the defendant in such case, would be to set aside the attachment, is not a question to be determined in this action, as we hold that the complaint is not in tort, and because no motion to set it aside on that ground was made in the court below.

The determination of the second, third, fourth and fifth assignments of error, depends upon the admissibility of the admissions of Swan, one of the co-partners, and one of the defendants in the action, in regard to the cause of the fire, as evidence for the plaintiff in an action to recover back the moneys paid to the partnership upon the insurance policy. The record shows that the admissions were made shortly after the fire and before the dissolution of the partnership. The witness Nelson says: "I had some talk with Swan about setting the stock on fire, some time after the fire." "What did he say?" This was objected to by the defendant, the objection was overruled and exception taken. The witness answered: "It was some time after the fire; I could not say how long; maybe a month. We were at the mill, or house. He told me he put that to fire, himself, or set that afire. I cannot say how he worded it."

The admission given in evidence was made whilst the appellant and Swan were still partners, and it related to a matter in which the partnership was interested, and it tended to establish the plaintiff's cause of action against them. The plaintiff was seeking by his action to recover from the defendants a sum of money received by them as partners from the plaintiff, and the question at issue between the plaintiff and the partners was, whether in law they ought to have received said sum of money, when it was paid to them by the plaintiff. We are clearly of the opinion that any statement, made by either of the partners, whilst they were still partners, tending to prove that they ought not to have demanded or received the money from the plaintiff, is admissible as evidence for the plaintiff, as against both of the defendant partners. The general rule is, that the admissions of one partner are admissible against both, in an action by both, or against both. The following

cases would seem to be conclusive upon this point: 1 Phil. on Ev. 498, notes 139, 137; Bond v. Lathrop, 4 Conn. R. 338; Walden v. Sherburn, 15 Whar. R. 409; Corps v. Robinson, 2 Wash C. C. Rep. 390; Adams v. Brownson, 1 Tyl. 452; Williams v. Hodgson, 2 Har & Johns. 474-477; Chapin v. Coleman, 11 Pick 331; Wood v. Braddish, 1 Taunt. 104; Thwaites v. Richardson, Peak, 16; Henderson v. Wild, 2 Camp. 582; Boyce v. Watson, 3 J. J. Marsh, 498-500; Taylor's Law of Evidence, p. 626, § 743; Cram v. Redingfield, 12 Sim. 35; Whitcomb v. Whiting, 2 Doug. 652; Rupp v. Latham, 2 B. & A. 795; Nicholls v. Dowding, 1 Stark R. 81; Raidstorm v. Gandell, 15 M. & W. 304; Phillips v. Claggett, 11 M. & W. 84.

The fact that Swan had suffered a default in the action, and was apparently hostile to his co-partner Towle, at the time of the trial, can make no difference as to competency of his admission as evidence, although it would affect the weight of such admissions as evidence, especially if the admissions were made after commencement of the hostile feelings of Swan towards his co-partner. The evidence being admissible, there was no error in submitting such evidence to the jury as a part of the plaintiff's case.

As there was a general verdict only in the case, we cannot determine whether the jury found in favor of the plaintiff for the whole amount paid by the plaintiff upon the policy on the ground that the fire which caused the loss, was set, or caused to be set, by the defendants themselves, or by one of them, or upon the ground of fraudulent and false proofs of loss in overvaluing the property destroyed by the fire.

Had there been no proof which would have justified the jury in finding that the defendants, or one of them, set fire to the insured property, and so caused the loss, the verdict should have been, not for the whole amount of money paid by the company for the supposed loss, but for so much only as the amount paid exceeded the actual loss sustained by the insured. The action for money had and received is, in some sense, an equitable action, and the insurance company having voluntarily paid the money on an alleged loss, claimed by the defendants, they can only recover back so much as in equity and good conscience they ought not to have paid.

The provisions in the policy in regard to fraudulent over-estimates of the loss, or false swearing as to the extent of the loss, working a forfeiture of their right to recover anything upon the policy, does not affect the rights of the plaintiff in this action to recover back money paid on the policy, nor enlarge its rights beyond what they would have been had no such provision been found in the policy. False swearing and false valuation in proofs of loss, might have been a good defense to a recovery upon the policy, had the plaintiff refused to pay the loss, but it cannot be made the basis of a right to recover back money already paid upon the policy. The plaintiff's

right to recover depends upon proof establishing the fact that the company has paid more money than covered the loss sustained by the defendants and that such payment was procured by the false and fraudulent acts of the defendants.

This action for money had and received to the plaintiff's use is in no way founded upon the contract of insurance, but upon the fact that false and fraudulent representations, were made by the defendants in order to induce the plaintiff to pay the same. This was so expressly held in the *Northwestern Life Ins. Co. v. Elliott*, 10 Ins. L. J. 333. In that case, the policy upon which the money had been paid, was void and illegal under the laws of Oregon. Still the company had paid the loss on the false claim of the death of the party whose life was insured. It was afterwards ascertained that the person whose life was insured was not dead, and the company thereupon brought an action to recover the money paid. It was insisted on the trial that the claim for the money was founded on the void and illegal contract of insurance, and for that reason no recovery could be had. Judge Deady, in deciding the case, says: "True, the plaintiff might, at common law, upon the facts, have maintained *assumpsit* for money had and received by the defendant to plaintiff's use and the law in the interest of justice, and by way of promoting the remedy which was in form *ex contractu*, would have implied a promise on the part of the defendant to pay. But this would not have been a contract arising out of the void and illegal one, nor in any respect in affirmance of its validity but only an implication or fiction of law that upon the facts—the plaintiff being entitled *ex equo et bono* to recover the money which the defendant had wrongfully obtained from it—he promised to repay the same." *Cutts v. Phalen*, 2 How. (U. S.) 376, holds the same doctrine.

The plaintiff, in the case at bar, in order to avail itself of the right to sue out an attachment in this action, elected to waive the action for the wrong committed by the defendants, and bring their action for money had and received to its use, upon the implied *assumpsit* to repay the same. In this action, it recovers the money if it recovers at all, on the ground that it has paid for a loss which did not in fact occur. If the loss did not in fact occur, to the extent of the payment made, then in equity and good conscience the money ought not to be refunded, and no promise to refund the same could be presumed in favor of the plaintiff. And if there was a loss, though not as great as the money paid, and the excess of payment was made on account of the fraud of the defendants, as to such excess there would arise an implied promise on the part of the defendants to refund the excess. The fraud consists in falsely over-estimating the claim, and demanding and receiving the excess beyond the actual loss, and not in receiving the money which was justly due for a real loss sustained. We think, therefore, that in this action for money had and received, which has, al-

ways been considered an action at law, which is maintainable upon equitable principles, can only avail the plaintiff for the purpose of recovering what it has paid in excess of the real loss, if any, which was sustained by the defendants unless the jury should find that the fire which destroyed the property was caused, either directly or indirectly, by the wrongful act of the defendants, or one of them. If the latter fact was made to appear, there would be no loss under the policy which the plaintiff ought to pay. If, on the other hand, there was in fact an honest loss, under the policy, and the plaintiff has paid more than such honest loss, by reason of the fraud of defendants, that fact does not entitle the plaintiff to recover back in this action the amount of money which is covered by the honest loss.

The only case we have found which would seem to question the soundness of the conclusions we have arrived at, upon the question of the amount the plaintiff ought to recover in this action. If there was an honest loss, is *Ins. Co. v. Mathew*, 102 Mass. 221. This was, however, an action of tort to recover money obtained by false representations upon an insurance of live stock. There were two points in the case. First, that there were false representations made at the time of procuring the policy which renders it void, and similar false representations made in making proofs of loss upon which the money was paid. The case was, however, disposed of in favor of the insured and against the company upon another point not involving the question as to the amount which the company ought to recover in case a recovery was had by it.

The complaint of the plaintiff admits that some of the property burned was covered by the policy and the proofs show the same fact, so that there was something due the defendants from the plaintiff upon the policy, after the fire took place, unless they wrongfully caused the fire, and in determining the amount the plaintiff ought to recover, the amount of such actual loss should have been considered if they were entitled to recover at all, on the ground of fraudulent representations as to the amount of the actual loss sustained.

The learned circuit judge instructed the jury that if they found from the evidence that the loss of defendants was small and materially less than the amount of the policies of insurance, and that the defendants knew that fact when they made their proofs of loss, and intentionally and knowingly stated the amount of the loss to be materially greater than they knew it to be for the purpose of unjustly procuring from the plaintiff more than the amount of the loss, and the plaintiff paid the loss relying upon such proofs and in ignorance of its falsity, then the jury should find a verdict for the plaintiff for the full sum paid by it with interest from the date of payment. This instruction was excepted to by the defendant, Towle. As stated above, this instruction was er-

roneous, and did not state the true rule for establishing the amount the plaintiff should recover in this action upon that branch of the case.

As there was only a general verdict in the case, we cannot determine that the verdict was not based upon the fact that there was a fraudulent over-valuation of the amount of the losses of the defendants. This erroneous charge may have induced the jury to render a verdict for the whole sum paid by the plaintiff, notwithstanding they found in favor of the defendant, Towle, on the charge that the fire was wrongfully set by the defendants, or one of them.

The judgment of the Circuit Court is reversed and the cause remanded for a new trial.

NOTE.—So long as the conditions in an insurance policy are not in violation of law or contrary to public policy, they are binding upon the assured, and any breach thereof by him releases the insurer from liability, as a general rule, whether the loss results from such breach or not.¹ Any substantial violation will defeat a recovery.² And a policy forfeited by a breach of condition cannot be revived by any act of waiver or estoppel unless done upon knowledge of the facts. The policy becomes void.³ The preliminary proof of loss is a condition precedent.⁴ But false swearing, to defeat recovery on a policy, must be fraudulent.⁵ But courts of equity do not interfere in insurance cases unless they present extraordinary features.⁶ Wise jurists have said this jurisdiction should be sparingly exercised.⁷

Decisions in actions for money had and received, to recover insurance money paid to the assured are not numerous. The reversal of the relations of the litigating parties often works different results from those obtaining before the money has been paid. Perhaps the true rule should be as stated by Wigam, V. C.:

"The court can never lawfully impose merely arbitrary conditions upon a plaintiff only because he stands in that position upon the record, but commonly

require him to give the defendant that which, by the law of the court, independently of the mere position of the party on the record, is the right of the defendant in respect of the subject of the suit."⁸

The rule of damages generally is stated by Wood:

"If, after the settlement, the insurer discovers that there was fraud, misrepresentation, or concealment, in the original contract, or circumstances transpire which would have justified its resisting the claim, but which it had no means of ascertaining at the time of payment, it may recover the amount paid the assured."⁹

A case in Michigan seems to sustain this rule against the Wisconsin case. That was *assumpsit* to recover back. The policy contained the conditions that all fraud or attempt at fraud in the preliminary proofs of loss should bar a recovery. The issues were setting fire and fraudulent over-valuation. The jury found for the company for the amount paid and interest. The court said: "If either charge were made out to the satisfaction of the jury, the right to recover under the general count cannot be questioned. The point is too clear for discussion. The theory that the plaintiffs in error either set the fire, or caused it to be set, may be discarded altogether without affecting the regularity of the result, because the failure to find one way or the other on the special questions could certainly have no greater effect than would be due to explicit replies, and if such answers had been found and reported, they would reach no further than to negative the theory as to the fraudulent burning, without in the least conflicting with the correctness of the other ground. If, then, the entire report made by the jury is considered, and the utmost effect is given to the replies to the special questions, the result is that the jury found for the company, that is, the commission of fraud after the fire, and not upon the other, and no incongruity is caused."¹⁰

In Missouri, the same general rule seems to obtain. An action was brought to recover back money paid upon a policy after loss, in ignorance of a subsequent insurance upon the same property which avoided the policy by the terms thereof. The court said: "There is no doubt, at this day, that money which has been paid under a mistake of facts which, had they been known, would have been a defense to bar a recovery, may be recovered back. Here there was an act on the part of the assured directly against the policy stipulation, which would have discharged the office from all liability to the assured under the policy, had it been known at the time of the adjustment of the loss. As to the point, then, whether money can be recovered back which has been paid under a policy rendered void by the act of the owner, which act was unknown to the underwriters at the time the money was paid, the law is with the plaintiff below."¹¹

In another case, the decision of the lower court in favor of the plaintiff was set aside, on the ground that the judge instructed the jury that they might find for

¹ Wood on Fire Ins. § 58, n. 2 and 3; See Hartford Ins. Co. v. Matthews, 102 Mass. 321; Ferris & Eaton v. N. Am. F. Ins. Co. 1 Hill, 71; Johnson v. Continental Ins. Co. 39 Mich. 33; New York Life Ins. Co. v. Statham, 98 U. S. 24; Dermott v. Jones, 2 Wall. 1; Jeffries v. Life Ins. Co. 23 Wall. 47; Redman v. Ins. Co. 47 Wis. 99; Duncan v. Ins. Co. 6 Wend. 485; Nicoll v. Ins. Co. 3 W. & M. 529; 3 Pars. on Cont. 429; Mut. B. & Ins. Co. v. Miller, 39 Ind. 475; 1 Phillips on Ins. 418, 464; May on Ins. 180, 161; 3 Kent. Com. 473; Burritt v. Ins. Co. 5 Hill, 138; Wood v. Ins. Co. 13 Conn. 533; Wood on F. Ins. 317, 318, 271; Cooper v. Ins. Co. 50 Pa. St. 299; Loehner v. Ins. Co. 17 Mo. 247.

² Blumer v. Ins. Co. 48 Wis. 637; Ripley v. Ins. Co. 30 N. Y. 136; First Nat. Bank v. Ins. Co. 50 Id. 45; Babbitt v. Ins. Co. 60 N. C. 70; Cont. Ins. Co. v. Kasey, 25 Gratt. 268; Alexander v. Ins. Co. 66 N. Y. 466; Watson v. Ins. Co. 73 N. Y. 310; See *Zetna Ins. Co. v. France*, 91 U. S. 510; Day v. Ins. Co. 1 McArthur, 41.

³ Security Ins. Co. v. Fay, 22 Mich. 467.
⁴ Ferris & Eaton v. N. A. Ins. Co. 1 Hill, 71; See Com. Ins. Co. v. Sennett, et al, 41 Penn. 161.

⁵ Dogge v. N. W. Nat. Ins. Co. 49 Wis. 501; Parker v. Amazon Ins. Co. 34 Wis. 364; Ins. Co.'s v. Weides, 14 Wall. 375; Williams v. Phoenix F. Ins. Co. 61 Me. 67; Moore v. Prot. Ins. Co. 39 Me. 97; Franklin F. Ins. Co. v. Updegraff, 43 Pa. St. 350; Marion v. Great Rep. Ins. Co. 35 Mo. 148; Wolf v. Goodhue F. Ins. Co. 43 Barb. 400.

⁶ Willard's Eq. Jur. 169.

⁷ Story's Eq. Jur. 1301, et seq; Douglass v. Knickerbocker Life Ins. Co. 83 N. Y. 492, 504; 1 Pom. Eq. Jur. 452; 3 Parsons on Cont. 463.

⁸ Hanson v. Keating, 4 Hare, 1, 4; Lady Elbank v. Montollien, 5 Ves. 797; Sturgis v. Champneys, 5 My. & C. 103; Neeson v. Clarkson, 4 Hare, 97, 101. But see Pom. Eq. Jur. Vol. 1, p. 422, n. 1; See also, id. 422; also, Finch v. Finch, 20 Oh. St. 501, 507; Baker v. Drake, 53 N. Y. 311—for the general rule of damages, whether the action be in tort or on contract.

⁹ Wood on Fire Ins. p. 760; § 468, citing Arnould Mar. Ins. 1003, citing Buller v. Harrison, Cowp. 665; See also, May on Ins. § 477, 575; Gerhauser v. N. B. & M. Ins. Co. 6 Nev. 15; Jeffries v. Life Ins. Co. 23 Wall. 47; 2 Phil. Ins. § 1816, 1817; Townsend v. Crowley, 8 C. B. (N. S.) 477.

¹⁰ Johnson v. Cont. Ins. Co. 39 Mich. 33.

¹¹ Columbus Ins. Co. v. Walsh, 14 Mo. 229.

the plaintiff, without finding that the defendant knew the falsity of the statement which was the basis of the action, yet the court expressly held that the action to recover back, would lie, under the circumstances.¹²

In an early English case, "the late husband of the defendant had effected a policy on his life in the Argus Assurance Company. He died in October, 1840, leaving the defendant his executrix, not having (by mistake), paid the quarterly premium on the policy, which became due on the 3d of September, preceding. In November, the ordinary of the office informed two of the directors that the policy had lapsed by reason of the non-payment of the premium, and one of them wrote upon the policy the word "lapsed." In February, 1841, the defendant, as executrix, applied at the office for, and received from the same, payments of the sum secured on the policy. The directors had forgotten that the policy had lapsed. The action was sustained."¹³

It appears that in all these cases stated at length above, the full amount was recovered.

FRANK C. HADDOCK,

Oshkosh, Wis.

¹² Hartford Live Stock Ins. Co. v. Matthews, 102 Mas. 291.

¹³ Kelly v. Solari, 9 Mees. & W. 54; See also, N. Y. Ins. Co. v. Statham, 33 U. S. 24; Dermott v. Jones, 2 Wall. 1; Pearson v. Lord, 6 Mass. 81; Stuart v. Sears, 119 Id. 143; Welch v. Goodwin, 123 Id. 71; Mer. Ins. Co. v. Abbott, 131 Id. 397.

RAILROAD COMPANIES — MORTGAGE — LIEN—CONTRACT—CONFLICT OF LAWS.

BARNEY & SMITH M'F'G. CO. v. HART, RECEIVER, ETC.*

Court of Appeals of Kentucky, September 16, 1886.

1. *Railroad Companies—Mortgage—Lien—Contract—Conflict of Laws.*—Where half of the purchase price of railroad cars had been paid, and notes given for the balance, and the cars removed from one State to another, and placed upon the road of the company under its contract with a party to construct and equip certain parts of the road at a fixed price, a contract (that on the failure of the purchaser to pay the deferred payments the company should have the right to resume possession of the property, and sell it for the payment of the debt, and, in event it failed to pay the purchaser, was still to be liable, and that no right or title to the cars should pass to the purchaser until the whole was paid) made by the builder of the cars with the agent of the railroad contractor is in the nature of a mortgage, and creates a lien upon the cars as between the parties; but the title to the cars passes to the agent of the contractor, and the lien of the builder is not good against innocent purchasers and creditors, unless the contract is filed for record according to the laws of the State where the cars are taken.

2. —. *Record.*—The lien of the builder for the purchase price of cars made in another State, and brought into the State of Kentucky, is governed by the laws of Kentucky, and is good against creditors and innocent purchasers only when recorded as required by the law of that State.

* S. C., 1 Southwestern Reporter, 414.

Appeal from Fleming circuit court.

Lincoln & Stephens and O'Hara & Bryan, for appellant, Barney & Smith Manuf'g Co.; Wm. J. Hendrick, for appellee, Theodore Hart, Receiver, etc.

PRYOR, C. S., delivered the opinion of the court.

In the month of March, in the year 1877, appellant, the Barney & Smith Manufacturing Company, doing business in the state of Ohio, entered into the contract with one A. P. Berthoud to construct for him the two cars in controversy, being at the price of \$2,400 payable in installments. The sum of \$1,400 was paid when the contract was made, and Berthoud's note executed for the balance, which seems, or the greater part of it, never to have been paid. By the terms of the contract it was agreed that, on the failure of the purchaser (Berthoud) to pay the deferred installments, the company (now appellant) should have the right to resume possession of the property, and sell it for the payment of the debt; and, in the event it failed to pay, Berthoud was still liable to the appellant therefor. It was also stipulated that no right or title to the cars should pass from or vest in Berthoud until all the purchase money was paid, and on full payment, and not before, the title to the cars, and the absolute property and possession thereof, should vest in Berthoud, the party of the second part.

The cars were constructed for the purpose of being used on the Covington, Flemingsburg & Pound Gap Railroad, in the state of Kentucky; and when finished by the company were delivered to Berthoud, and by him brought to Kentucky, and placed upon and used on that railroad. A man by the name of Quintard had contracted with this Pound Gap Railroad Company to construct and equip several miles of the road, and in the settlement, of the accounts of Quintard, the value of these cars were charged to him as a part of the equipment of said road, and credited to Berthoud.

A short time after the cars had been placed on the road, many of the laborers and contractors who had worked on this road in its construction, and who had not been paid by Quintard for their services, instituted actions against him and the railroad company in the Fleming circuit court, and obtained general attachments, that were levied on the property of the company and Quintard, including the cars in controversy; the road being then operated by Berthoud, who was, as the proof clearly indicates, the mere agent of Quintard, the original contractor. The actions against Quintard were consolidated, and proceeded to trial under the name of *Mason, Shannahan & Co. v. Covington, Flemingsburg & Pound Gap Railroad Company and Quintard*. A receiver was appointed, who afterwards resigned, and another substituted, and, by an agreement with each, Berthoud was permitted to operate the road, with the cars upon it, as if no suit had been instituted; Berthoud agreeing that on the first of

March, 1879, he would deliver up to the receiver the rolling stock, loose materials, personalty, and all the property now on the track of said railroad, and belonging to the same, without any further notice. Berthoud was in fact operating the road under the direction of the receiver from the time the court placed the road in his possession.

After the institution of the various actions in the Fleming circuit court, the appellant (manufacturing company) instituted an action in the United States circuit court for the district of Kentucky against Berthoud, to recover from him the possession of the cars, under its contract. The marshal, by a process from that court, seized the two cars, and, before removing them they were taken from him by the receiver. Appellant's action against Berthoud in the district court was still prosecuted, and, Berthoud failing to appear, a judgment by default was entered, and the marshal again seized the cars; and, when this was done, the receiver in the Fleming circuit court instituted his action as such against the marshal, and regained the possession. When the action in the Fleming circuit court by the receiver against the marshal was called, the appellant, (manufacturing company) by its petition, asked to be made a defendant in lieu of the marshal, which was done, and then, by motion had the case transferred to the United States circuit court, at Covington, for trial.

The receiver, by an order of the Fleming circuit court, was directed to prosecute the action, and when the case was transferred to the district court such party submitted to the jurisdiction of that court; and, the law and facts having been submitted to the judge, a judgment was rendered adjudging that the receiver was entitled to the cars, and gave costs against the appellant. In that action, transferred from the Fleming circuit court to the United States district court, the appellant filed an answer setting up title by reason of its judgment by default in that court against Berthoud; and, by an amended answer, set up title in its own right against Berthoud, and all others claiming to be the original and absolute owners of the property. On the entire pleadings an issue was raised, and the title of the appellant brought directly in question, and the judgment rendered as heretofore stated.

After that judgment the appellant, conceiving that its only effect was to restore the possession of the cars to the receiver of the Fleming circuit court, on the ground that he had been unlawfully deprived of them by the marshal, filed its petition in the consolidated attachment suits pending in the Fleming circuit court, and asked to have the cars sold, and the proceeds of sale applied to the payment of its unsatisfied debt. In this assertion of right the appellant is met—First, with the judgment rendered in the district court in bar of any further claim of title; and, secondly, that, under the contract between the appellant and Berthoud, the title as to creditors and purchasers

passed from the appellant, because the contract, being in the nature of a mortgage, had never been recorded.

Whether the judicial determination of the United States circuit court was in favor of the receiver on the question of title, or merely restored to him the possession of the property, the state court having first obtained jurisdiction, we shall not stop to inquire, as, in our opinion, the title to the property passed to the purchaser, Berthoud, the lien retained by the contract on the part of the manufacturing company being in the nature of a chattel mortgage. The statute of this state provides that "no deed of trust or mortgage, conveying a legal or equitable title to real or personal estate, shall be valid against a purchaser for a valuable consideration, without notice thereof, or against creditors, until such deed shall be acknowledged or proved according to law, and lodged for record." Section 10, c. 24, Gen. St.

In this case \$1,400 of the purchase money was paid to the appellant by Berthoud, his note executed for the remainder, and the cars delivered to and brought from the State of Ohio to the state of Kentucky by him, and placed upon the road of the company under the contract with Quintard to construct and equip certain parts of the road at a fixed price. That it was a sale of the cars to Berthoud is manifest, and the reservation of title in the vendor was simply to create a lien by the appellant as against any purchaser or creditor of the vendee. It was a lien for the purchase price, or a part of the purchase money, that could be enforced between the parties, but did not affect the right of creditors unless recorded, as provided by the statute. All the appellant could have done under the contract was to regain the possession, and sell the property to satisfy the unsatisfied claim. The vendee had agreed that the vendor should sell instead of the chancellor, and but for this provision of the contract a court of equity would have been called on to enforce the lien. Appellant has made its vendee the ostensible owner,—had received more than half the purchase money,—and when the cars had been transferred to an adjoining state, and placed upon the track of the railroad company, the appellant, with this evidence of the lien in its pocket only, is now insisting that no title ever passed to its vendee, or that it has a prior equity against the claims of creditors. To so hold would be to disregard the plain provisions of the statute, enacted to prevent fraud, and protect the rights of creditors and purchasers; and, as said by this court in the case of Greer v. Church, 13 Bush, 430, the title in such cases will be treated as being where the nature of the transaction requires it should be. The cases of Vaughn v. Hopson, 10 Bush, 337, and Greer v. Church, *ubi supra*, settle this question.

In the case of Heryford v. Davis, 102 U. S. 235, on error to the circuit court of the United States for the western district of Missouri, the manufacturer of cars agreed to loan to B., for hire,

certain cars, to be used on its road, and at the same time took notes from B. for the value of the cars, with certain bonds of the company as collateral security for the payment of the notes; the latter to have the privilege, at any time during the four months, (the period of hiring,) to purchase the cars, on the payment of the notes; and that, until such payment is made in full, B. shall have no right, title, claim, or interest in the cars, except as to their use for hire. In default of payment, A. was to sell the cars for so much as might be needed to pay the amount due on the notes, and the balance, if any, to be paid over to B.; and, when all the notes are paid, A. agreed to give B. good and sufficient bill of sale. The cars were delivered to B. without the contract having been recorded, and C., obtaining a judgment against B., levied on the cars. The supreme court held that the title to the cars passed to B., and that, to protect them from seizure and sale by C., the contracts should have been recorded as provided by the laws of Missouri.

A similar decision was also rendered by the supreme court in the case of *Hervey v. R. I. Locomotive-works*, on error to the circuit court for the southern district of Missouri, reported in 93 U. S. 664.

It is insisted that Berthoud was not indebted to any of the creditors of Quintard, or the railroad company, and, the title being in him, his property should not be subjected to pay another's debt. The question is not raised by Berthoud, and, during the entire litigation, he has made no claim to these cars, or interposed, by any pleading in the Fleming circuit court, to show title in himself, or that he had any interest in the litigation. His testimony might have shed some light on the subject, and, although anxious to prevent creditors from making their debts by the sale of the cars, he fails to testify as to title in himself, or to speak at all with reference to the claims of others. The suits had been pending in the state courts since March, 1877, by these creditors claiming that the cars belonged to Quintard or the railway company. He made no claim in his own right, but undertook to operate the road as the agent of the receiver. In February, 1878, long before the appellant sued Berthoud in the United States circuit court, as the agent of Quintard or for himself, he made out an account against the railroad company for these cars, that was allowed. All the rolling stock was charged to the company, or transferred to it, and not until February, 1879, was the claim of the appellant asserted against Berthoud. Quintard had agreed to construct and equip this road. The cars and rolling stock was upon it, being used for purposes of transportation. No claim was set up all this while by Berthoud. That he was the agent of Quintard, or connected with him in the contract, is evident, and equally as manifest that they charged the railway company with these cars long before any claim was set up by the appellant. So, whether the cars

belonged to the railway company or to Quintard is immaterial. If to the railroad, it was an innocent purchaser; if to Quintard, his creditors can subject them. As to whether or not the cars were liable to the claims of attaching creditors, as against the lien of the appellant, must be determined by the law of this state. While the lien may be valid by the laws of Ohio against creditors and purchasers, it has no such effect in this state. *Green v. Van Buskirk*, 5 Wall. 310.

Judgment affirmed.

NOTE.—A sale may undoubtedly be made upon condition that the title shall not pass until the purchase money has been paid.¹ And an agreement of that character is valid, although the goods are not in existence when the contract is made.² And in cases of this character, the vendor is protected against attaching creditors.³ The protection of the vendor, in such a case, is put, by Williams, C. J., in a Connecticut case,⁴ upon the ground that when the vendee comes into possession of property known to belong to another man, it is incumbent upon persons disposed to deal with it, to ascertain its status. "Whether, therefore, the vendee had borrowed it, or bought it, or hired it, is a matter of inquiry, and ought to be ascertained by him who proposes to trust his property on the faith of this appearance."

The vendor, however, must, as against third persons, show that the vendee has not complied with the conditions of the sale.⁵ Upon this condition the secret lien of the vendor is good against the creditors of the vendee. As to *bona fide* purchasers for a valuable consideration without notice, the principle is different. The rule is well established and without exception, that when it becomes necessary that one of two innocent parties shall suffer a loss, it must fall upon him who by his act rendered the loss possible.

There can be no doubt, that when personal property is transferred from one State to another, its liability to seizure and sale must be wholly determined by the laws of the State to which it has been carried.⁶ It might well happen, therefore, that when the property has been so removed, the contract, which was in Ohio a conditional sale, might, in Kentucky, because of its registration laws, and their operation on secret liens, be held an absolute sale—but with a chattel mortgage attached, and therefore, without the prescribed registration, invalid against creditors or subsequent purchasers.—[ED. CENT. L. J.]

¹ Benjamin on Sales, 3d ed., p. 286, note; and cases there cited.

² *Kenner v. Puffer*, 114 Mass. 376.

³ *Strong v. Taylor*, 2 Hill, 326; *Hussey v. Thornton*, 4 Mass. 405; *Bennett v. Pritchard*, 2 Pick. 512; *Vincent v. Cornell*, 13 Pick. 294; *Fairbanks v. Phelps*, 22 Pick. 355; *Hart v. Carpenter*, 24 Conn. 437.

⁴ *Forbes v. Marsh*, 15 Conn. 384.

⁵ *Leighton v. Stevens*, 19 Me. 54; *Leigh v. Mobile, etc. Co.*, 53 Ala. 165; *Van Duzor v. Allen*, 90 Ill. 499.

⁶ *Green v. Van Buskirk*, 5 Wall. (72 U. S.) 310.

WEEKLY DIGEST OF RECENT CASES.

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1. AGENCY.—*Agent's Authority—Warranty—Evidence—Sufficiency—Sale.*—The fact that the vendor of a steam-boller, through his agent, furnishes the vendee, at the time of the sale, with his pamphlet descriptive of such boilers, in which durability is advertised as an essential quality, is evidence from which the agent's authority to warrant durability may be inferred. From evidence that, after the sale of a boiler by the vendor's agent, but before payment, the vendee claimed the agent warranted its durability, which claim the vendor neither admitted nor denied, but received the purchase price, it is competent to find such a warranty. *Smilie v. Hobbs*, S. C. N. H., July 30, 1886; 5 Atl. Rep., 711.

2. ASSIGNMENT.—*Partial Assignment of Debt may be Enforced in Equity—Not in Fraud of Insolvent Law.*—A bill in equity may be maintained to enforce the partial assignment of a debt. A. had made a contract to erect a school-house for the city of N., but became insolvent, and, in order to secure funds to enable him to complete his contract, made an assignment to C. of \$600, which was a part of the sum to be due to him from the city of N. upon the completion of the school-house, and C. thereupon advanced him certain sums of money. Held, that the assignment was not in fraud of the insolvent law, and could be enforced in equity. *James v. City of Newton*, S. J. Ct. Mass., Sept. 8, 1886; 8 N. East. Rep., 122.

3. ASSIGNMENT FOR BENEFIT OF CREDITORS.—*Goods Held to Secure Advances made by Insolvent—Right of Assignee—Death of one Partner—Power of Survivor to Execute Deed of Assignment—Improperly Uniting Actions—Recovery of Insolvent's Goods—Settlement and Distribution of Insolvent Estate.*—The assignee of an insolvent warehouseman properly has the possession of goods previously consigned to the warehouseman, to secure advances made to the consignor. Surviving partner has the power of executing a deed of assignment for the benefit of the firm's creditors. An action by an assignee to recover the possession of personal property cannot be united in an action to settle and distribute the estate of his assignor. *Atchison v. Jones*, Ct. of App. Ky., Sept. 11, 1886; 1 S. W. Rep., 406.

4. CONFLICT OF LAWS.—*Insolvency—Jurisdiction—Discharge in Another State.*—A defendant's discharge under the insolvency law of Massachusetts, is no bar to a suit in New Hampshire, on a contract made in that State before the insolvency, when the plaintiff has not resided there since the insolvency

proceedings were begun, and has not submitted to the jurisdiction of the insolvency court. *Norris v. Atkinson*, S. C. N. H., July 30, 1886; 5 Atl. Rep., 710.

5. CONSTITUTIONAL LAW.—*State Quarantine Laws—Commercial Relations—Congressional Interference—Acts of Congress—Fee for Inspection—Preference of Port.*—The system of quarantine laws established by statutes of Louisiana is a rightful exercise of the police power for the protection of health which is not forbidden by the Constitution of the United States. While some of the rules of that system may amount to regulations of commerce with foreign nations or among the States, though not so designed, they belong to that class which the States may establish until Congress acts in the matter by covering the same ground or forbidding State laws. Congress, so far from doing either of these things, has, by the Act of 1799, c. 53, Revised Statutes, and previous laws, and by the recent Act of 1878, 20 U. S. Sts. 37, adopted the laws of the States on that subject, and forbidden all interference with their enforcement. The requirement that each vessel passing a quarantine station shall pay a fee fixed by the statute for examination as to her sanitary condition, and the ports from which she came, is a part of all quarantine systems, and is a compensation for services rendered to the vessel, and is not a tax within the meaning of the Constitution concerning tonnage tax imposed by the States. Nor is it liable to constitutional objection as giving a preference for a port of one State over those of another. That section (nine) of the first article of the Constitution is a restraint upon powers of the general government and not of the States, and can have no application to the quarantine laws of Louisiana. *Morgan, etc. Co. v. Board of Health*, S. C. U. S., May 10, 1886; 22 Rep., 417.

6. CORPORATIONS.—*Action by Stockholders, when Entertained—Equity.*—A court of equity will not entertain an action by stockholders against the directors of the corporation and others, for the purpose of compelling the defendants to an accounting, obtaining the appointment of a receiver, and to restrain the collection of an assessment on the capital stock, on the ground of conspiracy, fraud and embezzlement by the defendants, if it appears that the plaintiffs, at the time they, in writing, requested the president and directors to institute the action on behalf of the stockholders (which request was refused), were aware that they had no cause of action against said directors, at least, and that the real object which they had in view in instituting the action was not stated to the directors; for in such case it is clear that the request to the directors; for in such case it is clear that the request to the directors to institute the action was not an earnest, but a simulated one. *Bacon v. Irvine*, S. C. Cal., July 27, 1886; 11 Pac. Rep., 646.

7. ——. *Execution of Instruments by—Authority of Officers—Mortgages—Foreclosure—Attorneys' Fees.*—Where instruments, purporting to be executed by a corporation, have affixed to them the corporate seal, and are proved to be signed by the proper officers, such officers must be presumed not to have exceeded their authority, and the burden to prove the contrary is on the party disputing the due execution of the instruments. Where facts and circumstances surrounding the execution of instruments by the officers of corporations show the existence of proper resolutions of authoriza-

tion, and support the presumption of their authoritative execution as shown by the corporate seal being thereto affixed, as well as the proved signatures of the proper officers, the fact that such resolutions do not happen to appear in the proper book of the corporation will not be held absolutely to disprove their existence, and make null and void such instruments. Where the resolutions of a corporation, authorizing loans and mortgages, did not give authority to have attorneys' fees secured in the latter, a court in actions for the foreclosure of the mortgages properly declines to allow any. *Schallard v. Eel River, etc. Co.*, S. C. Cal., July 13, 1886; 11 Pac. Rep., 590.

8. ——. *Franchises—Power to Extend Operations—Taxation—Exemption by Charter—Manufacturing Company.*—An act of the legislature giving a corporation power to extend its operations does not change its character or attributes, and therefore is not a new franchise. A corporation taxed, under the New Jersey law of 1884, for State purposes, is not liable for the payment of the same, upon showing exemption by its charter, and that it is a manufacturing company. *State v. Society, etc.*, N. J. Ct. Chancery, Sept. 24, 1886; 5 Atl. Rep., 724.

9. *CORPORATIONS—Municipal Corporations—Lien for Street Improvements—Complaint—Necessary Averments—Apportionment Between Lot Owners—Constitutional Law—Rules of Pleading—Legislature Assuming Judicial Functions.*—A petition seeking a lien for street improvements is defective which only alleges that the ordinance authorizing the improvements was duly passed by the general council. This is a mere legal conclusion, and all the facts entitling the contractor to his lien must be alleged and proven. A petition seeking a lien for street improvements must contain an allegation that the apportionment between the lot owners was made by the council as the law requires. The act of legislature of Kentucky of March 24, 1882, providing that all courts of Jefferson county shall take judicial notice of the passage, approval, contents, and publication of each ordinance of the city, held invalid, as making a petition to depend upon the legislative instead of the judicial judgment. *Johnson v. Ferrell*, Ct. App. Ky. Sept. 14, 1886; 1 S. W. Rep. 412.

10. ——. *Stockholders—Liability of.*—A statute provided that members of every incorporated manufacturing company should be liable for all debts of the corporation until the whole capital stock was paid in and certain certificates filed. Held, that this liability extended to all persons who were stockholders when the debt was contracted, and also to all persons who were stockholders when the liability was enforced by legal process, but not to persons becoming stockholders after the debt was contracted, and ceasing to be stockholders before the liability was enforced. Another statute gave to a stockholder paying such debt of the corporation an action for contribution against the stockholders "originally liable" with him for the debt. Held, that all persons who were stockholders when the debt was contracted, and also all persons who were stockholders when the liability for the debt was enforced, could be made to contribute. Executors and administrators may effectively plead the special statute of limitations of three years, in their favor, to an action against them for such contribution. Trustees holding stock in trust are liable to contribute from the

trust funds in their hands. Married women are also liable to contribute, the liability being statutory and incident to the ownership of stock. No record is required to perfect the transfer of stock, unless such record is required by the charter or by-laws of the corporation. When outstanding notes of a corporation were paid by the proceeds of bonds issued by the corporation to others than the note holders. Held, that the debt represented by the bonds was contracted as and when the bonds were issued. *Sayles v. Bates*, S. C. R. I. July 10, 1886; 2 N. Eng. Rep. 638.

11. *DEED—Exception and Reservation From—Property Conveyed by Inference.*—As a deed of property carries with it that without which the property granted would be useless in the hands of the grantee, so, also, an exception or reservation in a deed works in favor of the grantor. *Green Bay, etc. Co. v. Hewitt*, S. C. Wis. Sept. 21, 1886; 29 N. W. Rep. 237.

12. *EMINENT DOMAIN—Action of Trespass—Jury of View—Waiver—Former Recovery—Timber Act of 1824.*—When one invested with the right of eminent domain enters upon and appropriates the land of another, without complying with an existing statutory requirement to make compensation or tender a bond, the land owner may recover in an action of trespass such damages for the unlawful entry and damages to the property as have been suffered to the time of bringing suit, or bond filed and approved in the event of such being done before suit brought. A land-owner whose land has been unlawfully entered upon by or under the right of eminent domain, may either proceed by action of trespass for the unlawful entry, or may waive his right to so proceed, and submit his entire case to the jury of view, but if he does the latter he is bound by it. A gas and water company, invested with the right to take property under a power of eminent domain, entered upon land without first making compensation or tendering a bond; after being in possession it cut timber; later a bond was filed by the company; later an action of trespass for the unlawful entry was commenced against the company. Held, that it was proper to show on the trial of such action that on the hearing before the viewers, the plaintiff has submitted the question of the value of the timber cut, and asked that the damages sustained therefor, be allowed, and that the jury of view had so allowed. When the cutting of timber is a mere incident to the taking of land for a public use the timber act of 1824 does not apply. *Bethlehem, etc. Co. v. Yoder*, S. C. Penn. March 29, 1886; 6 East. Rep. 838.

13. *EQUITY—Accident and Mistake—Reforming Deed—Trust.*—Where lands were intended to be conveyed to one in trust to another, but, by mistake, the intended trustee was given an absolute deed, and execution upon a judgment against him was issued, and the land in question was advertised to be sold to satisfy the execution, an action brought by the intended *cestui que trust* to reform the deed to the intended trustee so as to show the former's title will be sustained. *Sullivan v. Brubling*, S. C. Wis. Sept. 21, 1886; 29 N. W. Rep. 211.

14. ——. *Cloud Upon Title to Realty—Sheriff's Deeds.*—A married woman is entitled, as a preventive against a cloud upon her title, to an injunction to restrain a sheriff from selling, under an execu-

tion in which her husband is the debtor, property which she, by clear and decisive proof, establishes to be her separate property, because she would be compelled to show, in an action of ejectment, by proof outside of the deed, that such property was her separate property, in order to defeat a recovery; for the true test by which to determine the question whether a sheriff's deed under an execution sale would cast a cloud upon the plaintiff's title is this: "Would the owner of the property in an action of ejectment brought by the adverse party founded upon the deed, be required to offer evidence other than her deed, or her other muniment of title, to defeat a recovery?" *Tibbetts v. Fore*, S. C. Cal. July 28, 1886; 11 Pac. Rep. 648.

15. ——. *Fraud—Undue Influence—Rescission of Contract*.—One whose consent to execute a contract has been obtained through fraud or undue influence may rescind the contract, but he must do it promptly on discovering the facts which entitle him to rescind. In this case, where a trust deed by a married woman was executed on May 23, 1884, and the plaintiff, having full knowledge of the facts, did not commence the action to set aside the deed on the ground of undue influence or fraud until October 10, 1885, and the complaint then failed to allege any reason for such delay, *held*, that the delay was unreasonable, and fatal to the action. *Burke v. Levy*, S. C. Cal. July 28, 1886; 11 Pac. Rep. 643.

16. ——. *Jurisdiction—Chattel Mortgage—Agency—Partnership*.—A bill in equity will not lie where there is a remedy at law; hence, a general creditor cannot sue in equity to recover a debt for merchandise sold; where the chattels which the plaintiff seeks to have applied to the payment of his debt, are property which, from its nature, can be come at, to be attached, and taken on execution in a suit at law, if the property of the debtor and the debtor and the case stated are not within Pub. Stats. chap. 151, § 1, cl. 11. If the property was sold to defendant under a firm name, defendant's wife being the other member of the firm, plaintiff can sue him therefor, if, in buying, defendant acted as the agent of his wife, an undisclosed principal; and he can sue her also; but he can not sue both jointly, either at law or in equity; but may proceed against each separately, although not to judgment against both, for a judgment obtained against one, although unsatisfied, is a bar to an action against the other. If the chattels have been mortgaged or pledged to a third party, the general property is in the debtor and can be attached in an action at law; so, if the wife file a certificate proposing to do business on her separate account, under the firm name of her husband, filed in fraud of the statute and of his rights, the effect is that the property is attachable as his property, the deceit practiced being no greater than if any other person had taken the business, with defendant as agent. Section 3, chap. 151, Pub. Stats., gives jurisdiction in equity in the cases specified, concurrently with that of courts of law; and it is only on the ground that the debtor's property has been conveyed in fraud of creditors that plaintiff can bring his case within it. *Weil v. Raymond*, S. J. Ct. Mass. July 1, 1886; 2 N. Eng. Rep. 506.

17. ——. *Pleading—Presumption—Easement—Drainage*.—The discontinuance of an original bill does not dispose of a cross bill, where the cross bill sets up additional facts and prays for affirmative relief; in such case the cross bill remains for

disposition as though filed as an original bill. A pleading, filed by respondent, seeking to enjoin the wrongful use by complainant of a drain, the obstruction of which the original bill sought to enjoin, does not set up new or distinct matter, and is maintainable as a cross bill. A right gained by prescription cannot be enlarged or extended beyond the prescriptive use. When the term "drainage" is used as appurtenant to lands, and, at the time, a drain for water exists, with no provision for house sewage, which, if included, might result in a nuisance, "drainage" will not be construed to include house drainage or sewage. *Wetmore v. Fiske*, S. C. R. I., July 17, 1886; 2 N. Eng. Rep., 626.

18. EVIDENCE. — *Parol Evidence—Ambiguity in Building Contract*.—Where a clause in the specifications, the basis of a building contract, recites that "the entire walls of the building, inside and outside, are to be painted," and it is claimed and denied that the meaning is that the plaster as well as the wood-work is to be painted, and an expert testifies that the meaning of the clause would "depend on the conversation," the language of the clause is sufficiently ambiguous to warrant the admission of extraneous evidence to explain its meaning. *Beason v. Kurz*, S. C. Wis., Sept. 21, 1886; 29 N. W. Rep., 230.

19. EXECUTORS AND ADMINISTRATORS.—*Debt Due Estate by Executor*.—The only property of a testator in the hands of her executor, as shown by the inventory filed in the county court by the executor, being a note given by the executor to the testatrix during her life-time, and certain rents due from him to her, the county court has no authority to compel the executor to pay a claim against the estate, as he had no funds in his hands belonging to the estate. The claim of the estate against the executor is a mere chose in action on which he may or may not be liable, and he does not admit that he owes the estate anything, or waive any defense he may have, by merely including the claim in his inventory. *In re Estate of Divan*, S. C. Wis., Sept. 21, 1886; 29 N. W. Rep., 218.

20. ——. *Judgments—Liability of Heirs—Executor's Resignation—Presumption in Favor of Proceedings of Court*.—If there is a vacancy in the office of executor of the estate of a deceased person at the time an action is brought, and judgment is rendered therein against the estate, the heirs are not bound by such judgment. Where a probate court has jurisdiction of the subject-matter and the parties, all presumptions are in favor of the validity of its orders, and an order accepting the resignation of an executor cannot be collaterally attacked. *Luco v. Commercial Bank, etc.*, S. C. Cal., July 30, 1886; 11 Pac. Rep., 650.

21. FRAUD.—*Sale of Land—Misrepresenting Value*.—When property has been sold, and the deed thereof executed, and fifteen months afterwards a note is given to the vendor for the balance of the purchase money, the deed will not be set aside on the ground of misrepresentation as to the value of the property, when the representation is the mere judgment of the vendor, and the vendee has knowledge of, or means of ascertaining, the value of the property. *Belz v. Keller*, Ct. of App. Ky., Sept. 16, 1886; 1 S. W. Rep., 420.

22. ——. *Statute of Frauds—Contract*.—The statute of frauds of this State extends to contracts for

the sale of leasehold interests in land, as well as of lands and tenements, or making leases thereof. Hence an oral agreement to sell certain buildings erected upon leased land, and the machinery, together with the lease, which had about two years and nine months to run, is an entire contract, and as such, including the leasehold interest, is within the statute of frauds, and an action thereon cannot be maintained unless the contract is in writing and signed by the party to be bound. Where defendants entered into the contract in good faith, and did not recede from it until they found that certain machines, which they supposed were included in the sale, belonged to the tenant in possession, and incurred expense in making alterations, an action on the case charging them with falsely entering into the contract with intent to injure the plaintiff, is not maintainable. *Potter v. Arnold*, S. C. R. I., July 17, 1886; 2 N. Eng. Rep., 621.

23. FRAUDULENT CONVEYANCES.—*Preferences—Partners—Trial—Submission of Issues—What Submitted.*—A debtor, even when in failing circumstances, has the right to pay the *bona fide* demand of one of his creditors to the exclusion of others. *Lininger v. Raymond*, 12 Neb. 19; s. c., 9 N. W. Rep. 560. A partner or firm has the same right, so long as the payments are made in good faith to creditors of the partnership. Where a cause is being tried by a jury, all questions of fact at issue, and material to the case, should be submitted to them, with proper instructions for their guidance. *Dietrich v. Hutchinson*, S. C. Neb., Sept. 8, 1886; 29 N. W. Rep., 247.

24. GARNISHMENT.—*Who Liable—Money Held for Third Party—Claimant not Appearing—Discharge of Trustee.*—A trustee in foreign attachment, who has received money from the debtor for a temporary purpose, with notice that it belonged to another party, is not chargeable for the money so received. In foreign attachment, the fact that the claimant of the funds in the possession of the trustee refused to appear under the terms imposed and leave granted by the court, does not prevent the discharge of the trustee. *Cram v. Shackleton*, S. C. N. H., July 30, 1886; 5 Atl. Rep., 715.

25. GIFTS INTER VIVOS.—*Revocation—Intention.*—After a valid gift *inter vivos* of a promissory note held by the donor, now deceased, against the donee, a re-delivery of the note to the donor, without any intention to re-vest the title to it in him, except in the contingency of his becoming poor, which never happened, is not a revocation of the gift, nor does it amount to a gift *inter vivos*. *Mars-ton v. Marston*, S. C. N. H., July 30, 1886; 5 Atl. Rep. 713.

26. HOMESTEAD.—*Mortgage by Married Woman—Equity—Jurisdiction.*—A mortgage of a tract of land, including the homestead, executed by a married man without the concurrence and signature of the wife, is invalid for the purpose of impairing, dismembering, or in any manner affecting such homestead or its appurtenances; but *alter* as to the portion of such tract, if any, not embraced within such exempt homestead. When a district court has gained jurisdiction of a cause for one purpose, it may and should retain it generally for relief. *Swift v. Dewey*, S. C. Neb., Sept. 15, 1886; 29 N. W. Rep., 254.

27. HUSBAND AND WIFE.—*Deed by Married Woman—Consideration.*—A deed of trust of her separate property executed by a married woman, empowering the trustee, in case of default on the part of her husband in making payment for certain indebtedness, to sell the property, and out of the proceeds to pay such indebtedness, is sufficiently supported by a good consideration where such deed is executed in consideration of the extension, by her husband's creditors, of the time to pay such indebtedness. *Burkle v. Levy*, S. C. Cal., July 28, 1886; 11 Pac. Rep., 643.

28. INFANTS.—*Action—Goods Sold to Partnership—Plea of Infancy—Estoppel.*—In an action upon contract for goods sold and delivered to a partnership, one member of which is a minor, the plea of infancy may be interposed by him in bar of any claim of personal liability upon the contract. An infant is not estopped from setting up such defense by the fact that he has engaged in business as a member of such partnership. *Folds v. Al-lardt*, S. C. Minn., Sept. 6, 1886; 29 N. W. Rep., 201.

29. INSURANCE.—*Benefit Associations.*—The certificate of a benefit association is in legal contemplation a policy of insurance and governed by the same general rules of law. Statements in the application must be incorporated or appropriately referred to in the contract to become warranties. Where the charter of a benevolent association provides that the benefit shall be paid to the party designated in the application, or if that be impossible, to certain other parties named, the rights of the beneficiary become vested when nominated in the application, and the name of such beneficiary cannot afterwards be changed by the member. Where there is nothing in the charter conflicting, however, the member may perhaps change the beneficiary, but a charter limitation will prevail over any general rule of law. *Presby-terian Assurance Fund v. Allen*, S. C., Ind., June, 1886; 15 Ins. L. J. 763.

30. ———. *Life—Payment of Premium.*—A., an insurance agent, residing at Chester, on May 1, 1882, received the application of B. for a \$1,000 policy of insurance upon the life of B., the premium for the year being advanced by A. from his own funds; the application was forwarded to C. at Philadelphia [he being the agent of D., the insuring company], and was by him sent to D., whereupon a policy was made out, which with a receipt signed by the secretary, and containing the following: "Not to be valid or render said policy binding until payment is made as stated in the margin hereof during the life-time of the said insured, and this receipt countersigned by 'C,' agent, at Philadelphia, Pa.," was sent to C., who forwarded it to A. Neither the policy nor receipt was ever delivered to B.; but A., in making his settlement with C., treated the premium for the year as paid, and C., in his settlement with D., treated it as paid. On March 4, 1883, B. died; E., his administrator, brought *assumpsit* against D. to recover the amount of the policy. *Held*, that the payment of the premium by A. for B., if found as a fact by the jury, was such a payment as would be binding upon D. and would justify a recovery by E. *Continental, etc., Co., v. Ashcraft*, A. S. C. Penn., Apr. 5, 1886; 6 East Rep., 863.

31. MARRIED WOMAN.—*Title to Real Property bought for her by Husband—Deed in Husband's*

Name—His Creditors.—Evidence—Res Gestæ—Declarations of Married Woman as to her Title to Land.—Where the husband buys land by his wife's direction for her, and makes the cash payment with her money, but gives his own notes for the deferred payments, which, however, are paid with her money, as they mature, though he has taken the title in his own name, without her knowledge, the land must be conveyed on her demand made upon the discovery that he had taken title. The declarations of a married woman made upon the discovery that her husband had taken title to land bought for her by him, by her direction, with her money, are competent evidence for her as *res gestæ*, in a suit by his creditors to set aside a conveyance to her of the land, as without consideration and fraudulent as against them. *Mitchell v. Colglazier*, S. C. Ind., May 24, 1886; 32, Rep., 427.

32. MASTER AND SERVANT.—*Injury by Fellow-Servant—What Plaintiff Must Show.—Evidence—Expert—Whether Vessel Skillfully Handled.—Former Acts of Carelessness.—Declaration of Servant—When Admissible Against Master.—Fitness of Servant.—Negligence—Inference from Accident.*—Plaintiff, while engaged as a laborer in shoveling grain from cars into the hoppers of an elevator owned and operated by defendant, was ordered by the foreman, whose order he was required to obey, to assist in hauling in and fastening to the pier of the elevator a square-rigged vessel to be loaded from the elevator. The vessel had been brought to the pier by, and was in charge of, a steam tug commanded by an employee of the defendant; the captain of the tug neglected to have the yards of the vessel properly braced or stayed, so as to avoid contact with the elevator building while in the act of being placed alongside the pier, and in consequence the yards of the vessel came in contact with the building, and knocked off a parcel of slating, which fell upon and injured plaintiff. *Held*, that the captain of the tug and plaintiff were fellow-servants, and to justify a recovery, plaintiff must show (1) that the injury suffered by the plaintiff was caused by the negligent or unskillful management by the captain of the tug in attempting to place the vessel in tow in position alongside the pier; and (2) that there was want of ordinary care and diligence on the part of defendant in the employment, or in the retention in service, of the captain of the tug. The foreman of the elevator testified that he had frequent and constant opportunities of observing the way in which the tug brought vessels into the wharf at the elevator. He also testified that he had been engineer and assistant engineer in different steamers, plying to different parts of the country, and that he was familiar with the operation of tugs, having been about the harbor for twenty-three years. *Held*, that he was competent to testify as to whether the vessel was skillfully or negligently brought to the pier by the captain to be placed in position to be loaded. Proof of former acts of carelessness or unskillfulness on the part of the captain of the tug furnishes no presumption that he was guilty of negligence or unskillfulness on the occasion when the plaintiff was injured. The declaration of defendant's assistant superintendent, while engaged in the general management of defendant's affairs, and while observing the captain of the tug

in the act of bringing in a vessel to the wharf, that "the longer he was in the employ the worse he got, or words to that effect," is admissible. Negligence, such as unfits a person for service, or such as renders it negligent in a master to retain him in his employ, must be habitual, rather than occasional, or of such a character as renders it imprudent to retain him in service. A single exceptional act of negligence will not prove a servant to be incapable or negligent. A jury should not have been allowed to infer negligence from the simple fact of the happening of an accident. *Baltimore Elevator Company, v. Neal*. Md. Ct. App., June 23, 1886; 6 East, Rep., 497.

33. ———.—*Negligence—Damages—Fact for the Jury.*—A railway company was engaged in the increasing of the width of a tunnel upon its line of road in order to accommodate two sets of tracks; A. was superintendent of the work, receiving his instructions from B., the railway company's road-master. Under directions emanating from B., A. erected at a point one hundred and sixty feet from one end of the tunnel and about forty feet from the railway tracks, a small frame building for the storage of dynamite, to be used in the accomplishing of the tunnel-improvement; after the completion of the building and whilst it contained about one thousand one hundred and fifty pounds of dynamite, C., who was employed by the railway company as a flagman on a gravel train which was standing at a distance from the tunnel taking up ballast from the fragments that had been brought out, was directed by his conductor to go to the breast of the tunnel and flag a train that was about due then. Whilst performing that duty, the dynamite in the storage house, from some unknown cause, exploded, and C. was killed. *Held*, that the locating of the storage house, so far as C. was concerned, was not the act of a fellow-servant but of the railway company itself. *Held*, also, that the question whether the placing of the magazine was an act of negligence was for the jury. A master is bound to take heed, that he does not through his want of care expose his servants to unnecessary risks or dangers either from the character of the tools with which he supplies them or the place in which he requires them to operate. *Tissue v. Baltimore, etc., Co.*, S. C. Penn., March 29, 1886; 6 East Rep., 853.

34. MORTGAGE.—*Foreclosure—Sale of Platted Lots—Validity—Action to Set Aside Sale—Laches—Pleading.*—A mortgaged lands to P., by government description, and thereafter caused the same to be surveyed and platted into lots and blocks, with streets and alleys. P. joined in the plat and dedication, and thereafter, upon default of the mortgagor, foreclosed and sold the land in separate blocks, as described on the plat. *Held*, that the sale was not necessarily void because the premises were not sold in smaller parcels, or in lots or half blocks. When an action to set aside a sale for such cause was delayed until after the time for redemption had expired, and the complaint failed to disclose any excuse for such delay, or to set forth the facts showing any special equities on the part of the plaintiffs, *held*, that a demurrer to the complaint was properly sustained. *Abbott v. Peck*, S. C. Minn., Sept. 7, 1886; 29, N. W. Rep., 194.

35. **NEGLIGENCE.—Instructions—Evidence—Contributory Negligence.**—Where prayers of the opposite party are excepted to only on the ground of want of evidence to support them, the objection that they are incorrect as legal propositions is deemed waived and will be considered on appeal. A special exception to the granting of prayers, on the ground of want of proof to support them, must show the defect in proof relied on. In an action to recover damages for personal injuries claimed to have been caused by the negligence of a railroad company, a prayer offered by defendant, which instructed the jury that they were entitled to consider the familiarity of plaintiff with the tracks and their use, should be refused. In admitting evidence of the knowledge of plaintiff and so allowing it to be weighed for all legitimate purposes, the court goes as far as it properly can. Where strict compliance with a city ordinance requiring the company to station a man on the front of locomotives or on the rear of tenders, "within twelve inches of the bed of the road," has been rendered impracticable through improvements in the construction of locomotives, failure to literally comply therewith is not of itself an act of negligence. Its spirit and intent must, however, be observed. It is contributory negligence in law for an adult, who is in full possession of all his faculties and familiar with the crossing and the movements of cars, to attempt to cross a railroad in front of a moving engine, in full view and within ten or twelve feet; and the jury should be so instructed, in case they find such facts to exist. *Baltimore etc., Co., v. Mali*, Md., Ct. of App. June 24, 1886; 3, Cent. Rep., 903.

36. **NEGLIGENCE—Question for Jury—Leaving Machinery Exposed—Contributory Negligence.**—The complaint charges negligence on defendant's part in leaving certain dangerous machinery exposed, in consequence of which plaintiff was injured. *Held*, upon the evidence in the case, that the jury were to judge whether it was reasonably prudent, under the circumstances, to leave such machinery exposed; and also, upon the question of plaintiff's contributory negligence, whether the plaintiff was apprised of the danger, or, in the exercise of ordinary prudence, ought to have known it; and that these questions were properly submitted to them. *Barbo v. Bassett*, S. C. Minn. Sept. 6, 1886; 29 N. W. Rep. 194.

37. **PRACTICE—New Trial—Newly-Discovered Evidence—Insurance.**—In an action on an insurance policy, which policy plaintiff alleges was issued on an application made and signed by himself, evidence on the trial that plaintiff did not know what representations the application contained, because it was made by his agent, are not properly admissible, because contrary to the averment of the complaint; but if such evidence is admitted, on judgment for the plaintiff, the defendant will be entitled to a new trial, on the ground of newly-discovered evidence, where, as a basis of his motion, he produces an affidavit of such agent, which puts in issue the plaintiff's statement that he did not know what representations were made, and tends to show that he himself made them. *Menk v. Commercial Ins. Co.* S. C. Cal. Sept. 1, 1886; 11 Pac. Rep. 664.

38. **RAILROAD—Municipal Corporation—Track in Street—Maintaining Proper Public Street—Numerous Tracks—Viaduct—Damages for Condemning Lands.**—A railroad company which

is authorized by its charter to lay its track or tracks on the street of a city, with the imposed duty of keeping the street in due repair, may be required to construct a viaduct to give proper public passage, if its tracks are so numerous and its use of them so frequent as to block public travel. The duty to keep the street in condition for free use is continuous, and the company must comply with any demand arising from any exigency. *Semble*, that in such a case, if land must be condemned to make the viaduct, the company, not the city, must pay the damages. *Minneapolis v. St. Paul, etc. R. Co.*, S. C. Minn. April 6, 1886; 22 Rep. 436.

39. **SET-OFF AND COUNTER-CLAIM—Judgment—Several Defendants.**—A judgment sustaining a counter-claim set up by one of several defendants inures to the benefit of the others; but, being so set up in one or two separate actions by the same plaintiff against the same defendant joined in the two actions, with different co-defendants, a judgment in the first action disposes of the counter-claim, and estops such defendant or his co-defendants to claim its benefit in the action following. *Bank of New London v. Ketchum*, S. C. Wis. Sept. 21, 1886; 29 N. W. Rep. 216.

40. **TRUSTS—Personal Property—Transfer Need not be in Writing—Express Trust—Subject—Purpose, and Beneficiary—Acceptance by Trustee—Revocation—Consent of Cestui Que Trust—Trial—Evidence—Striking Out—Motion Must be Definite.**—Where the subject of a trust is personal property, it is not necessary that the transfer should be in writing. The intention of a trustor to create a trust, where the subject is clearly defined and the purpose made manifest, and the acceptance of the trust by the trustee, with full knowledge of its subject, purpose, and beneficiaries, creates the trust. After a trust is once created and accepted, it is not in the power of the trustor to revoke it without the consent of the beneficiaries, unless power to do so was reserved in the declaration of trust. When testimony is admitted, some of which is relevant and competent, and intermingled with that which is improper, a motion to strike out should be directed with such precision to the portion attacked that no uncertainty may remain as to testimony that is challenged. *Heilman v. McWilliams*, S. C. Cal. Aug. 26, 1886; 11 Pac. Rep. 659.

41. **WILL.—Construction of.**—The testator gave an annuity of \$200 to his sister, and directed \$3,000 to be paid at her death to her children "and their representatives, if deceased, excepting" W. At the date of the will, eight of the sister's children were living, and two deceased, one of whom was the mother of W. and the plaintiff. *Held*, that it was clearly not the intention of the testator to exclude the issue of the two persons deceased; and that the plaintiff was entitled to share in the bequest as a primary legatee. *Bronson v. Phelps*, S. C. Vt.; 6 East. Rep., 779.

42. **Construction—Lapsed Legacies—Descent and Distribution—Right of Devisee to Residue—Who Take—Gift to Heirs.**—By the terms of a will two persons were left specific shares of a residue. The legatees, however, died before the testator. *Held*, that those shares lapsed, and the testator died intestate as to them. M. J. W. was left a life-estate in a house and lot, "as his full portion

of the testator's estate." *Held*, not to exclude him from the participation which the laws of descent or the statute of distributions gives him in the two shares of the residue of which the testator died intestate. E. W.'s heirs were given a share of the residue. J. W., one of those heirs, died in the life-time of the testator, leaving children. *Held*, that J. W.'s children being persons who, at the death of the testator, would by law inherit a share of the real estate of E. W., and would be entitled to a share of her personal estate, they take under the gift. *Ward v. Dodd*, Ct. of Chan. of N. J., Sept. 10, 1886; 5 Atl. Rep., 650.

43. **WILLS—Revocation—Child or Children Born After Making Will.**—Every last will, made when testator had no issue living, wherein any issue he might have is not provided for or mentioned, if at the time of his death he leave a child or children, or issue, or leave his wife *eniente* of a child or children which shall be born, such will shall be void, and such testator be deemed to die intestate. *Coudert v. Coudert*, N. J. Ct. of Chan., Sept. 20, 1886; 5 Atl. Rep. 722.

44. **WITNESS.—Impeachment—Character and Reputation—Particular Knowledge of Individual Acts.**—Where the character of a witness is in question it is improper, on the cross-examination of an impeaching witness, to ask if the witness has any personal knowledge of any particular act of bad conduct on the part of the witness whose character is being assailed. Nor is such testimony competent on the re-direct examination. *Fox v. Commonwealth*, Ct. of App. Ky., Sept. 9, 1886; 1 S. W. Rep., 386.

QUERIES AND ANSWERS.*

[Correspondents are requested to draw up their answers in the form in which we print them, and not in the form of letters to the editor. They are also admonished to make their answers as brief as may be.—Ed.]

QUERIES.

26. Plaintiff recovers a verdict and judgment before a jury and magistrate. The time for bond in appeal or stay of execution is ten days from rendition of judgment. The judgment can be made out of defendant's property but is not a lien until levy is made. On day of trial defendant and his counsel both request of plaintiff's attorney that execution be not issued; that they will either put in a bond in appeal or for stay of execution—either of which would have secured plaintiff's claim. Two days after trial defendant's attorney calls at the office of plaintiff's attorney, and not finding him in, leaves a note saying, "Don't issue execution, we will give either an appeal or stay bond." Plaintiff's attorney relies upon this promise. Before the ten days expire defendant's attorney learns that the defendant is insolvent and cannot give bond, and without notice to plaintiff's attorney writes for defendant two chattel mortgages—one in favor of another client of defendant's attorney, and the other in favor of a relative of defendant. They file these mortgages, the effect of which is to entirely defeat the plaintiff's claim. Can the action of defendant's attorney be justified? What was his duty in the premises? What would be a proper punishment for said attorney? Cincinnati, O. J. T. H.

QUERIES ANSWERED.

Query 22. [23 Cent. L. J. 287.]—M. is indebted to one of the ice-dealers of Longstown, Ohio, on a bill contracted three years ago; he is irresponsible and unable to pay, being the head and support of a family and entitled to certain exemptions. For the purpose of compelling him and other delinquents to pay old bills, all of the ice dealers of said place entered into a written agreement in the spring of this year, to boycott all persons indebted to any one of them. In pursuance of said agreement, M. was notified that if he did not pay by a certain day that he would be placed upon the "black list," and the ice market closed against him. Being unable to pay he did not comply, and all ice dealers refused to sell him, though tendered the cash for the ice upon delivery. He then made arrangements with a neighbor to buy more than he wanted, and in that way obtained ice for a short time, and until the dealers found that out, when they refused to sell any more to the neighbor. So that, in fact, he has been absolutely unable to obtain ice during the season. Has he a cause of action at common law? K. & H.

Answer.—There is no cause of action at common law. It is a part of every man's civil rights that he be left at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason, or is the result of whim, caprice, prejudice or malice. With his reasons neither the public nor third persons have any legal concern. Cooley on Torts, p. 278. Further, an act which, if done by one alone, constitutes no ground of an action on the case, cannot be made the ground of such action by alleging it to have been done by and through a conspiracy of several. *Kimball v. Harman*, 34 Md. 507. *Chapman, C. J.*, in *Carew v. Rutherford*, 106 Mass., 12, says: "And it is no crime for any number of persons, without an unlawful object in view, to associate themselves together and agree that they will not work for, or deal with, certain men or classes of men, or work under certain conditions." There are no cases in conflict with the foregoing: but note this sentence from Lord Coleridge, C. J. in *Mogul Steamship Company v. McGregor*, a recent English case (vide Vol. 22, Cent. L. J. p. 305,) "a conspiracy to do the thing which has been called by the name of boycotting is unlawful and an indictment would lie; and if an indictment, then an action." Cincinnati, Sept. 25, 1886. W. L.

RECENT PUBLICATIONS.

NEW TRIALS AND APPEALS, or the rules of practice applicable to the review of judicial determinations in civil actions and in special proceedings under the Code of Civil Procedure, with an appendix of forms. By Edwin Baylies, Counsellor at Law. Rochester, N. Y.: Williamson & Higbie, Law Publishers. 1886.

This is a work of a strictly local character, applicable altogether to practice in the courts of New York. It is well arranged and prepared with great care and labor, and will no doubt prove a valuable acquisition to the legal literature of the Empire State.

JETSAM AND FLOTSAM.

THE Congregation of the Inquisition at Rome has just issued a decree that has created a great sensation in Belgium, forbidding Catholic judges to grant divorces to Catholic suitors. There has been a divorce law in force in Belgium since 1803, and it has been administered under six different Popes without interference. Moreover, Leo XIII. passed three years at Brussels as Papal Nuncio, and witnessed its operation. His allowing the issue of this decree by the Inquisition is, therefore, looked on now as signifying in some degree the triumph of the Jesuit reactionists at the Vatican, and it promises a renewal of the bitter war between the Liberals and the clergy in Belgium. It probably means that the declining health of the Pope creates increased difficulty in resisting what our presidents know so much about—"pressure." The pressure of the reactionists is constant, while the power of resistance varies greatly in different men and at different periods of life. The persons whom the decree will most perplex, however, are the Catholic judges. They have sworn already to administer the law, and have been administering it without scruple or hindrance from ecclesiastical authorities. They must administer it still or resign. It will be interesting to see how many will do so; that is, how many will risk eternal damnation in order to keep their places. It seems rather hard on them, too, to be singled out for restrictions which are not imposed on their French, or English, or American brethren. The English or American judges could escape by leaving divorce cases to the Protestant brethren, but in Belgium the judges are all Catholic, and generally pious.—*The Nation, N. Y.*

PURLOINING A JUDGE'S SALARY.—One of the boldest and most remarkable cases of forgery by a boy ever known in Philadelphia has just come to light, and it was no fault of the boy that he did not succeed in getting away with a large sum of money. James Barber, sixteen years old, who lives on the top floor of the Orphan's Court building, is in prison on the charge of larceny and forgery. Detectives Muller and Sharkey on Saturday arrested him in Mount Moriah Cemetery for stealing a warrant for \$1,750 belonging to Judge William N. Ashman, and forging the name of the judge and that of City Treasurer Bell in an attempt to have it cashed. The warrant represented the judge's salary for three months, and was delivered by a letter-carrier at the court building on May 26, it having been sent by mail from the auditor-general's office at Harrisburg. The lad either took it from the mail-box or from a table in the judge's room. He then wrote a letter to City Treasurer Bell, saying: "Please give me a check for this warrant, and send by bearer. Yours, W. N. Ashman." Young Barber took the warrant and forged note to Mr. Bell. The warrant was not indorsed, and the lad was told to take it to the judge and have him sign his name on the back. The hopeful forger left, but instead of going to Judge Ashman he stopped at a place in the vicinity, and placed the judicial signature on the back of the paper. He again visited the city treasurer, who, upon carefully scanning the warrant, discovered that the amount was written \$1,700 in the body of the warrant, while the figures were \$1,750. The lad was again directed to return with the warrant to Judge Ashman, and a letter written by the city treasurer calling attention to the mistake in the warrant was also sent. When a safe place was reached the redoubtable youngster destroyed Mr. Bell's note and composed one of his own. It said: "Please send up your bill. Something's wrong

in your account." When the note was delivered to Judge Ashman he was puzzled, and said he would call at the city treasury. When he called there the judge and city treasurer soon learned the true state of affairs. The detectives were immediately employed to catch the thief and forger. Later in the day, seeing that he was baffled, he sent the warrant to Judge Ashman, with a letter signed "Jimmy So-so." When arrested, he made a confession.

THE Irish bull is sometimes introduced into this country with the most gratifying effect. Baron Dowse, of the Irish Exchequer, let loose some famous specimens when he sat in the House of Commons. Replying to a question relating to some sectarian celebrations in Derry, he is reported to have said: "These celebrations, sir, take place at an anniversary which occurs twice a year in Derry." The other evening we encountered an equally well-developed example of the bull. A member of the English Bar, an Irishman well known in society for his many amiable qualities, was discussing a current topic with considerable animation. He was occasionally interrupted by one of the company, and at length becoming irritated, he addressed his friend with much dignity, and said: "You can interrupt me, surr, when I'm done speaking!"—*Pump Court (Eng.)*.

THE COURT HAD A FELLOW FEELING.—Major Gassaway, a prominent San Antonio lawyer, is famous for his long speeches. They are so long they cause his clients to get long sentences from the exasperated jury.

Recently Major Gassaway defended a murderer, and addressed the jury off and on for the better part of two days. The jury gave the man imprisonment for life in the penitentiary, and they would have given Gassaway twice as much if they could have legally done so.

When Judge Noonan, who was on the bench, asked the doomed man the usual question as to his having objection to sentence being pronounced on him according to law, the latter replied:

"I think, your honor, that the time consumed by my attorney, in addressing the jury, ought to be deducted from my term of imprisonment."

Judge Noonan said that he thought so, too.—*Texas Siftings*.

DOG LAWS.—A dog law is everywhere and at all seasons the occasion of much miscellaneous growling.—Hark to the London Law Journal.

"The dog controversy is raging furiously. One 'leading' journal has opened a 'London Dog-hunt' column to the rabid correspondents on both sides. It is needless to remark that in a controversy conducted as this is likely to be, there will be plenty of bad language and irrelevant matter. But it will do some good if it convinces the Commissioner of Police that the metropolis is not a nigger settlement, and that the warning *surtout point de zele* applies with peculiar force to the administration of the police laws in such an unwieldy overgrown community as London."

"Nigger settlement" is good! On this side of the water it has been *defendu* for twenty years past to spell the word with two g's.

PLAUSIBLE.—Magistrate: "Well, Patrick, what have you got to say about stealing the pig?"

Patrick: "Well Y'r Honnor-r, ye see, it was jist this: the pig tuk upon him to sleep in my bit of a garden for three noights, y'r Honn'r-r, and I jist sayzed him for the rint!"—*Judy*.

The Central Law Journal.*ST. LOUIS, OCTOBER 22, 1886.***CURRENT EVENTS.**

CROWDED DOCKETS.—In our article on jury trials in our last issue, we expressed the opinion that very little of the law's delay is in civil cases attributable to the jury system. It is more fairly chargeable to the judges, or to be still more accurate, and to put the responsibility upon the primary delinquent, to the legislative branch of the government, which fails to provide an adequate judicial force. So far as the United States are concerned, the following slip from a newspaper tells the whole story:

"WASHINGTON, D. C., Oct. 10.—The October term of the Supreme Court of the United States opens here to-morrow with a larger and more crowded docket than ever before. A year ago when the court met there were 1,033 cases on the docket, to-morrow there will be 1,100 facing the court. Last year the court cleared up about 400 cases and with that number as a fair basis of work for the coming year, the court, it may be said, is nearly three years behind, and with fair prospects of running still further behind this and succeeding years, unless Congress does something to remedy matters."

From this it appears that any litigant unfortunate enough to be involved in a "Federal question," no matter how just his cause, or how urgent his need, must after the ordinary delays of the lower courts, submit to the torture of hope deferred for three long years before the Supreme Court of the United States can do him justice. For two good reasons this condition of affairs is utterly inexcusable. One is that the delay is, in many cases, an absolute denial of justice. Under the present conditions of society and business, a delay for three years, is quite equivalent, in evil consequences, to a delay of twenty years in Lord Eldon's time. The other is that it is the constitutional duty of Congress to provide for the due administration of justice, it ought to have the wisdom to do so, and it assuredly has superabundant

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pecuniary means. The expense of additional judges and courts cannot be pleaded as an excuse in a country in which one of the leading questions of the day is: what shall the government do with its surplus money?

In many of the States the same evil exists; in some it has been partially remedied by the organization of intermediate courts and commissioners, and by following the Federal precedent, of denying to minor litigants the benefit of appellate revision of the judgments of subordinate courts.

That the pecuniary limitation on the jurisdiction of appellate courts is undemocratic, is obvious; it denies to the poor, judicial facilities for obtaining justice enjoyed by the rich. It is, however, unavoidable, and if the limitation is reasonable, is no doubt judicious. With that limitation and the aid of commissioners and intermediate courts, the fact remains that in most of the States the dockets of the appellate courts are still too full, and the course of justice is still impeded. Whether this results from the litigious spirit of the people, or distrust of the courts of the first instance, might be a question. Whatever may be the cause, the duty of the government, State and Federal, is the same—to provide such judicial facilities as will insure the speedy administration of justice.

NOTES OF RECENT DECISIONS.

INSURANCE—FIRE AND STORM—CONDITION—VACANCY OF HOUSE.—In the Supreme Court of Iowa an insurance case of some interest was recently decided.¹ The action was brought on a policy of insurance against fire and storms, and it appeared that the house was destroyed by "a high wind cyclone or tornado." In the policy was a condition that the company should not be liable while the premises shall be vacant or unoccupied. The tenant before the loss occurred had moved out of the house leaving in it nothing but a few tools.

The court held that a condition in a contract cannot be disregarded when it is attempted to enforce the contract.

¹ *Sexton v. Hawkeye etc. Co.*, The Reporter, Vol. 22, p. 402.

"The parties contracted that the building should not be permitted to be vacant or unoccupied. We cannot vary or depart from their contract. It may be, but the point we do not determine, that if the condition required the performance of acts which in no way affected the hazard, or the non-performance of which could work defendant no prejudice, that the courts would not regard it. But it cannot be justly claimed that the hazard of "high winds, cyclones, or tornadoes" was not increased by the vacancy of the building. The occupants of a dwelling, for their own safety, and the protection of the property they may have in it, will exercise care for the protection of the building by keeping closed and secure the windows and doors of the house during high winds, which would, to some extent, secure to it increased stability and capacity of resistance to storms. The tools and other articles of the plaintiff, and other articles owned by the tenant in the house at the time of the loss, did not constitute occupancy, as contemplated by the policy. The building was described in the policy as a 'dwelling-house,' and was insured under the policy as such. The contract contemplates that it shall be occupied as a dwelling. Its occupancy, for the purpose of storing tools, jars, etc., did not comply with the condition against the vacancy of the building."

That the condition of occupation expressed in the policy is material to the risk, is well settled by authority. In New York a summer residence was burned; the policy had a condition that it should be void if the house remained vacant without the consent of the insurer for more than thirty days, and a breach of that condition defeated a recovery.² And in Missouri there was a like ruling in a similar case, although the plaintiff had left a man in charge, with instructions to sleep in the house every night, which he did until within a few days before the fire, when he left the premises.³ To the same effect is a Wisconsin ruling on a policy which recited that "unoccupied premises must be insured as such," and vacated the policy if the occupant vacated the premises without immediate notice to the insurer and the payment of additional

premium.⁴ And in Massachusetts, a shop was held to be "unoccupied" within a like condition in the policy, if no practical use was made of it.⁵ And a farm-house is "unoccupied" when it is only used by the owner and his servants to take their meals in, and a barn is "unoccupied" when it is only used for the storage of grain, hay and farming tools.⁶ And if the terms are more stringent the condition will be fully enforced; thus, where there was, "warranted a family to live in said house throughout the year," the court held it a breach of the warranty that, at the time of the fire and for some time before, the only occupancy of the house was by two workmen who took their meals there and were at work elsewhere in the day, but slept in the house at night.⁷ If the condition is that the house shall not, during the term, become vacant if the assured can prevent it, it is incumbent upon him to prove that the house became vacant by reason of causes beyond his control.⁸

Of course the contract in such cases must receive a reasonable construction, and not only so, but the "unoccupied" condition of the house must be shown to have existed at the time of the disaster, and that, in a proper sense, it was unoccupied. In an Iowa case,⁹ the court expresses this limitation thus: "Of course the terms of the contract must receive a reasonable construction. The parties did not intend that one tenant should not move out and another move in. Nor did they intend that the house should be deemed vacant if the occupant should close it and go off on a visit, and not occupy it for a reasonable time."

CARRIER — OF PASSENGERS — MASTER AND SERVANT—DAMAGES—EXEMPLARY DAMAGES. —The Supreme Court of Tennessee has recently held, that a deck passenger on a steamboat may recover, against the owner of the boat, exemplary damages for an assault committed on him by the mate of the boat.¹⁰

⁴ *Wustine v. City etc. Co.*, 15 Wis. 139.

⁵ *Keith v. Quincy etc. Co.*, 10 Allen 228.

⁶ *Ashworth v. Builders' etc. Co.*, 112 Mass. 422; see also *Corrigan v. Connecticut etc. Co.*, 122 Mass. 288.

⁷ *Poor v. Humboldt etc. Co.*, 125 Mass. 274.

⁸ *North American etc. Co. v. Zanger*, 63 Ill. 464.

⁹ *Dennison v. Phoenix Ins. Co.*, 52 Iowa 457.

¹⁰ *R. R. Springer etc. Co. v. Smith*, 18 W. Rep. 280.

² *Herman v. Adriatic etc. Co.*, 85 N. Y. 162.

³ *Cook v. Continental etc. Co.*, 70 Mo. 670.

The defense relied upon was, that the plaintiff, consorting with certain deck hands, violated, with them, the rules of the boat, and that the mate had used no more force than was necessary to secure proper behavior by the plaintiff, and preserve the property of the shippers from plunder. And further that if, in inflicting the injury complained of, the mate had exceeded his rightful powers, the defendant company was not liable, as the acts complained of were without the scope of his authority.

It appeared, however, to the satisfaction of the jury, that the mate abused his rather indefinite authority, and in administering the customary discipline to the deck hands, "took in" the plaintiff also, and kicked him in the mouth. The jury therefore rendered a verdict against the defendant company, owners of the boat, for \$1,250 damages. Upon appeal the Supreme Court said:

"That the court charged the jury, and we think properly, that if the mate, while in charge of the vessel, committed an unwarrantable assault upon the plaintiff, a passenger, plaintiff might recover.¹¹ In the opinion of Justice Clifford, of the Supreme Court of the United States, sitting in United States Circuit Court, Rhode Island District, it is said the principles of law applicable to the relations of master and servant, do not fully define the rights, duties, and obligations between carriers and their passengers. The carrier agrees to carry, for hire, the passengers from one place to another, and is responsible for any breach of the obligation they assume, in the ill treatment of the passenger, by himself or employes. And in the case cited it was held that a clerk of a steamer, on one of her regular trips, getting into a dispute with one of the passengers, and inflicting personal injuries upon him, the owner was liable; and this would be so, irrespective of the dispute, and as if none had arisen, although defendant did not authorize the acts of his employe. Exemplary damages, in actions for torts, are given, where fraud, malice, gross negligence, or oppression intervenes,¹² and where the liability of the princi-

pal arises from the acts of agents, employes, or officers, the law is well settled, in Tennessee the rule prevails in respect to exemplary damages.¹³

¹¹ *Haley v. Mobile & O. R. Co.*, 7 Baxt. 240; *Louisville & N. E. Co. v. Garrett*, 8 Lea 488; *Louisville N. & G. S. R. Co. v. Guinan*, 11 Lea 98; see also *Sedg. Dam.* (6th ed.) note on pages 570, 571.

ACTION OF USE AND OCCUPATION AGAINST A TRESPASSER.

1. General Principles—Necessity of the Existence of the Relation of Landlord and Tenant.

2. The Action Will not lie Against a Trespasser—Illustrative Cases.

3. Summary.

4. Observations—The Doctrine Examined.

1. *General Principles—Necessity of the Existence of the Relation of Landlord and Tenant.*—The general doctrine, supported by an almost unbroken line of authorities, is, that the action for use and occupation lies only where the conventional relation of landlord and tenant subsists between the parties, founded upon agreement, expressed or implied.¹

And at common law this action could not be maintained upon a lease for years, either pending or after the expiration of the term, "for a lease was considered to be a real contract, the only remedies upon which were, by distress or action for debt on the demise."²

While this was the general common law rule, yet, however, a few cases permitted the action.³

¹ *Wood's Landlord & Tenant*, p. 948; *Hathaway v. Ryan*, 35 Cal. 188; *Murdock v. Brooks*, 38 Cal. 596; *Harley v. Lamoreaux*, 29 Minn. 138; s. c., 12 N. W. Rep. 447; *Taylor on L. & T.*, § 636; *Abbott's Trial Ev.*, 351; *Carpenter v. U. S.*, 17 Wall. 489; *Boston v. Binney*, 11 Pick. 1; *Mayo v. Fletcher*, 14 Pick. 525; *O'Fallon v. Boismenn*, 3 Mo. 405, 408-9; *Ackerman v. Lyman*, 20 Wis. 54; *The Aull Savings Bank v. Aull*, 80 Mo. 199, 201; *Holmes v. Williams*, 16 Minn. 164; *Hood v. Mathias*, 21 Mo. 308, 313; *Bancroft v. Wardwell*, 18 Johns. 490; s. c., 7 Am. Dec. 396, note; *Hutton v. Powers*, 38 Mo. 350, 356; *Cohen v. Kyler*, 27 Mo. 122; *Newly v. Vested*, 6 Ind. 418; *Smith v. Stewart*, 6 Johns. 46; *The DePere Co. v. Reynen*, 65 Wis. 271; s. c., 22 N. W. Rep. 761; *Preston v. Hawley*, (N. Y.) 2 Central Rep. 762; *Vegely v. Robinson* (Mo.), 2 Western Rep. 551.

² *Featherstonhaugh v. Bradshaw*, 1 Wend. 135; *Taylor on Land. & Tenant*, § 635.

³ *Crouch v. Brilles*, 7 J. J. Marshall, 257; *Pott v.*

¹¹ This principle is declared in *Thomp. Carr.* 352, and in the case, therein reported, of *Pendleton v. Kinsley*, reported in 3 Cliff. 416.

¹² *Sedg. Dam.* 35.

"In order to obviate the difficulties, which occurred in the recovery of rent, where the demise was not by deed the statute of II Geo. II, C. 19, sec. 14, authorized a recovery in an action on the case, for the use and occupation of the premises."⁴

The Missouri Statute also provides, that "a landlord may recover a reasonable satisfaction for the use and occupation of any lands or tenants, held by any person *under an agreement* not made by deed."⁵

The revised Statutes of New York contain substantially the same provisions,⁶ as well as many other state statutes.

It seems that this legislation does not change the general rule, for it is held that the relation of landlord and tenant must still exist to support this action. The law will imply a contract to pay rent from the mere fact of occupancy, yet, no implication can arise where there was no tenancy in contemplation between the parties, or where neither party expected to pay rent,⁷ or where the position of the parties to each other can be referred to any other ground than that of a distinct tenancy,⁸ or where the occupancy is of such a character as to negative the existence of a tenancy.⁹

Occupancy alone will raise this relation by implication only where it has been with the assent of the owner,¹⁰ and without any act or claim on the part of the occupant, inconsistent with an acknowledgement by the occupant of the owner as his rightful landlord.¹¹ But this implication may be rebutted by proof of a contract, or any other facts inconsistent with the existence of such a relation.¹²

The authorities affirm that the facts must show, expressly or impliedly, that the defendant occupied as tenant of the plaintiff. When a person occupies the land of another,

not as tenant, but adversely, or where the circumstances under which he enters show that he does not recognize the owner as his landlord, the action of use and occupation will not lie.¹³

And the question as to whether an implied contract of tenancy existed is said to be for the jury.¹⁴

Many authorities hold that neither an express demise nor an express promise is necessary to sustain this action; but that it is sufficient if the defendant held as a tenant of the plaintiff or by his permission or sufferance, recognizing the plaintiff's title, for the reason that in such cases the law will imply a promise to pay a reasonable sum for such use and occupation.¹⁵

To sustain the action, "something in the nature of a demise must be shown, or some evidence given to establish the relation of landlord and tenant. That relation can only grow out of contract. * * * The contract need not be technical and formal, but there must at least be a permissive occupation by the tenant. Occupation by the tenant with the assent of the landlord is indispensable to the maintenance of the action."¹⁶

Where the defendant occupies the premises by mere license of plaintiff, it being revocable at plaintiff's pleasure, so long as it remains executory, and, until so countermanded, it can only operate as an excuse for trespass, or, if the occupancy is not with permission of plaintiff, then it is a mere trespass and not a demise. The relation of landlord and tenant

¹³ Butler v. Cowles, 4 Ohio, 213.

¹⁴ Chamberlain v. Donahue, 44 Vt. 57; Wood's Land. & Ten., 948; Chambers v. Ross, 25 N. J. L. 293.

¹⁵ See Gunn v. Scovill, 4 Day (Conn.), 228; s. c., 4 Am. Dec. 208, which holds that an action of *indebitatus assumpsit*, may be maintained on the implied promise, arising merely from the use and occupation of real estate, by permission, without an express promise to pay rent, and this in the absence of statute, by virtue of common law principles. Wood's Land. & Ten., 699. "Almost any evidence which shows the relation of landlord and tenant to exist between the parties, will support this action. It is not necessary for the plaintiff to prove an express contract with the tenant when he took possession; or any particular reservation of rent; nor that the tenant has once paid rent; for an understanding to that effect will be implied, in all cases where a permissive holding is established." Taylor, § 635; 2 Gill. & Johns. 326; 6 Ad. & El. 839, (n) See, also, Sutton v. Mandeville, 1 Munford, 407; s. c., 4 Am. Dec. 549; Eppes v. Cole, 4 Hen. & M. 161; s. c., 4 Am. Dec. 512.

¹⁶ Central Mills Co. v. Hart, 124 Mass. 123, 125.

Lesher, 1 Yeat. 578; Roberts v. Lemel, 3 Munr. 253; Green v. Scovill, 4 Day, 228; Epps v. Cole, 4 Hen. & Muf. 161; s. c., 4 Am. Dec. 512.

⁴ Taylor's Land. & Ten., § 635.

⁵ 1 R. S. Mo. 1879, § 3061, p. 516.

⁶ 1 R. S. 789, § 26; Taylor's Land. & Ten., § 635.

⁷ Clark v. Clark's Admr., 2 New Eng. Rep. (Vt.) 218.

⁸ Taylor's Land. & Ten., § 636.

⁹ Chambers v. Ross, 25 N. J. L. 293, 294. See Moore v. Harbey, 50 Vt. 297, 300.

¹⁰ Wood's Land. & Ten., 948.

¹¹ Chambers v. Donahue, 44 Vt. 57.

¹² Id.; Stacy v. R. Co., 82 Vt. 551; Hough v. Birge, 11 Vt. 190; Strong v. Garfield, 10 Vt. 502. See Stocket v. Walkins, 2 Gill. & John. 326; s. c., 20 Am. Dec. 438, with note.

in either case would have no existence between parties.¹⁷

Where the relation of landlord and tenant does not exist, the possession is to be considered hostile.¹⁸

In the action for use and occupation, it must be averred in the declaration that the land was occupied by permission of the plaintiff or at the request of the defendant,¹⁹ and where it contains no allegations of any facts showing that the relation of landlord and tenant subsisted between them, at the time of the alleged use and occupation, it fails to state a cause of action, and a demurrer to it will be sustained.²⁰

In one case the defendant was in occupation of the premises when the plaintiff became the purchaser and remained in possession more than two months against the latter's consent. It was admitted that the defendant never recognized the plaintiff as his landlord, or agree to pay him rent for the use of the premises. The court held that the relation of the parties did not necessarily suggest a tenancy, and a promise to pay rent would not be implied.²¹

In a Georgia case it is said that a contract may be implied from the title of the plaintiff and the occupation of the defendant. "These being proven a contract will be inferred."²²

2. The Action Will not lie Against a Trespasser.—Hence, under these principles it is uniformly held that this action can not be maintained against a mere trespasser;²³ that a trespasser can not be converted into a tenant without his consent;²⁴ that if the possession is not under contract, it must at least be permissive, for a tortious occupation will not

be sufficient;²⁵ that mere occupancy does not of itself necessarily imply the relation of landlord and tenant, but that the character of the occupancy and the intention of the parties as evinced by their conduct toward each other must be considered, for as this relation exists, only by virtue of a contract, express or implied, the occupancy must be under such circumstances that a contract can be fairly implied, and this can never be done "unless the entry was by permission of the landlord, either express or implied, and in subordination of his title," hence, "express permission given by the owner to one who is in possession tortiously, will not convert his occupancy into a tenancy unless he accepts such permission and holds in pursuance of it. * * * Therefore, it is erroneous to say that mere proof of occupancy, is sufficient to establish a tenancy. The owner must go farther and show an occupancy under such circumstances that a contract, express or implied, can be predicated thereon, which can never be done unless the original entry were lawful or the occupancy during the period for which rent is claimed was with the assent of the owner, express or implied."²⁶

A few cases will be sufficient to illustrate this rule. *Hurley v. Lamoreaux*,²⁷ was a suit for use and occupation of certain premises, in the nature of assumpsit. The complaint contained no allegations of any facts showing that the relation of landlord and tenant subsisted between the parties at the time of the alleged use and occupation. A demurrer to the petition was sustained because it failed to state a cause of action—the court holding that this action lies "only where the relation of landlord and tenant subsists between the parties, founded on agreement express or implied."²⁸ The court further observed: "The plaintiff appears to claim that he has framed his complaint upon the theory of waiving a tortious entry and occupation of the premises by the defendant, and suing upon an implied

²⁵ *Hathaway v. Ryan*, 35 Cal. 188; *Murdock v. Brooks*, 38 Cal. 596.

²⁶ *Wood's Land. & Ten.*, 6-10.

²⁷ 29 Minn. 138; s. c., 12 N. W. Rep. 447.

²⁸ Citing *Taylor's Land. & Ten.*, § 636; *Abbott's Trial Ev.*, 851; *Carpenter v. U. S.*, 17 Wall. 487; *Boston v. Binney*, 11 Pick. 1; *Mayo v. Fletcher*, 14 Pick. 525; *Ackman v. Lyman*, 20 Wis. 454; *Holmes v. Williams*, 16 Minn. 164.

¹⁷ *Id.*; *Wood v. Wilcox*, 1 Denio, 37; *Merrill v. Bullock*, 105 Mass. 486, 490.

¹⁸ *Espy v. Fenton*, 5 Oregon, 423.

¹⁹ *Taylor's Land. & Ten.*, § 661; *Bradley v. Davenport*, 6 Conn. 1; *Hayes v. Warren*, 2 Stra. 933.

²⁰ *Hurley v. Lamoreaux*, 29 Minn. 138; s. c., 12 N. W. Rep. 447.

²¹ *Cohen v. Kyler*, 27 Mo. 122. See *The Aull Say. Bk. v. Aull*, 80 Mo. 199, 201; *Edmonson v. Kite*, 43 Mo. 176, 178.

²² *Mercer v. Mercer*, 12 Ga. 421. Citing *Chitty on Contr.*, 578; 5 B. & Ald. 322; 3 N. & P. 40; 6 Ad. & El. 854.

²³ *Taylor's Land. & Ten.*, § 636.

²⁴ *Hurley v. Lamoreaux*, 29 Minn. 138; s. c., 12 N. W. Rep. 447.

contract to pay for use and occupation. One obstacle in the way of this claim is that no tortious entry or occupation is in any way alleged. But the insuperable answer to it is found in the authorities above cited,²⁹ which hold, in effect, that a trespasser cannot be converted into a tenant without his consent."³⁰

In *Marquette, etc., R. R. Co. v. Harlow*,³¹ Harlow sued the railroad company for rent for the use and occupation of the land occupied for its tracks. There was no evidence of any agreement to pay rent or for the use and occupation of the land and the only question of liability arose out of what was claimed to be the implied obligation. The testimony showed that the land was entered upon by the company without H's consent or knowledge, but when the company had taken possession he gave consent to building and grading the road, but told the company that it was to gain no rights of the soil, that in his allowing it to grade it was to gain no rights whatever. H. never offered to make a deed to the company of the land and the company never asked for one, and the company was not asked for rent until just prior to the institution of this action. H. said that he had repeatedly told the company that it was a trespasser, but had never given it notice to quit. The court held that, from the above facts, the relation of landlord and tenant could not be inferred and the action must fail.³²

Gallagher v. Hinelberger,³³ was an action for rent against a trespasser of certain lands. During the defendant's occupancy he was notified by the owner, that the rent therefor was a certain sum per annum, which would be demanded as a condition for its further occupancy, but defendant refused to pay such rent as being too much, but promised to "make it right," and continued in possession. The plaintiff from month to month made out and presented bills at a *pro rata* amount of the whole rent demanded. Defendant refused to make payment. The court held that no express contract for the payment of such

sum arose out of such notice, demand and occupancy, but that during the whole of such time the defendant was a mere trespasser, and consequently the action must fail.

The rule announced in *National Oil Refining Co. v. Bush*,³⁴ does not seem to accord with the above. In that case, the action was *assumpsit* for use and occupation. The tenant claimed to hold under a written agreement. The landlord denied that the agreement was in force, and notified the tenant that he would eject him in ten days, and hold him liable in damages, which notice three days thereafter was followed by another, notifying him that the landlord considered him a trespasser. The tenant remained in possession sometime thereafter, and then surrendered the premises. The trial court submitted to the jury the question, whether or not the tenant was a trespasser. This the Supreme Court held proper. The trial court instructed the jury that they must find some new contract between the parties to rebut the presumption (that the tenant was a trespasser) arising from the above notices. In holding this to be error, the Supreme Court said:³⁵ "Such contract was not necessary to the maintenance of the action; it is not necessarily founded upon a specific contract, written or oral, but upon the use of the premises. The occupant may be, in fact, a trespasser, but the owner of the tenement may waive the trespass and recover in *assumpsit*, and it does not lie with the tort-feasor to defeat him by interposing his own wrong. To tell the jury, therefore, that they must find some new contract between the parties, in order to rebut the presumption arising from the notices, was error, for that presumption might well be rebutted by the subsequent act of the parties." But the Supreme Court seemed to be of the opinion that the defendant was a trespasser—that is, if the plaintiff had so treated him his action could not be maintained.³⁶

The language of the court in this case seems to be in full accord with the Georgia doctrine, as announced in *Mercer v. Mercer*,³⁷ and against the general current of authority.³⁸

²⁹ See authorities in last note.

³⁰ See *Henwood v. Chesman*, 3 Serg. & R. (Pa.) 500.

³¹ 87 Mich., 554.

³² See *Dalton v. Landahn*, 30 Mich. 349; *Hogsett v. Ellis*, 17 Mich. 351.

³³ 57 Ind. 63.

³⁴ 88 Pa. St. 335, 340-341.

³⁵ P. 341.

³⁶ See *Goddard v. Hall*, 55 Maine, 579; *Featherstonhaugh v. Bradshaw*, 1 Wend. 134.

³⁷ 12 Ga. 421.

³⁸ See *Chambers v. Ross*, 25 N. J. L. 293, 294; *Dean*

3. *Summary.*—From this review of the authorities it has been seen that the courts, with singular unanimity, declare that a trespasser cannot be held to pay rent or a reasonable sum for the use and occupation of lands or tenements, but that before a recovery can be had, the relation of landlord and tenant must be shown to exist between the parties, and to sustain this relation there must be a contract, either express or implied, and hence it is said that as the bare occupancy alone of a mere trespasser can, in no sense, be deemed a holding in pursuance of an implied permission of the landlord—such holding being tortious only—and as a contract, either express or implied, cannot be predicated thereon; therefore, the conclusion is reached, that to find that the relation exists under such circumstances would be to convert the trespasser into a tenant without his consent, and to find against the clear intention of the parties.

Hence the decisions leave it with the wrong-doer, to say whether he considers himself a tenant of the owner, and whether it is his will to pay a reasonable amount for the benefit derived from his use and occupancy of premises knowingly not his own. If he made no contract to pay for such use and occupancy, and is not in possession in pursuance of permission from the owner, but by virtue of his own will only, and he declares that it was not his intention to pay, but derive what benefit he could from his neighbor's property until ejected, the decisions declare that he cannot be held, as the "relation of landlord and tenant" cannot be implied from such holding. But if he takes possession as a trespasser, and afterwards holds in pursuance of permission of the owner, he can be held, for the holding, in "pursuance of permission," converts the trespasser into a tenant with his consent. That is to say, in the case supposed, consent of the trespasser is the controlling element in determining the character of the occupancy, for if the wrong-doer insists that he is not holding as tenant, he must still be considered a trespasser, and, therefore, the indispensable relation of landlord and tenant, upon which a recovery must be grounded, cannot be said to exist. Hence this doctrine, in effect, permits the tort-feasor to de-

feat a recovery by interposing his own wrongful act.³⁰

4. *Observations—The Doctrine Examined.*—Assuming that the relation of landlord and tenant is indispensable to entitle the owner of the premises to maintain his action, the conclusion that a mere trespasser cannot be held, would seem to be irresistible. And hence it appears that upon the assumption of this fact rests the soundness of this doctrine.

Why must this relation exist? If the trespasser knowingly occupies and uses premises not his own, deriving a benefit therefrom, consistent with what principle of reason or justice can it be said that he should not be held to pay for such use? Is the answer that by the mere occupancy the supposed indispensable condition upon which the action is assumed to rest, to-wit, the relation of landlord and tenant, is not created, a sufficient reason? In other words, does the absence of this relation create a justifying excuse to a court in dismissing the action? thus denying a suitor the redress to which, it would seem, according to the plainest principles of reason and justice, he is entitled, by reason of the infringement of a property right, ever held sacred by our law. Though it clearly appears that the plaintiff's rights have been invaded by the defendant's wrong-doing, that his action is meritorious, and that he has been diligent in asserting it, yet, according to this reiterated and persistently followed doctrine, if the latter has not agreed, or if from his acts it cannot be inferred that he intended to remunerate the former for the benefits received, the wrong must go unredressed.

This rule is not in harmony with the general doctrine of implied promises. It is antagonistic to the analogous rule applied to personal property. "With respect to goods, it is a long established rule, that the owner, from whom they have been tortiously taken, may in many cases waive the tort, as it is expressed, and state his demand as arising on contract. It is competent for him to treat the party liable to his action as a purchaser, an agent or a bailee, whose use and disposal of the goods is thereby sanctioned and confirmed; and then the value of the goods as a

v. *Pierce*, 1 Camp. 467; *Hull v. Vaughan*, 6 Price, 157; 2 Saund. Pl. & Ev. 890; *Chitty on Contr.*, 382.

³⁰ *National Oil Refining Co. v. Bush*, *supra*.

fair compensation for the use of them, is recoverable and to be assessed in damages."⁴⁰

With reference to personal property, in all cases where the defendant has derived some benefit from his infringement of the plaintiff's right, the latter may waive the tort, and sue on the implied contract. Thus, if the thing is money, the defendant must have received it,⁴¹ or if services, he must have derived benefit from them.⁴²

The essence of the right to waive the tort and sue on the implied promise seems to be the benefit resulting to the defendant, for unless he receives some advantage from his wrong the plaintiff is denied an action in *assumpsit*.

It may further be observed that where a promise is implied, it is because the party to be charged intended it should be, or because natural justice plainly requires it, in consideration of some benefit received.⁴³

It would seem to an ordinary mind that natural justice requires that these principles, which are constantly recognized and enforced with reference to wrongs touching personal property, should be invoked in like manner concerning wrongs to real property, as in cases of the character under consideration. Can a just distinction be drawn between a beneficial use of personal and real property? In each case the common ground of equity is that the defendant, upon his own request,

has received a beneficial value without paying therefor, and it seems grossly inequitable that he should be permitted to retain it. The injustice is more palpable when it is considered that the defendant wrongfully obtains the benefit. The eminently just and equitable principle that there is an implied obligation to pay therefor whenever money or property is received, should be applied with equal force in the two classes of cases, without reference to the intent of the party benefited. There are numerous cases where from the circumstances the law implies a legal obligation and a promise, though there was no express promise and no intent between the parties to enter into a contract.⁴⁴

In commenting on the palpable injustice of the doctrine under consideration, the learned editor of the *American Law Review*, after referring to the distinction between personal and real property in this respect, said: "Although there may have been in ancient times some foundation for the distinction between real and personal property in this regard, real property in modern times has become little more than a mere commercial property, and no reason whatever exists for keeping up this distinction. The rule which gives such an action in respect to the use of personal property is founded in the most obvious considerations of justice. The law *ex æquo bono* raises or implies a promise on the part of the taker of a chattel to pay the owner what its use is reasonably worth and to recover this the owner might, at common law, sue in *assumpsit*. The denial of the rule in the case of real property not only breaks in upon the uniformity of the law in an important respect, but it leads frequently to injustice. In many cases it will be difficult to determine upon the facts whether the person using and occupying the land entered under a license or as a mere trespasser. If he entered under a license, the request for the license will support the implication of a promise to pay for the use of the land what it is reasonably worth, according to the general doctrine of implied promises. But if it turns out, upon the evidence, that he entered as a trespasser, then the plaintiff is driven at the trial to an amendment of his petition or declaration; in which

⁴⁰ Per Jackson, J., in *Cummings v. Noys*, 10 Mass. 436. "Sundry cases to this effect are stated in *Hambly v. Trott*, Cowp. 371. As if one take a horse from another and bring him back again, the owner may maintain trespass against the wrongdoer; or, after his death, an action for the use and hire of the horse against the executor. So, in the like case, the owner might waive the trespass as against the original taker, and bring trover against him. 1 Burr. 81. So in *Johnson v. Spiller*, Doug. 167, note 56, it was holden that a demand in trover may be proved as a debt against a bankrupt, if the demand be of such a nature that it can be liquidated, as for the value of goods converted by the bankrupt." Id.

⁴¹ *Gilmore v. Milburn*, 12 Pick. 120.

⁴² Consistent with this rule, if the defendant's cows have been wrongfully pastured on the plaintiff's land, the latter may waive the trespass and recover in *assumpsit*; *Welch v. Bogg*, 12 Mich. 42; See *Webster v. Drinkwater*, 5 Greenleaf, 819; s. c. 17 Am. Dec. 238, with note, where this doctrine is fully and elaborately discussed; see further, *Halleck v. Myer*, 16 Cal. 574; *Frat v. Clark*, 12 Cal. 89; *Beely v. Taylor*, 5 Hill. 588; *Barker v. Cory*, 15 Ohio, 9; *Howe v. Clancy*, 58 Me. 180; *Boston R. Co. v. Dana*, 1 Gray, 183.

⁴³ *Webster v. Drinkwater*, *supra*; *Birch v. Wright*, 1 T. R. 371.

⁴⁴ See in this connection, *Paddock v. Kettredge*, 21 Vt. 378; *Ives v. Hulet*, 12 Vt. 327.

case the difficulty may arise that his amendment will change the nature of the action from an action *ex contractu* to an action *ex delicto*, and will hence not be admissible, at least under the modern codes of procedure. If he finds himself in this dilemma, he will be driven to a non-suit, and to the bringing of a new action. Now, a rule of law which results in putting a meritorious, and perhaps diligent plaintiff, to this delay, expense, and perhaps to a total loss of his right of action, through the intervention of the Statute of Limitations, is neither founded in sense nor in justice; and it is a shame that the judicial courts continue with ape-like servility to reiterate it and re-state it in their decisions. It is a thoroughly idiotic and obsolete rule. * * * It is a putrid reminiscence which demands the attention of legislatures."⁴⁸

The prevailing doctrine is, in itself, an absurdity, and rests upon an illogical and unsound basis; it is in direct conflict with long settled and established rules, founded on eminently just and equitable principles; it often leads to the grossest and most palpable injustice, and no degree of respect or reverence should permit it to be laid up among the fundamentals of an enlightened jurisprudence. That it should be still reiterated and followed as a rule upon which rights are determined seems inconceivable; but it may be largely due to the conservatism of the bench which is always slow to cast aside rules which have long existed, however unjust they may be.

The language of the Supreme Court of Pennsylvania⁴⁹ contains the germ which should direct future judicial action. The courts should, with one accord, sweep the last vestige of this doctrine from our law as a fossilization of condensed nonsense, unworthy to rank as a legal maxim in the jurisprudence of an enlightened people. If the courts refuse to assume this responsibility legislation should perform this work. EUGENE MCQUILLIN.

St. Louis, Mo.

STATUTE OF LIMITATIONS.

DYER V. WITTLER.

Supreme Court of Missouri, April Term 1886.

1. *Limitations—Statute of—Missouri—Real Estate—Who Affected.*—The Missouri statute of limitations only applies to those having a present existing right to commence an action or make an entry.

2. *Married Women—When Right of Action Accrues—Twenty-four Years Limitation.*—The Statute of limitations does not begin to run against a married woman or her heirs till the estate of her husband ceases, after which ten years are allowed. *Valle v. Obenhouse*, 82 Mo. 81, to this extent overruled.

RAY, J., delivered the opinion of the Court.

This is an action of ejectment, for certain real estate in the City of St. Louis, described in the amended petition, upon which the case was tried. Suit was commenced in May 1878. The defence is the statute of limitations of twenty-four years. Rev. Stat. Sect 3222.

The reply is, that in the year 1836, the mother of the plaintiffs was the owner of the land in fee simple, having inherited it from her father; that she was, at the time, the wife of Abner W. Dyer, their father; that there was issue born alive of the marriage in 1837, that their marital relation continued until 1869, when it was dissolved by the death of the mother; that the father survived and died in 1870; that the plaintiffs are the only surviving issue of the marriage, and claim the premises as heirs of their said mother.

At the trial, evidence was given tending to support this reply. The court, under appropriate evidence, in that behalf, offered by the defendants, gave the following declarations of law, which drove the plaintiffs to a non suit:

"The court, of its own motion, declares the law to be, that if defendants, or those under whom they claim, entered upon a tract of land, embracing the premises described in the petition herein, in the year 1846, claiming to own said tract under, and by virtue of, a deed purporting to convey the same to them in fee, and in that year enclosed said tract with a fence, and improved and cultivated said tract, and occupied said tract, (or the portion thereof described in the petition,) so enclosed and improved continuously from that time, under such claim of title, up to the time of the death of Abner W. Dyer, on or about the 25th of June, 1870, and for three years next after his death, and before the original petition in this case was filed, the plaintiffs are not entitled to recover." After an unsuccessful motion, to set aside non suit, the plaintiffs took the case, by writ of error, to the St. Louis Court of Appeals, where the ruling and judgment of the circuit court was affirmed; from which the plaintiffs bring the case here by writ of error.

From this record it appears, that the plaintiffs claim the property in question as the heirs of their mother, who, at and before 1846, when the

⁴⁸ 20 Am. Law Rev. 568.

⁴⁹ *National Oil Refining Co. v. Bush*, *supra*.

adverse possession, under which the defendants claim, first commenced, was the owner in fee of said real estate, and a married woman, with issue born alive of that marriage; that the said marriage continued until 1869, when it was dissolved by the death of the mother; that the father survived the mother and died in 1870; and that this suit was commenced in 1878, and within ten years after the death of the father; but not until thirty-two years after said adverse possession had commenced, and thirty-one years after the date of the present statute of limitations of 1847, and more than three years after the death of their father. The defense, is the 24 years statute of limitation. Under this state of facts, the only question is, are the plaintiffs barred of their right of action, under a proper construction of the statute of limitation of 1847, invoked by defendants, for their protection.

The 1st section of that act, now section 3319, of the Rev. of 1879 on its face declares, in substance, that no action for the recovery of lands, or the possession thereof, shall be commenced, had or maintained, by any person whatever, unless it appears, that the plaintiff, his ancestor, predecessor, grantor or other person under whom he claims, was seized or possessed of the premises in question within ten years before the commencement of such action or suit.

(But it may be remarked at the outset, that, by common consent, the proper construction of the statute is, that, notwithstanding the sweeping language of the 1st Section of the act, no person is embraced in, or contemplated by the 1st, or any subsequent section of the statute, except such as have a present-existing right to commence an action or make an entry. *Dyer vs. Brannock* 66 Mo., page 422—*Johns and Wife vs. Fenton*, not yet reported—*Harris and Wife vs. Ross*, not yet reported.)

Section 4, now section 3222 of the Rev. 1879, declares that, "If any person entitled to commence any action in this article specified, or to make an entry, be, at the time such right or title shall first descend or accrue, either within the age of twenty-one years, or insane, or imprisoned on any criminal charge, or in execution upon some conviction of a criminal offence for any time less than life, or a married woman, the time during which such disability shall continue shall not be deemed any portion of the time in this article limited, for the commencement of such action or the making such entry; but such person may bring such action or make such entry after the time so limited, and within three years after such disability is removed:—provided, that no such action shall be commenced had or maintained, or entry made, by any person laboring under the disabilities specified in this section, after twenty-four years after the cause of such action, or right of entry shall have accrued."

Section 3224—Rev—1879, reads that: "If any person, entitled to commence such action or to

make such entry, die during the continuance of any disability specified in section three thousand two hundred and twenty-two, and no determination or judgment be had of the title right of action to him accrued, his heirs or any person claiming from, by or under him, may commence such action or make such entry after the time in this article limited for that purpose, and within three years after his death, but not after that period."

The question before us, it may be remarked, is determinable, of course, by the state of the common law, as it stood, at that date, unaffected by subsequent statutes limiting the common law rights of the husband in the fee simple estates of the wife. The material and decisive question, for determination, in this case, therefore, is, to whom, by the common law, as it stood at that date, did the right of action or cause of entry accrue, by reason of the adverse possession, or disseizin, under which the defendants claim title.

The solution of that question depends upon another, to wit; who, under the law and the facts had, or was entitled to, the seizin and possession of the premises, when the adverse possession first commenced. The Court of Appeals, in their opinion affirming the ruling and judgment of the circuit court, held that the case was governed by that of *Valle vs. Obenhouse* 62 Mo., 81, as modified and explained by *Dyer vs. Brannock* 66 Mo. 391 and 442, adjudicating upon this very title. 14th Mo. Appeal Reports 52.

That case (*Valle vs. Obenhouse*) held, that "The husband is understood to be jointly seized of his wife's estate, and during the existence of coverture he is not tenant by the curtesy, but only seized by right of his wife, and if there be a disseizin, it is of the joint estate, and they must jointly bring an action to recover the possession. Under this view of the title of husband and wife in the lands of the wife, the statute of limitation will begin to run from the date of the disseizin against both." If that ruling be accepted as the present state of the law in this state on this question, the plaintiffs are unquestionably barred.

It has been something over ten years since the decision was rendered, and it has justly been esteemed an important one, and if, during all this time, its correctness has not been challenged, it should not now be lightly called in question. It becomes important, therefore, to consider, not only the case itself; but, also, how far, if at all and to what extent, it has since been questioned, modified or overruled.

In the first place it may be remarked, that the opinion in that case was that of a majority of the court—one of its members being absent, and another delivering a dissenting opinion to the effect "that the wife had no right of action or entry, after the disseizin, until the death of the husband, and that her grantee, the plaintiff, in that event was not barred by the statute of limitations."

It may also be added that one member of the majority placed his concurrence in that opinion

on grounds somewhat different from those stated in the opinion proper. It may be further remarked that the case, when decided, was regarded by the court as a new one in regard to the proper construction of our statute of limitations, and for that reason, as well as its own merits, was carefully considered by the several judges in their respective opinions. In that of the court proper, as well as that of the dissenting judge, the two "opposing theories" are elaborately discussed, and numerous authorities cited in support of the respective positions. So that but little, if anything, remains to be said on the question itself beyond a few remarks, the citation, perhaps, of some additional authorities, and a consideration of subsequent decisions of this court, in which the question itself, or the legal propositions on which the question at issue rests, are stated and recognized with more or less distinctness, or else more elaborately considered, and in one case, at least, where the Valle & Obenhouse case is directly questioned, and its construction of the statute of limitations in this behalf expressly questioned.

The Valle-Obenhouse case itself, in speaking of the effect of the tenancy by the curtesy of the husband upon the wife's seizin and possession of her fee simple estate, concedes that "It is clear that if a wife has a mere reversion, the statute does not bar her, until her reversion vests by the death of her husband, since in such cases her right of action only commences on the termination of the particular estate."

The court then remarks, "Where a particular estate has been created by the husband, whether with or without the consent of the wife, the wife or her heirs cannot sue until its determination." The error in this is, that the creation of the particular estate is the act of the marital law, and not of the husband's deed; the latter simply transfers what the former creates. Under the facts and authorities the seizin and possession of the wife, by operation of the marital law, is transferred to the husband during his life, consequently no right of action accrues to her or her heirs until his death, and in such case the wife is not within the purview of either the 10 or 24 year provisions of § 3222, since she is not in the language of that section entitled to commence an action or make an entry. In such case no cause of action whatever accrues to the wife until the husband's death.

The question of the right of action depends upon the fact and right of seizin or possession. Whoever is entitled, under the law, to the possession, "*ex necessitate*" is entitled to the right of action. As was well said in the dissenting opinion in the Valle-Obenhouse case, *supra*, the statute of limitations (§ 3222), does not undertake to determine who is, or is not entitled to commence an action, or make an entry, but simply provides within what period such person, so entitled, shall commence their action or make their entry. That question is determinable solely by the common law applicable to the facts of the case.

It may be conceded, also, as claimed in the concurring opinion in that case, that the statute was designed to operate with uniformity, and exclude all alike, whether infants, *femmes coverts*, insane persons, etc., after the lapse of 24 years from the date, when the right or title contemplated shall have first accrued.

"If, (as elsewhere said, in said concurring opinion, in speaking of the right of action), it has descended or accrued, then by the express proviso of the statute, 24 years, even in the case of a married woman, makes a complete bar." But the question remains, has the right in question under the law and the fact so accrued? If it has, it is unquestionably barred; but otherwise, not.

It is true, that infants, insane persons, prisoners and married women, are all grouped together in § 3222, and are all to be treated alike—as barred by its provisions whenever they are alike entitled to sue, but only when so entitled. There is a marked difference in the effect which the several disabilities therein mentioned have upon the subjects thereof, at least, so far as the married woman is concerned.

It must be remembered that, as to infants, insane persons and prisoners, their several disabilities have no effect to displace or suspend their seizin or possession of their real estate.

Not so in the case of a married woman. Her disability of coverture, by its own force, under the marital law, operates to transfer her seizin and possession of her fee simple estate to her husband, and with it the consequent right of action. This important difference, so far as a right of action incident to a disseizin is concerned, seems to have been overlooked, both in the opinion of the court and that of the concurring opinion.

But passing from that decision, the next case in which this question came before the court, is that of *Dyer v. Bannock*, 66 Mo. 420 to 423, and especially 422, which appears to be an adjudication upon this very title involved in this case. 14 Mo. Appeal, 54 and 2nd Mo. Appeal, 432. The opinion in this case, as I understand it, seriously impairs, if it does not virtually overrule, that in the Valle-Obenhouse case. While it, in terms evidently recognizes the ruling in that case; yet, it states, with much distinctness and clearness, and with apparent approval, the general leading legal propositions announced as the basis of the dissenting opinion in that case. It appears to me difficult, if not impossible, to reconcile the two cases. It is there stated, that "It is generally understood that the statute of limitations does not run against any one who has no right of possession." It is there also said, speaking of the husband, that "So long as he lives, his life tenancy, whether outstanding in a third person, or remaining in him, effectually prevents any action or entry by his heirs." It is there further said, "This would be the result, whether the husband, during the life of the wife, had transferred his estate to

some third person by deed, or it has passed to an adverse possessor."

It is also there said, in speaking of the instruction of the trial court in that case, that "The objection to this instruction is, that the tenancy by the curtesy of A. W. Dyer, consummate on the death of his wife, is entirely overlooked. Mrs. Dyer died in 1869, before the bar of 24 years had elapsed. Her estate, not having been barred by the statute of limitations, on her death passed to her heirs. Her heirs, however, could not sue on her death, because her husband survived her, and they had no right of entry or action during his life estate. If the statute of limitations is construed to run against them from the death of the mother, it operated against parties who had no right of action, and who would have been trespassers had they undertaken to enter. Indeed, upon this construction of our statute, had the husband lived three years or more after the death of the wife, the title of the heirs would be wholly destroyed, since they cannot sue during the continuance of the particular estate, and before its determination the three years from the death of the mother have gone by." It is also stated in said opinion, that, "The person barred by the statute is one whose right of entry has accrued, and who neglects to sue during the three years allotted after his right of action accrues." The opinion then winds up with this remark—"Whether, in the event the suit had not been brought within three years after the death of the husband, the heirs would have been barred by an adverse possession of ten or thirteen years, as was held by the Court of Appeals, is of no practical importance in the case. It is unnecessary to give an opinion on this question until such a case arises." And just that identical case has arisen on this record, and upon the same title, and we are now called on to decide what was there waived.

In the case of *Kanaga & Wife v. St. L., etc. R. Co.*, 76 Mo. 214, the court states the common law rights of the husband in the wife's fee simple lands, in the following pointed language: "The husband, during the marriage, has the exclusive right to the possession of her real estate, not held to her sole and separate use, and is the only proper party plaintiff in a suit to recover the possession thereof." If this be true, the ruling in the *Valle-Obenhouse* case, *supra*, cannot be correct.

In the still later case of *Gray and Wife v. Dryden*, 79 Mo. 106, Commissioner Martin uses this equally pointed language: "This was an action for an injury to the actual possession of real estate. The possession of the wife was the possession of the husband. I do not well see how their possession can be joint or common under our law. Certainly this is not so in respect to her general real estate, which is placed by the law in the exclusive possession of her husband. Where he is in possession of it, the fact that she is on it with him, gives her no possession, any more than to

any other member of his family, whose actions are subject to his control. She is not in joint possession with him, because she is there; and she is not a necessary party to any suit to vindicate the possession against trespassers and wrong-doers."

In a still later case, that of *Mueller & Wife v. Kaessman*, 84 Mo. 318, 332, 330, it was held, that "in this State a wife is not a necessary party to an action of ejectment by the husband for her lands." The leading question, however, in that case was, as to how far and to what extent, the common law rights of the husband in the real estate of the wife, were changed, modified or abolished, by § 3295, Rev. Stat. 1879, first enacted in 1865. In the discussion of that question, the common law rights of the husband, anterior to that statute, are stated at page 324 in the following language: "What were the rights of husband at common law in the land of the wife? These. He was jointly seized with her of that land: had *jure uxoris*, the exclusive right to the possession of that land, its rents and profits; could make a tenant to the *præcipe*; could lease or mortgage by his own deed alone; or by his deed, without joining his wife with him, convey his marital interest in the land, which conveyance would be good during their joint lives, and his freehold estate might be seized and sold on execution." At page 330 this further language is used: "At common law it was necessary for the husband to join the wife with him in an action to recover the real estate of the wife, * *

* * and if the common law rule has not been abrogated by our code, it would seem that she must be joined. It has, however, been otherwise decided in this State, the husband being regarded as the only necessary party plaintiff in actions for the recovery of her lands." Citing *Gray v. Dryden*, 79 Mo. 106; *Cooper v. Ord*, 60 Mo. 420, and cases cited.

This case, also, says the *Kanaga* Case, 76 Mo. 207, in so far as it conflicts with the views therein expressed, should be no longer adhered to. But this, as I understand the case, does not affect, or overrule, anything therein said as to the common law rights of husband and wife anterior to the enactment of the statute (§ 3295) limiting such rights, but only his rights to his wife's land, since the passage of the statute under construction.

In a still later case, that of *Harris and Wife v. Ross*, not yet reported, this language is used: "It is of the essence of the statute of limitation not to run against a party until a right of action has accrued to such party. The statute strictly speaking, it must be remembered, whether expressly or by analogy, deals only with the rights of action, and when there is no such right there can be no bar. In such case there is nothing for the statute to operate upon, or to set the same in motion.

* * * * Sec. 3222 of the statute of limitations, by its terms, deals only with persons entitled to commence an action or make an entry; and § 3224 of same act has no application to the heir of a person not thus entitled.

In the late case of *Campbell v. Laclede Gas Co.*, 84 Mo. 352, and pages 376 and 7, the commissioner, after showing that the plaintiffs are clearly barred by the ten year statute of limitation, adds this further paragraph: "Under the rule approved in *Valle v. Obenhouse*, 62 Mo. 81, the plaintiffs would be barred by the absolute limitation of twenty-four years, which runs through all these disabilities, excepting only the suspension of the right to sue by reason of an existing tenancy by curtesy."

This, at least, is a recognition, by the commissioner who wrote that opinion, of the rule laid down in the *Valle-Obenhouse* Case.

The authority of that case, so far as this one is concerned, however, may well be questioned for two reasons: 1st. As it appears that the plaintiffs were clearly barred by the ten-year law, it would seem that there was nothing left for the twenty-four year proviso to operate on, and its potency was not at all needed, as it only operates when the ten year law fails to destroy plaintiff's title. 2nd. As it appears that the disability under which the parties labored, through whom the plaintiff's claimed at the time the adverse possession was first taken, was that of infancy, and not coverture, as in the case at bar.

Their subsequent disability of coverture would afford no protection as cumulative disabilities are not allowed. But, be this as it may, the commissioner evidently recognized the authority of that case.

To this opinion of the commissioner there is a concurring opinion of a member of the court, concurred in by three others of the judges, to the effect that "while he concurred in holding the plaintiffs to be barred, it was not upon the authority of that case; and he desired to add to what he had heretofore said in his dissenting opinion (62 Mo. 90), that a statute which deprives a married woman of her property, for failure to sue for it in twenty-four years, when, during all that time, she had no right to the possession, and could not, therefore, maintain an action for such possession, was, in his opinion, plainly unconstitutional. The construction given to the statute, by a majority of the court in that case (62 Mo.), could not, therefore, be the correct one."

This concurring opinion is, at least, a declaration to the effect that the rule laid down in that case is not the law. It is, however, proper to say of this concurring opinion, as was said of the opinion of the commissioner, that its authority also may be equally questioned for the same reasons.

The last case, in which reference is made to the ruling of the *Valle-Obenhouse* case, 62 Mo. 81, is that of *Johns and Wife v. Fenton*, not yet reported, which was a suit by the wife and her second husband for the admeasurement of dower in the real estate of her first husband. The doctrine of that case, as I understand it, in treating of the scope and operation of the statute of limitations,

is to the effect that "the right limited is a present, existing right of action or of entry; that the wife's right to dower is not of that sort, and for that reason not barred by the statute, and that it is obvious, that cases like "*Valle v. Obenhouse*, 62 Mo. 81, can have no application to such a case. This manifestly is the correct doctrine. The court, then, speaking of the assignment of dower, holds, that the statute begins to run from the period of its assignment, and if assigned before her second marriage her right of action would be barred in ten years. If, after that marriage, then, by the period of twenty-four years—citing *Valle v. Obenhouse*—conceding, without admitting, that that might be true; yet it is obvious that such a case is not in point, and would be no authority in support of the ruling in the *Valle-Obenhouse* case, for the reason, if no other, that the wife's real estate in the case supposed, is not an estate of inheritance, to which the husband's tenancy by the curtesy could attach, or interpose, as in that case, and in the one at bar. This case, therefore, has no application, and is not an authority in the case at bar.

The law on the question at issue is well stated in strong and pointed language in "*Sedgwick & Wait on Trial of Title to Land*," at page 117 and 118, § 219, where it is said: "A tenant by the curtesy initiate may sue alone for the possession of his wife's land, and for damages for withholding it * * *. At common law the husband's interest in the estates of which the wife was possessed at the time of the marriage, was a freehold, he alone having the right of entry, and the present right of exclusive enjoyment. The wife could not recover the lands from a stranger, even though her husband was joined as defendant, and disclaimed title and admitted the wife's right to possession."

To the same effect, also, is the case of *Clark v. Clark*, 20 Ohio State Reports, 128, where it said, that during coverture the right of possession of the wife's fee simple lands is in the husband, and the wife cannot maintain an action to recover the same from a stranger.

Wilson v. Arentz, et al., 70 N. C. 670, is also a case in point. In that State it seems they have a statute substantially like § 3295, Rev. of '79, and it was there held that, "A tenant by the curtesy initiate has a right to sue alone for the possession of his wife's land, and for damages for the detention of it, * * * and the fact that the Act of 1848 (Battle's Rev. Code § 33) deprives him of the power to lease the land without the consent of his wife, will not prevent his recovery of the land by action, under C. C. P., without joining his wife as a party."

To the same effect is the case of *Bledsoe v. Sims*, 53 Mo. 305, and *Kanaga v. St. Louis, L. & W. R. Co.* 76 Mo. 207; See also *Cooper v. Ord*, 60 Mo. 421, 430.

In the North Carolina case of *Wilson v. Arentz, et al.*, *supra*, it is said, that "For an injury done

to the inheritance, his wife must have joined in the suit; for a trespass to the possession, he could sue alone."

This, I apprehend, is the true criterion for determining, when the wife is, or not, a necessary or proper party to a suit affecting the wife's fee simple lands.

The objection, that the construction here given § 3222 of the statute of limitations, renders the same nugatory and senseless, so far as a married woman is concerned, is not, we think, well taken. A married woman during coverture may have a right of action for an injury done to the inheritance or integrity of her fee simple lands; or to the possession of her sole and separate estate in lands from which the husband's marital rights are excluded, just as any other person, and these rights of action of hers and others of a like character, are just as much within the operation of that section as any other of the parties therein named. Whenever and wherever she has a right of action during coverture, she is as fully within the operation of that section—24 years and all—as any other party therein mentioned, and equally barred, whenever they are barred. This objection therefore, is without force or merit, and is fully met and refuted in the dissenting opinion of Judge Hough in the case of *Valle v. Obenhouse*, 62 Mo. 81, and the argument need not be here repeated.

The contention and point in judgment in this case is, that the wife during coverture, by reason of the husband's curtesy *instituta*, has no right of action, and that after her death her heir had none by reason of the husband's curtesy consummate prior to his death, and for these reasons the plaintiffs are not barred by the statute of limitations.

Adopting the views expressed in the dissenting opinion of Judge Hough in the case of *Valle v. Obenhouse*, 62 Mo. 81, and of the authorities there cited; as well as in consideration of the views expressed in the subsequent decisions of this court hereinbefore mentioned, and the additional comments, reasons and authorities herein given and cited, we hold, that the ruling of the court in that case is not the correct one, and its authority in that particular is hereby overruled.

This leads to the conclusion that, upon the facts of this case, the plaintiffs herein are not barred of their right of action, and for these reasons the judgment of the St. Louis Court of Appeals is reversed and the cause remanded for further proceeding in conformity to the views here expressed. All concur, except Sherwood, J., who dissents.

NOTE.—Statutes of Limitation formerly were not favorably regarded, but this is no longer the case, for they are recognized to be statutes of repose.¹ In con-

sideration of purely equitable rights, courts of equity act in analogy to statutes of limitation,² but only feel bound to apply such statutes in cases where their jurisdiction is concurrent with that of courts of law,³ and will not follow them when manifest wrong would be produced thereby.⁴ When the statute once begins to run, no subsequent disability will stop it.⁵ When it is provided that the statute shall not run in case of certain disabilities, it is held, that the disability must have existed when the right of action accrued; a party cannot avail himself of a succession of disabilities.⁶ Such statutes generally are considered to have only a prospective operation in the absence of any provisions to the contrary.⁷ Statutes, extending the time for bringing suits, will not be construed to revive actions already barred.⁸ It has been held, that when a cause of action has been barred by the statute, it cannot be revived by statute nor by constitutional amendment.⁹ In a late well considered case it was held, that the bar could be removed as to a debt, but not as to a claim for specific property.¹⁰ Such statutes must be so construed as to effect the legislative intent,¹¹ which must not be evaded by construction.¹² If the language is clear and free from ambiguity, it should be applied as expressed, although the consequences in a particular case should appear harsh;¹³ but when the law is doubtful, it should be construed in favor of imperiled rights rather than prejudicially thereto.¹⁴ The disability clauses in such statutes exempt the disabled from the necessity of suing, still they are at liberty to sue if they wish.¹⁵ The decision of the court in the principal case settles the construction of the Missouri law, but does it reflect the legislative intent? They say that § 3219 only applies to cases where there is a present existing right to commence an action or make an entry. This present existing right must refer to the period of the beginning of the adverse possession or disseizin. If not so, in what sense is the term used, and how can the section be read in connection with any other meaning? They say subsequently, quoting the language of *Harris v. Ross*, that § 3222 also only applies to persons who have a present right of action or of entry, and § 3224 has no application to the heir of a person not so entitled. They also say there, that the statute deals only with rights of action, and where there is no such right no bar can exist. In the principal case

2. *Hall v. Russell*, 3 Sawy. 506.

3. *Etting v. Marx's E.* 4 Hughes 312.

4. *Fogg v. St. Louis R. Co.*, 17 Fed. R. 871.

5. *Harris v. McGovern*, 99 U. S. 161; *Rogers v. Hillhouse*, 3 Conn. 398; *Daniel v. Dav*, 51 Ala. 43; *Swearingen v. Robert on*, 39 Wis. 463; *Mercer v. Selden*, 1 How. (U. S.) 37; *Tracy v. Atherton*, 36 Vt. 503.

6. *Hogan v. Hurtz*, 94 U. S. 773; *Butler v. Howe*, 13 Me. 397; *Keeton v. Keeton*, 20 Mo. 530; *Fritz v. Joiner*, 54 Ill. 101; *Reimer v. Stuber*, 20 Pa. St. 458.

7. *Ward v. Kilts*, 12 Wend. 137; *Central Bank v. Solomon*, 30 Ga. 406; *Pitman v. Bump*, 5 Oreg. 17; *Stine v. Bennett*, 13 Minn. 153; *Martin v. State*, 24 Tex. 61; *Thompson v. Reid*, 41 Iowa 48.

8. *Robb v. Harlan*, 7 Pa. St. 292; *Garfield v. Bemis*, 3 Allen 445; *Wires v. Farr*, 25 Vt. 41.

9. *Girdner v. Stephens*, 1 Helsk. 290; *Yancy v. Yancy*, 5 Helsk. 353; *Rockport v. Walden*, 54 N. H. 167.

10. *Campbell v. Hott*, 115 U. S. 690.

11. *Gorman v. Judge of Newaygo Circuit*, 37 Mich. 138; *Gautier v. Franklin*, 1 Tex. 732.

12. *U. S. v. Wilder*, 13 Wall. 264; *Roberts v. Pillow*, Hempst., 624.

13. *Fisher v. Harnden*, 1 Paine (C. C.) 55; *Arrowsmith v. Durell*, 21 La. An. 295; *Amy v. City of Watertown*, 23 Fed. R. 418.

14. *Elder v. Bradley* 3 Ad. 247.

15. *Piggott v. Rush*, 4 Ad. & El. 912; *Milliken v. Marlin*, 66 Ill. 13; *Chandler v. Vliet* 2, Saund., 130.

1. *McCluny v. Stillman*, 3 Pet. 270; *U. S. v. Wiley*, 11 Wall. 506; *Phillip v. Pope*, 10 B. Mon. 163; *McCarthy v. White*, 21 Cal. 485; *Dickinson v. McCamy*, 5 Ga. 486; *Elder v. Dyer*, 26 Kan., 604.

neither the wife nor the plaintiffs, her heirs, had any right of action or entry when the adverse possession began; so under this decision the limitation law does not apply to them. Then under what law was this case decided? It will not do to say that this law becomes of force when a right of entry accrues, for the words of the law would still remain, that the ancestor must have been seized within ten years before the suit is brought. Whenever the law operates, it does not say you must begin your action within ten years after you have a right of action, but merely says your ancestor must have been seized within ten years before you bring suit. In the case at bar the conclusion reached is no doubt equitable, but has the court endeavored to ascertain the intent of the legislature? We believe the lay mind [and our legislators may be presumed to be such], intended to make an absolute bar in all cases after twenty-four years, and the prior decisions in this State look as though the legal mind was much of the same impression.¹⁶ Query, did the legislature design a distinction between right of action and right of entry, considering the first solely relative to the act of disseizin and the latter relative to the dispossessed, and make the existence of either state of affairs for twenty-four years an absolute bar?

S. S. MERRILL.

¹⁶. *Dyer v. Brannock*, 2 Mo. Ap. 443.

OFFICIAL BONDS—SURETIES—STRICTISSIMI JURIS—CONDITIONAL DELIVERY.

TRUSTEES OF SCHOOLS ETC. V. SCHEIK.*

Supreme Court of Illinois, October 5, 1886.

1. Suit on school treasurer's bond, signed by sureties but not signed by principal obligor. Suit was against the sureties. Among the facts found by the trial judge was that the bond was signed by the sureties upon the agreement, between them and the principal obligor, that he would not deliver the bond until he had signed it, which agreement he violated.

2. *Held*, that the sureties were liable for the defalcation, and that the agreement did not amount to a conditional delivery of the bond.

This case was brought by the appellants in 1876, in the Circuit Court of Will County, on a township treasurer's bond, against the principal in the bond and his sureties. The case was first tried before Hon. Josiah McRoberts. On the trial it was for the first time discovered that the bond was not signed by the principal in the bond; his name appeared in the obligatory part of the bond only. The court gave judgment against the principal obligor and his sureties. The cause was appealed to the Appellate Court, Second District, which court reversed and remanded the same on account of variance between the bond sued on and the bond introduced in evidence. See 3 Bradwell, 448.

The case was redocketed, suit dismissed against the principal in the bond and amended *narr.*

filed. The sureties on the bond prayed *oyer* of the bond and demurred. The cause was argued before the Hon. Francis Goodspeed, judge of the Will Circuit Court. The court was of the opinion that the bond was so incomplete as to be a nullity and no action could be maintained thereon, and sustained the demurrer. An appeal was taken to the Appellate Court, which court *held*, where the declaration upon the official bond alleged that the defendants, as sureties, signed and delivered such bond to the plaintiffs as their bond, it is sufficient on demurrer, although it appeared that the bond was not signed by the principal obligor, and reversed and remanded the same. See 10 Bradwell, 51.

The case was afterward tried before his Honor George W. Stipp, at the Will Circuit Court, without a jury, who found for the plaintiffs and entered judgment. An appeal was again taken to the Appellate Court, which court held, under the facts found by the trial judge, the bond was signed by the sureties upon the express condition that it was not to be delivered until it was signed by the principal obligor in the bond; and no cause of action should be maintained on the bond, and reversed the case. For the opinion, see 16 Bradwell, 49, from which decision an appeal was taken to March term, A. D. 1885, of the Supreme Court. The following opinion of the Supreme Court was filed Oct. 5, 1886, reversing the Appellate Court's last decision.

James Frake and B. W. Ellis for Appellant; *Messrs. Hill & Dibell and Messrs. Healy & O'Donnell* for appellees.

CRAIG, J., delivered the opinion of the court:

This was an action of debt brought by the Board of School Trustees against the appellees upon the bond of Phillipp Reitz, a defaulting school treasurer. In the Circuit Court the plaintiffs recovered a judgment, but on appeal the Appellate Court reversed the judgment and decided that no action could be maintained on the bond against the trustees, and under this ruling no remaining order was entered. The bond was never executed by Phillipp Reitz, the principal, although his name was inserted in the condition and obligatory part of the instrument. It was properly executed by appellees as sureties, and was accepted and approved by the Board of School Trustees. Much reliance seems to be placed in the argument upon the finding of facts as incorporated in the judgment of the Appellate Court, it being claimed that the court found that appellees signed the bond upon the condition that it should not be delivered until it had been executed by the principal. We do not so understand the finding; the Circuit Court has found the facts and recited in the record what that finding was, and this seems to have been adopted and sanctioned by the Appellate Court. Upon an examination of the Circuit Court it will be seen that the court found from the evidence that Reitz promised the sureties that he would sign the bond

*S. C. Chicago Legal News Vol. 19, p. 32 October 9th, 1886.]

before it was delivered. This, however, does not constitute the execution of a bond upon condition that it should not be delivered unless executed by the principal. Indeed, the sureties seemed to rely upon the promise of Reitz and not upon a conditional delivery, as is apparent from the finding of facts by the Circuit Court and from the decided weight of evidence. It is also said that the liability of appellees should be construed strictly. The general rule is that the undertaking of a surety is to be construed strictly; he is only bound in the manner and to the extent set forth in the obligation executed by him: *Cooper v. The People*, 85 Ill 417. But adhering to this rule to its ultimate limit, are the sureties liable on the obligation which they executed? The statute required this bond to be executed and delivered to the trustees for the purpose of keeping secure the public funds and for the purpose of guarding against a public loss. In view of this fact, while we regard it proper to adhere to the rule of law indicated above, still, a surety who has incurred an obligation of this character should not be allowed to escape liability upon a mere technical defect in the obligation he may have executed, which does not go to the substance of his undertaking. Keeping the principle in view, we will examine the principal objections urged against the validity of the bond upon which the action is predicated. It is claimed that where the name of an intended co-obligor appears upon the face of a bond, who has not executed it, the instrument is imperfect and not binding. The decisions of the courts of the different states are not harmonious in regard to the binding effect of a bond upon the rights of sureties where the bond has not been executed by the principal. In *Bean v. Parker*, 17 Mass. 603, where an action was brought against the sureties on a bail bond which had not been executed by the principal, the court held that no action could be maintained. It is there said: We think it essential to a bail bond that the party arrested should be a principal; it is recited that he is; and the instrument is incomplete and void without his signature. In a later case, *Russell v. Anable*, 109 Mass. 72, where the principals on a bond constituted a firm, and the firm name was signed by one of the partners, the court held that the surety was not bound unless it appeared that the partner who signed the firm name had authority from his partner to do so. In *Wood v. Washburn*, 2 Pick, 24, an administrator's bond not executed by the administrator was held not to be binding on the surety. In *Fery v. Burchard*, 21 Con. 602, a similar question arose, and the court held that a contract of a surety was of such a nature that there could be no obligation on his part unless the principal was also bound. In *Brown v. Jetmore*, 70 Mo. 228, a late case, and one, too, quite similar to the one before us, the sureties on a constable's bond were held not liable for a default of the constable upon the sole ground that the bond had not been executed by the principal. There are other cases holding a like view, and there are

others which hold that the sureties may be held liable, although the principal did not execute the instrument. *State of Ohio v. Bowman*, 10 Ohio, 445, was an action on a treasurer's bond. The principal's name was in the body of the bond but he did not sign the instrument; the sureties defended on the ground that the principal had not signed it, but the court held that they were bound. *Loew, Admr. v. Stocker*, 68 Pa. 226, was an action against sureties on a bond of indemnity; the principal's name had been signed without authority; on the decision of the case it was said: Had the bond not been executed at all by the principal, though his name was mentioned as one of the obligors in the body of the instrument, it is clear that the surety could not avail himself of this fact as a defense. *Herrick v. Johnson*, 11 Metcalf, 34; *Keyes v. Keen*, 17 Tenn. 330; *Haskins v. Lambert*, 16 Me. 142; *Grim v. School Directors*, 51 Pa. St. 219; *Williams v. Marshall*, 42 Barb. 524; *Miller v. Turnis*, 10 Upper Canada, 423, announce a similar rule.

The Supreme Court of Michigan does not seem inclined to adopt the rule established in either class of cases cited above, but seems disposed to adopt a medium ground.

Johnson v. Township of Kimball, 37 Mich. 590, is a case in its facts quite similar to the one under consideration. There, as here, the suit was against the sureties on the official bond of a defaulting treasurer; the bond was drawn setting out the name of the principal and sureties, but it was never executed by the principal. In the decision of the case the court said: Our statute plainly contemplates that the treasurer shall himself be a party to his own official bond. And while we are not prepared to hold that a bond knowingly and intentionally given without his concurrent liability will not bind the obligors, we are of the opinion that where he purports to be obligor and does not sign the bond, there must be positive evidence that the sureties intended to be bound without requiring his signature, before they can be held responsible. See, also, *Hall v. Parker*, 39 Mich. 287, where the same doctrine is announced.

We have given the authorities bearing on the question due consideration, and we are not inclined to adopt the view held by the courts that a bond signed by the sureties without the signature of the principal, may not be binding upon those who execute it, as was held in the case cited from Missouri and other like cases. If the sureties saw proper to bind themselves without the principal executing the bond and becoming bound, we think they might do so, and their undertaking is one that may be enforced in the courts by an appropriate action. The fact that the principal obligor in this case failed to sign the bond was a mere technicality which ought not to affect the rights of any of the parties concerned. In what way are the sureties injured by the omission of the principal obligor to sign the bond? If they are compelled to pay the trustees any sum of money on

account of the default of the treasurer they can recover the amount back from him whether he signed the bond or not; so far then as they are concerned they are in as good position as if Reitz, the treasurer, had properly executed the bond. If Reitz is insolvent, a judgment in favor of the trustees against him could be of no benefit to the sureties; if, on the other hand, he is solvent, the sureties can collect from him whatever sum they may be required to pay in consequence of executing the bond. If the bond had been signed by the sureties upon condition that it should not be delivered to the trustees until executed by the treasurer, and if the trustees had received notice of such condition, or notice of such facts pointing to such a condition as might put a prudent person on inquiry before the bond was approved, then they could not be regarded as innocent holders of the instrument, and entitled to maintain an action upon it. But the sureties, as appears, did not sign the bond on such a condition, but executed the instrument and relied merely upon the promise of the treasurer, that he would before delivery of the bond sign it. This was no more than a secret promise made by Reitz, the treasurer, to those who signed as sureties, which could not be binding upon the trustees. They had no notice of the arrangement existing between the treasurer and the sureties, and they ought not to be affected by it.

In *Smith v. Peoria County*, 59 Ill. 414, where an action was brought upon an official bond against one of the sureties, he set up as a defense that he signed the bond on condition that it should also be executed by one Cox as co-surety, before it should be delivered; that Cox failed to execute the bond; that, in violation of the agreement, the bond was delivered without his knowledge or consent. On demurrer to pleas, in which this defense was set up, the matters alleged were held not to constitute a valid defense to the action on the bond; but other pleas in which the same facts were a set up, and also that the plaintiff had notice, were held to constitute a valid defense to the action. Under the ruling in the case cited, if the bond in this case was signed by appellees upon condition that it was not to be delivered until executed by the principal, and the trustees at the time they accepted and approved the bond had notice, no action could be maintained on the bond; but, as said before, no such defense was made out. The judgment of the Appellate Court will be reversed and the circuit court will be affirmed. The cause remanded to the circuit court for further proceedings in conformity to this opinion.

Reversed and remanded.

SCHOLFIELD, J., dissenting.

NOTE—The rule that the liability of a surety is *strictissimi juris* is well established, but like other rules of law must be reasonably construed, especially when it comes into collision, real or apparent, with other rules of law equally beneficent. Such a rule is, that when

one of two innocent parties must bear a loss from the act of a third person, it must fall upon the one who enabled that third person to cause it. Sureties, therefore, who entrust their principal with a bond signed by them for delivery to the obligee, make him their agent and are responsible for his acts. In such a case the sureties are liable although their principal disregards their conditions and instructions, unless, indeed, the obligee is guilty either of fraud or rashness in accepting such a bond.¹ In a West Virginia case,² the sureties having executed the bond delivered it to their principal with instructions to get other sureties before delivering the bond. He disobeyed this instruction, but they were nevertheless held responsible. To the same effect is a Kentucky case,³ and so also is a Virginia case,⁴ and in Indiana the same doctrine has been held in two cases.⁵ In Missouri there is a like ruling,⁶ and in Vermont,⁷ and in Maine.⁸ In the Supreme Court of the United States the same principle has been recognized.⁹

It must be noted, however, that running through all these authorities there is a very material qualification of the broad doctrine that under the stated circumstances the surety is liable. "Unless, indeed, the obligee is guilty either of fraud or rashness in accepting such a bond;"¹⁰ the same language appears in *Lytle v. Cozad*,¹¹ and in *Nash v. Fugate*,¹² the court expresses the same limitation more fully. It says: "The instrument being complete in form, (precisely such as would have been adopted if the parties signing it were alone to be bound,) being found in the possession of the very person who would have held it if the purpose had been to make an unconditional delivery: under such circumstances an obligee accepting has the right to infer that the transaction is precisely what it purports to be, and that the real power is in fact co-extensive with the apparent power." And just here we may remark that in the principal case the instrument was not "complete in form," but, upon its face, was incomplete.

In *State v. Pepper*,¹³ the court holds that the obligee is not bound by the condition unless he has notice of it, or of circumstances which should put him upon inquiry. In *State of Maine v. Peck*,¹⁴ it seems to be stipulated that the bond must be perfect on its face, and that the obligee must have no notice of any condition, or of anything to put him on inquiry. And in each of the other cases cited, there will be found clauses which indicate clearly that the obligee must be, in a legal sense, a strictly innocent party.

There can be no doubt that when the obligee is, in a legal sense, a strictly innocent party; and the instrument is complete in itself, and the obligee has no notice of any condition or agreement contrary to the validity of its delivery, nor any knowledge of facts which should put him on inquiry as to irregularities;

1. *Murfree v. Official Bonds* § 166.

2. *Lytle v. Cozad*, 21 W. Va., 183, 199.

3. *Smith v. Moberly*, 10 B. Monr. 286; See also *Bank etc v. Carey* 2 Daus. 142; *Millet v. Parker* 2 Metc. Ky., 608.

4. *Nash v. Fugate*, 34 Gratt. 202.

5. *Deardorff v. Foreman* 24 Ind., 481; *State ex rel. v. Pepper*, 31, 76.

6. *State use &c v. Potter*, 63 Mo., 212.

7. *Passumstic Bank v. Goss*, 31, Vt., 318.

8. *State v. Peck*, 53 Me., 284.

9. *Dair v. United States* 16 Wall (U. S.) 1.

10. *Murfree on Official Bonds*, *supra*.

11. *Supra*.

12. *Supra*.

13. *Supra*.

14. *Supra*.

the surety will be bound, however stringent a condition he may have imposed upon his principal as to the delivery of the instrument. The principal is certainly his agent for the delivery of the bond, not the agent of the obligee to procure it. But we think it equally clear that if the obligee is not innocent in the strictest legal sense, if he has notice of a condition attached to the delivery which has not been observed, or of facts which should put him upon inquiry as to such conditions; or, if the bond is not regular and complete, (which ought surely to put the obligee upon inquiry,) then the obligee is bound by the condition. As already stated, the cases which sustain the liability of the surety who has imposed conditions as to the delivery of the bond, also recognize his immunity if notice of the condition can be brought home to the obligee, and there are other cases which directly sustain it. In a Virginia case,¹⁵ a bond was drawn in which the names of the principal and four sureties were inserted, one of the named sureties did not execute it, and it appearing to the court that two of those who did sign it had stipulated for the signature of the whole number named in it, they were held to be released, and their release authorized the release of the third surety. And in a New Jersey case, it appeared that one of the parties to a bond at the time of executing, stipulated that it should not be delivered until all the parties named in it had executed it, the court held that as one of the parties named in it had not signed it, it could not be received in evidence.¹⁶

The rule of law governing this subject, we are persuaded, is that if a surety executes a bond and delivers it to his principal upon, a condition that another person shall sign it before delivery, and that other person does not sign it, the surety is bound, unless he can show that the obligee had notice of the condition upon which he had signed it, or of such facts and circumstances as should put a reasonably prudent man upon inquiry as to the existence and character of such condition. And we cannot conceive of anything more likely to put a prudent man upon inquiry in such a case than the fact that the instrument is incomplete, that a name is inserted in the body of the bond as an obligor which does not appear at the bottom of the instrument among the signatures of the obligors.

And when a party is put upon inquiry as to the facts of a transaction, he is charged with notice of everything which, by that inquiry, he could reasonably be expected to discover, and if he ascertains, or ought to have ascertained, that the obligor in delivering the bond has committed a fraud upon the surety, by violating his promise by accepting he became a party to that fraud, is no longer, in contemplation of law, innocent; and the fraud, so practiced by the principal and abetted by the obligee, lets in all the equities of the surety against either, and restores to its full force the rule that the liability of a surety is *strictissimi juris*.

ED. CENT. L. J.

¹⁵ Ward v. Churn, 18, Gratt. 801.

¹⁶ State Bank v. Evans, 15 N. J. Law. 155; See also Pawling v. United States, 4 Cranch (U. S.) 318; Bibb v. Beech, 3 Ala., 38; King v. Smith 2 Leigh 157; People v. Boswick 32 N. Y., 445.

WEEKLY DIGEST OF RECENT CASES.

CALIFORNIA,	11, 26, 27, 29, 33, 40
ILLINOIS,	21
INDIANA	8, 17, 34
IOWA	19
KENTUCKY	2, 3, 14, 15, 1
MAINE	22, 32
MASSACHUSETTS,	1, 4, 20, 23, 36, 39
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NEW HAMPSHIRE,	7, 38
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PENNSYLVANIA,	13, 18, 37
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VERMONT,	5, 6, 10, 28, 35
WISCONSIN,	25

1. ACCOUNT—*Settlements with Cestui que Trust—Probate Account—Evidence.*—Where a trustee under a will has made a settlement with A. and B., *cestuis que trust*, and afterwards rendered a probate account which has been allowed, in a suit against the trustee for an accounting, the settlements are to be upheld as evidence that, in casting interest, there should be a rest at the time of such settlements, and thereafter the interest or income should be computed on the amount found due. A. and B. in such settlement; and this is so although, when such settlements were made, they were false in their statements, and the trustee had not in his hands the property which he pretended to have, but had misappropriated it to his own use; and where at the time of the settlement with A. and B., the trustee rendered an account of the sum due C., another of the *cestuis que trust*, under the same will, such an account is evidence of what C.'s share then was, and in casting interest a rest is to be made as of the date of such account, and also another rest at the date when the sum due C. was payable *McKim Judge &c. v. Hibbard*, S. J. Ct. Mass., Sept. 16, 1886; 8 N. East Rep. 152.

2. ASSIGNMENT for the Benefit of Creditors—*Preferences—Fraud—Statute of Limitations—Lex Fori Governs—Conflict of Laws.*—When an insolvent debtor who has made an assignment for the benefit of his creditors secures a part of the creditors a percentage of their claims, and they then transfer them to a third party, so that the assignor can get a *pro rata* allowance when the estate is distributed, the claims will not be allowed. The statute of limitations only affects or bars the remedy, and the statutory bar of the state where the remedy is sought to be enforced, and not of the state where the contract is made, governs. *Farmers' etc Bank v. Lovell*, Ky., Ct. of Appeals Sept. 21, 1886: 1 S. W. Rep. 426.

3. ATTACHMENT—*Claimant—Equitable Title of Claimant—Appeal—Attachment—Bona Fides of Sale of Property by Debtor—Weight of Evidence.*—An equitable title to land attached, acquired prior to the levy of the attachment, is valid as against the attachment. Where, in attachment proceedings, there is an issue as to the *bona fides* of a sale of real estate by the debtor, and there is some positive proof that the transaction was genuine, and the trial court has so found, the appellate court will not order a new trial, unless the verdict is clearly against the weight of the evidence.

Brooks etc Co. v. Bush, Ky., Ct. App. Sept. 18, 1886; 1 S. W. Rep. 424.

4. **BONDS—Probate Bond—Discharge of Bond—Liability of Sureties.**—W., as trustee under the will of E., gave bond "A." with sureties. W., who was also trustee under the will of D., had given bond "B." on which J. was security. J. under a misapprehension that he was surety on bond "A." petitioned to be discharged from liability thereon, and, as a result of his petition, the probate court decrees his discharge as surety thereon. G. and H., supporting that J. was surety on bond "A.," and wished to be discharged from further liability thereon, and supposing that there was no bond in force, signed a new bond, "C.," as sureties; the bond being for the same liability as bond "A." The slightest examination would have shown that J. was under no liability on bond "A." *Held*, that both bonds "A." and "C." were valid and in force; that the sureties on each bond should be held responsible in proportion to the amount of the bonds, and the liability they had severally incurred; and that it could not constitute any defense to the sureties on bond "C." that, by reason of the validity of bond "A.," their liability would be less than they intended. *Brooks v. Whitmore*, S. J. Ct. Mass., Sept., 8, 1886; 8 N. East Rep. 117.

5. **CONFUSION—of Goods—Sale—Notice.**—Floating logs distinctly marked are not subject to confusion or commixture of goods in the sense implied by those terms in law; and for their appropriation and turning them into money knowingly and without right, a party is liable to the owner; but it is not a case where defendant should be chargeable on account of the means of knowledge being particularly within his reach, and not within reach of the other party. On a promise by defendant "to settle and pay" for the logs appropriated, the question as to whether the parties referred to all the logs in controversy, or the number proved to have been purchased by the plaintiff, is to be found by the referee and not to be inferred by the court. Knowledge of a sale of logs to plaintiff would not necessarily imply knowledge of a transfer, by the seller, of his claim against the defendant for appropriation of other logs. *Goff v. Bratnerd* S. C. Vt., Aug. 9, 1886; 2 N. Eng. Rep. 612.

6. **CONTRACT—Statute of Frauds—Evidence—Waiver.**—S. and R. were partners, and as such owned a starch factory and had unsettled dealings. In view of settlement, S. offered to sell out to R. for \$250, if accepted before a certain time limited, and R. was willing to accept if he could raise the money. Within that time S. deeded to defendant, who, with knowledge of the facts, took a deed on a verbal condition that he would fulfill S.'s offer to R.; R. tendered fulfillment on his part, but the defendant refused. A bill having been brought to compel specific performance, the defendant did not plead the Statute of Frauds, but denied the contract and objected to the admission of oral evidence to prove it. The master received the evidence, but the defendant failed to file exceptions to the report. *Held*: (a) That all objections to the admission of testimony were waived. (b) That the contract was not void, that it was proved was enforceable, and that the orators were entitled to a decree. (c) That S. was a proper co-orator. *Shofield v. Stoddard*, S. C. Vt. Aug. 2, 1886, 2 N. Eng. Rep., 611.

7. **CONTRACTS—Moral Consideration—Subsequent Promise—Married Woman.**—A contract made by woman while married, which is void on account of her coverture, furnishes no consideration for her subsequent promise during widowhood. *Kent v. Rand*, S. C., N. H., July 30, 1886; 5 Atl. Rep. 760.

8. **CORPORATION—Legal Existence, how Questioned—Quo Warranto by Prosecuting Attorney.**—When parties in good faith attempt to organize as a corporation under a law authorizing such incorporation, and hold property and perform acts as a corporation, its legal existence can only be questioned at the suit of the state, instituted by the proper prosecuting attorney, and not by a private individual. *North v. State ex rel. S. C. Ind.*, Sept., 14, 1886; 8 N. East. Rep., 159.

9. **CRIMINAL LAW—Homicide—Trial—Circumstantial Evidence—Conviction—Sufficiency of Evidence—Excluding Every Other Hypothesis—Cumulative Evidence—Indictment—Several Counts—Verdict.**—Where it is sought to establish homicide by circumstantial evidence, the circumstances, when taken together, should be of a conclusive nature and tendency; leading, on the whole, to a satisfactory conclusion, and producing in effect a reasonable and moral certainty that the accused, and no one else, committed the offence charged. It is not sufficient that they create a probability, though a strong one. If, therefore, assuming all the facts to be true which the evidence tends to establish, they may yet be accounted for upon any hypothesis which does not include the guilt of the accused, the proof fails. It is essential that the circumstances, taken as a whole, and giving their reasonable and just weight, and no more, should to a moral certainty exclude every other hypothesis. *Com. v. Webster*, 5 Cush. 319. Evidence of distinct and independent facts of a different character, though it may tend to establish the same ground of defence, is not cumulative within the rule. *Waller v. Graves*, 20 Conn. 305; *Baker v. French*, 18 Vt. 460. Where distinct offences are charged in separate counts of an indictment, the jury must either return a general verdict of not guilty, or respond to each charge in their finding. *Wilson v. State*, 20 Ohio, 26; *Williams v. State*, 6 Neb. 334. *Casey v. State*, S. C. Neb. Sept. 22, 1886; 29 N. W. Rep. 264.

10. **DEEDS—Boundaries—Construction—Number of Acres Bounded—Number of Acres Stated in Deed—Covenant of Warranty—Statute of Limitations—Breach—Satisfaction—Assignment—Mortgage—Eviction—Outstanding Title—Deed—Proof of Ownership.**—The deed in question, after describing the other boundaries, was "west by Woodford line; supposed to contain 140 acres, more or less." This was followed by further description as being the same lands which were described in two mortgages therein specified. Then followed this clause: "Intending to convey the same lands, and no other, which passed to me by virtue of the foreclosure of said mortgages." *Held*, that the latter clause should not be treated as anything more than a reference to the mortgages and decree for further and more particular description. The fact that the land contained within the described boundaries was more than the amount stated in the deed—140 acres, more or less—cannot relieve the vendor from his covenant of warranty. When the boundaries describe the lands with certainty, they control the quantity, although stated incorrectly in

the deed; such statement of the number of acres being mere matter of description, and not a covenant on the part of the grantor. The statute of limitations is not a defense to a breach of a covenant of warranty, as such covenant runs with the land. The levy of an execution by plaintiff's creditor upon lands conveyed under a covenant of warranty, is not a satisfaction of the breach of such warranty; the grantor must make good the covenants of his deed. D. conveyed certain lands to P., with a covenant of warranty, and took a mortgage back on the same as security for part of the purchase money. Afterwards P. conveyed to B., with covenant of warranty, but excepted the mortgage which B. assumed. B. did not pay the mortgage, but conveyed to plaintiff by quitclaim deed, making no mention of the mortgage, which at that time was overdue. D. then foreclosed his mortgage, and no one redeemed. *Held*, that the plaintiff took the same right against D., on his covenant of warranty, that he would, had not P. mortgaged the land back to D.; that D.'s covenant of warranty was none the less broken by his taking a mortgage from his grantee to whom he covenanted, and the damages for its breach were none the less. A deed shows no title in itself in the grantor; and in order that such title may constitute eviction, it must be accompanied either with proof of possession corresponding to the deed, or of title in the grantor. *Wilder v. Davenport*, S. C. Vt. Aug. 18, 1886; 5 Atl. Rep. 758.

11. *Trust Deed—Escrows—Will—Election by Widow—Estoppel—Decree of Partition—Co-Tenants.*—Where title is claimed under a conveyance from a trustee and the *cestui que trust*, an allegation that the deed giving them title and power to sell was never delivered, but was left with the trustee for safe-keeping, and subsequently delivered up and canceled, is a good defense. Where a widow, with knowledge of her rights, makes an unequivocal assumption of ownership of one of two properties between which she has a right to choose, it is an election. Parties taking under a decree of partition are estopped from setting up title derived from the deceased owner of the property adverse to that of their co-tenants under the decree. *Burroughs v. De Couts*, S. C. Cal. July 81, 1886; 11 Pac. Rep. 784.

12. *DESCENT—Guardian—Probate Court—Sale—Infant—Will.*—The conversion of the real estate into money by the guardian of a minor ward, does not alter the course of descent. Hence, where a guardian sold real estate of his ward, inherited from her parents, by authority of the probate court, for the purposes of the guardianship, and the ward died during her minority, the surplus proceeds of the estate sold descends, and a will made by the infant ward would be ineffectual to interrupt the descent. Where the real estate had been held by her parents as tenants in common, the surplus proceeds thereof will descend in moieties, according to the canons of descent, one half going to the next of kin of the blood of the father and the other to the next of kin of the blood of the mother. *McCabe and Canning's Case*, S. C. R. I. June 19, 1886; 2 N. Eng. Rep. 62.

13. *EMINENT DOMAIN—Measure of Damages—Railroads—Lessor and Lessee—Machinery—Cost of Removal.*—When the lessees of a lot of ground from year to year are obliged, by reason of the taking of part thereof by a railroad company, to remove therefrom the machinery and apparatus

used by them in carrying on their business, and to remove the same elsewhere before the expiration of a current year of their tenancy, they are entitled to recover from the railroad company, the difference between the value of such machinery and apparatus in connection with the business conducted on the property and its value when removed and applied to use elsewhere. Such damages may include the cost of removing the said machinery. *Philadelphia, etc. Co. v. Getz*, S. C. Penn. Oct. 4, 1886; 18 Weekly Notes of Cases, 193.

14. *EQUITY—Reforming Deed.*—A court of equity will reform a written instrument of conveyance so as, by enlarging or narrowing its terms, to make it conform to the original intention of the parties as expressed in their verbal contract; and this, notwithstanding the statute of frauds, the spirit of which is not thereby violated. *Noel v. Gill*, Ky. Ct. of App. Sept. 21, 1886; 1 S. W. Rep. 428.

15. *Specific Performance—Inadequacy of Price—Fraud.*—Mere inadequacy of price is no ground for the rescission of a contract. To constitute a case for the interference of a court of equity, such inadequacy must be coupled with fraud, weakness of mind, or pecuniary embarrassment. *McKinney v. Crady*, Ky. Ct. App. Sept. 11, 1886; 1 N. W. Rep. 402.

16. *EXECUTION—Homestead—Gift—Liability to Indebtedness Prior to Acquisition—Petition to set Apart—Pleading.*—Under the statutes of Kentucky, (Gen. St. c. 88, art. 18, § 16,) land acquired by gift by a debtor, either before or after the debt sought to be enforced against it was created, and used and occupied by the debtor as a homestead, is not liable to execution or other process for debt. A petition in proceedings to have land set apart as a homestead need not state that the land was acquired and used as such, prior to the creation of the debt sought to be enforced against it. *Holcomb v. Hood*, Ky. Ct. App. Sept. 9, 1886; 1 S. W. Rep. 401.

17. *EXTRADITION—Habeas Corpus—Fugitive from Justice—Requisition—Authentication of Information—Certificate of Governor—Authentication by Signature of Prosecuting Attorney—Fraud of Sheriff.*—The appellant committed a felony in Michigan, and fled to Indiana, where he committed another felony, for which he was indicted, arrested, and imprisoned. While he was in prison a requisition from the governor of Michigan was delivered to the governor of Indiana, who issued his warrant. After this warrant was issued, the appellant escaped, and fled to Ohio; whereupon a requisition was obtained, and, on a warrant issued by the governor of Ohio, the appellant was brought back to the prison from which he had escaped, and after a time the prosecutor entered a *nolle prosequi*. *Held*, that the appellant was rightfully surrendered to the agents of the State of Michigan. It is not necessary for the governor who issues a requisition for a fugitive from justice to certify that the information and other papers accompanying the requisition are genuine; it is sufficient to certify that they are duly authenticated. Where the papers and information are authenticated by the signature of the prosecuting attorney, and by affidavit, it is sufficient. The fact that the sheriff in charge of the jail in which the appellant was confined, knew that there was to be no trial of the indictment found against the appellant in this State, would not prejudice the rights of the State

of Michigan. *Hackney v. Welsh*, S. C. Ind. June 26, 1886; 8 N. East. Rep. 141.

18. **FRAUD—Evidence—Functions of Court and Jury—Sheriff's Sales—Where Evidence of Fraud Wholly Insufficient, Court Should Withdraw the Case from the Consideration of the Jury—Evidence Held Insufficient to go to a Jury Upon an Allegation of Fraud.**—While it is true that juries are the judges of the credibility of witnesses, it is the function of the court to pass upon the sufficiency of the whole testimony. If the jury should accept the uncorroborated testimony of one witness, and disregard without reason the opposing and concurring testimony of five equally credible witnesses, with equal opportunity of observation and knowledge, it is within the power of the court trying the case, and where the question is properly raised for the Supreme Court on writ of error, to pass upon the sufficiency of the testimony and declare its convictions, notwithstanding the verdict. That a property was purchased at a very low price, and that the former owner continued in possession after the sale, might be urged with much force as a badge of fraud in the case of a private sale. But such an inference does not arise in case of a judicial sale. At a sheriff's sale, open to all bidders, the fact of a small price is entitled to no weight whatever as the basis of an inference of fraud. Before a title to real estate purchased at an open public judicial sale, for the highest price offered, can be swept away, fraud must be proved by evidence of a satisfactory character, and if there is no such evidence, the jury should be so instructed, and the case withdrawn from their consideration. While fraud, like any other fact, can be proved by indirect evidence, it is a serious allegation, and not to be lightly inferred. Though a number of circumstances are shown, which might be expected if fraud existed, if they are equally consistent with an innocent purpose, they do not singly or collectively warrant a conclusion of fraud. An agreement between the purchaser at a sheriff's sale and the defendant in the execution, that the former will convey the property to the latter upon being reimbursed for all the money he has expended, is lawful. *Meade v. Conroe*, S. C. Penn., Oct. 4, 1886; 18 Weekly Notes of Cases, 176.

19. — **Fraudulent Conveyance—Title of General Assignee.**—A general assignee stands in the shoes of a creditor as against a fraudulent grantee of his assignor, and he may sue to set the deed aside. A general assignee, though he represents the assignor, is not bound by his fraudulent conveyance to his wife. *Schaller v. Wright*, S. C. Iowa, June 14, 1886; 22 Rep. 401.

20. — **Misappropriation of Trust Funds—Trustees' Commissions—Taxes Paid to be Allowed.**—Where a trustee has misappropriated trust funds to his own use, in a suit against the sureties on his bond, who are found liable for the full amount which would be due from the trustee upon a proper management of the property intrusted to him, the sureties are to be allowed a sum equal to what would have been allowed the trustee as charges and commissions had he properly managed the estate; but such commissions are to be allowed but once where the trustee has continued to hold the funds for management after the parties for whom they were so held were entitled to receive them, and the trustee is to be allowed taxes paid by him in such case where they were paid on property which he falsely pretended to hold in order to

conceal his fraud in disposing of it. *McKim, Judge, etc. v. Hubbard*, S. J. Ct. Mass., Sept. 16, 1886; 8 N. East. Rep. 152.

21. **INJUNCTION.—Threatened Trespass—Proposed Structure—Ways—Highway Commissioners—Discretion.**—A mere threat to commit a trespass upon real estate is not in itself evidence of such an irreparable injury as to justify an injunction, where there is no allegation of insolvency of the defendant. In order to warrant an injunction against the erection of a proposed structure, a very strong case must be made out, both by the bill and the proofs, as to the injurious effects of such a structure. Otherwise the courts will leave the injurious effects to be ascertained by experiment. The commissioners of highways are invested with discretion as to the proper method of construction of embankments and bridges to be erected by them on the line of public highways within their jurisdiction. *Thornton v. Roll*, S. C. Ill., Sept. 9, 1886; 8 N. East. Rep. 146.

22. **INSURANCE.—Life Insurance—Action—Parol to Supplement Written Instrument—Legal Representatives—Right to Maintain Action.**—C. obtained a certificate of life insurance from the United Order of the Golden Cross, payable to H. at C.'s death. In an action by C.'s executor against H. to recover the same, held, that evidence was admissible to prove that the defendant promised C. that, after deducting from the insurance money whatever sum might be due him from C. at C.'s death, he would pay the balance to C.'s heirs. Held, also, that the legal representative of deceased promisee is the proper party to enforce the contract, though made for the benefit of the heirs. *Catland v. Hoyt*, S. C. Me., Sept. 20, 1886; 5 Atl. Rep. 775.

23. **INTEREST.—Computation—When Rests are to be Made.**—A., to whom a part of the principal of a trust fund was to be paid upon his becoming of age, reached his majority May 16, 1873, and at that time the trustee rendered an account of the trust property held by him for the benefit of A., and B., A.'s brother. The trustee, at the time, had misappropriated to his own use a portion of the funds held in trust; but in his account included accumulations, real or pretended, to a certain amount, and treated the property previously disposed of as still in his hands. On November 17, 1875, a settlement was made between the trustee and A. on the basis of the account, and the income of A.'s proportionate share, with its proportionate accumulation from May 16, 1873, the date of A.'s majority, to November 17, 1875, was paid A., together with \$2,000 out of his share of the principal fund. Held, that interest was properly cast upon A.'s share of the principal, with its share of added accumulation remaining in the trustee's hands, from May 16, 1873, a rest being made as of that date; an exception having been made where the trustee was charged with dividends paid. In a suit against a trustee for misappropriation of funds, interest is to be computed to the date of the execution. *McKim, Judge, etc. v. Hubbard*, S. J. Ct. Mass., Sept. 16, 1886; 8 N. East. Rep., 152.

24. **LACHES.—Action for False Representations—Failure to Enforce Judgment.**—Plaintiff's intestate held a judgment against the defendant for fifteen years (once renewed), which he had failed to collect by execution, and finally suffered to outlaw, trusting to defendant's representations that he had no property liable to be applied in satisfaction

thereof. The defendant had fraudulently transferred lands to his father before the recovery of the judgment, which he untruly represented to have been upon full consideration paid, and had otherwise deceived his judgment creditors in respect to the ownership of his property. *Held*, that reasonable diligence required that the creditor should seek to discover the property of the debtor, or the consideration therefor alleged to have been received, by appropriate proceeding in court, and not to rest implicitly upon the statements and conduct of a hostile and interested party till his legal remedies upon the judgment were lost by lapse of time; and that the plaintiff was not, therefore, entitled to bring an independent action for damages by reason of the alleged fraud and deceit of defendant. *Morrill v. Madden*, S. C. Minn., Sept. 6, 1886; 29 N. W. Rep. 193.

25. LANDLORD AND TENANT.—*Defect in Premises—Liability of Landlord to Repair—Several Tenants—Neglect—To Whom Liable.*—In the absence of any secret defect, deceit, warranty, or agreement on the part of the landlord to repair, he cannot be held liable to the tenant, or any one rightfully occupying under him, for an injury caused by the leased premises getting out of repair during the term, unless it be by reason of his own wrongful act, or failure to perform a known duty. This principle extends to cases where premises are leased to several tenants, and the injury has been caused by a defect in parts used by all of them in common, like halls and stairways. Where a landlord has been guilty of some wrongful act or breach of positive duty in not repairing leased premises, he is not liable for an injury caused thereby to one occupying the premises without rightful authority, as to a sub-tenant in possession contrary to the terms of the original lease. *Cole v. McKey*, S. C. Wis., Sept. 21, 1886; 29 N. W. Rep. 279.

26. LIMITATIONS.—*Statute of Limitations—Adverse Possession—Co-Tenancy—Estoppel—Probate Court—Jurisdiction.*—Where a conveyance is made by a party in the exclusive possession, under a deed which purports to convey the whole property, and the grantee goes into the open and notorious possession of the whole, neither grantor nor grantee having notice of a co-tenancy, their possession, if for the statutory period, will create a good title by adverse possession in the grantee. A party who is in possession of land under a deed will not be estopped from asserting title, by adverse possession, by the action of the probate court in decreeing to the heirs of a former owner an undivided one-half of the property. Had he appeared in the probate proceedings, and set up his adverse title, the probate court would have had no authority to hear and determine the question raised. *Bath v. Valdez*, S. C. Cal., July 30, 1886; 11 Pac. Rep. 724.

27. —. *Statute of Limitations—Adverse Possession—User of Water—Disputing Right of Possession.*—An adverse possession and user of water for five years continuously and uninterruptedly, with the knowledge of and to the injury of the true owner, will bar his right thereto; but a mere claim of right to the use and enjoyment of water, however long continued, will not ripen into adverse title thereto. If water is held and used adversely to the true owners for five years next before suit is brought, the mere disputing of the right to such possession by the owners will not prevent the bar of the statute. *Cox v. Clough*, S. C. Cal., July 30, 1886; 11 Pac. Rep. 732.

28. —. *Statute of Limitations—Guaranty—Consideration—Practice.*—The question was, whether the giving of a guaranty on a promissory note by the defendant while bankruptcy proceedings were pending against him, removed the bar of the statute of limitations, and, neither party wishing to go to the jury, the court ordered a verdict for the plaintiff. *Held*, that the verdict should be upheld if there was any evidence to sustain it; and that the evidence was quite as consistent with the idea that the guaranty was given for a lawful as for an unlawful purpose. The moral obligation resting upon one whose debts have been discharged in bankruptcy, is a sufficient consideration for a guaranty of their payment. *Robinson v. Larabee*, S. C. Vt., Aug. 21, 1886; 7 East. Rep. 64.

29. MASTER AND SERVANT.—*Negligence of Fellow-Servant—Defective Shaft in Mine.*—In an action against a mining company for personal injuries suffered by an employee, where the testimony disclosed that the partition between the stairway and car-track in the shaft of a mine which plaintiff was ascending was defective, so that a timber thrown down the car-track went into the stairway, and injured him, but that the promoting cause of the injury was the negligence of a co-employee in throwing the timber down the shaft: *Held*, that the defendant was not liable. *Kivem v. Providence, etc. Co.*, S. C. Cal., Aug. 12, 1886; 11 Pac. Rep. 740.

30. MORTGAGE.—*Chattel Mortgage—Void for Usury—Constructive Delivery—Trove and Conversion—Judgment in Action to Recover Other Property not a Bar.*—S. held a chattel mortgage upon wheat and other personal property belonging to W. admitted to be usurious. It also contained a clause authorizing the mortgagee to take possession of the mortgaged property before it became due. A few days before it matured he procured of W., the mortgagor, a writing by which the latter, in terms, "turned the property" described in the mortgage to S. The wheat was not, however, removed, but still remained in the granary of W., and under his control. Subsequently S. came to W.'s premises, and without his consent, and against his will, took and carried away the wheat, and thereafter sold the same. *Held*, that the mortgage was void, and that the property was not actually applied in payment of the same, through the constructive possession obtained under the writing referred to, and that W. was entitled to recover the value of the wheat so taken in an action for the conversion thereof. *Held*, also, that the judgment in a subsequent action by W. to recover other property covered by the same mortgage, in which the question of usury was not raised, was not a bar to this suit. *Witherell v. Stewart*, S. C. Minn., Sept. 7, 1886; 29 N. W. Rep. 186.

31. MORTGAGES.—*Foreclosure—Rents and Profits—Rents and Profits Pledged for Payment of Mortgage Debt—Sequestration of Rents—Taking Possession a Means of Payment—Payment—Appropriation of Payments by Law.*—A prior mortgagee, who has had possession of the mortgaged premises, must account for rents and profits to the subsequent incumbrancer, but a subsequent incumbrancer in possession is not bound to account to the prior incumbrancer. A mortgage which does not, by its terms, pledge the rents and profits of the mortgaged premises for the payment of the mortgage debt, gives the mortgagee no lien on them, and the mortgagor may take them, or assign

them, without liability to account to the mortgagees for them. Under the rule now in force, a prior incumbrancer has the right, as against the mortgagor and subsequent incumbrancers, in his case security is precarious, to have the rents of the mortgaged premises accruing subsequent to the appointment of a receiver sequestered for his benefit. Taking possession of the mortgaged premises is a means to which a mortgagee may resort to obtain payment of his debt, and a payment obtained in this way is subject, in respect to its appropriation, to the legal rules governing the appropriation of other payments. A debtor who makes a payment to his creditor, to whom he owes two or more debts, has a right to direct to which debt the payment shall be applied. If he simply hands the money over to his creditor, without direction as to its application, his creditor may apply the money as he pleases; and if neither party has exercised the right of appropriation, and a dispute subsequently arises, the court will make the appropriation, and in doing so, will, as a general rule, apply the payment to the debt which is least secure. *Leeds v. Gifford*, Court of Chancery, N. J. Sept. 24, 1886; 5 Atl. Rep., 795.

22. **NEGLIGENCE—Contributory Negligence—Travelers at Railroad Crossing.**—It is negligence per se for a traveler to cross a railroad track without first looking and listening for a coming train. If his view is obstructed, he must listen the more attentively; and if he is riding with bells attached to his sleigh, and does not stop his horse in order to listen, he is guilty of such contributory negligence that no action can be maintained against the railroad company for any injuries sustained. *Chase v. Maine etc. Co.*, S. C. Me., Sept. 20, 1886; 5 Atl. Rep. 771.

23. **PARTNERSHIP.—Action not upon Partnership Matters—Surplusage—Pleading—Judgment—Action to Set Aside Former Judgment—Pleading.**—Describing the plaintiffs in the title of an action as partners is surplusage, where the suit is not upon a partnership matter, and an allegation of compliance with the law relative to filing and publishing notice of partnership is unnecessary. In an action to set aside a judgment brought by a subsequent creditor, an allegation that the property levied upon by the defendants is all the property of the common judgment debtor is sufficient, without the further allegation that an execution had been issued, and returned unsatisfied. *Lee v. Orr*, S. C. Cal. Aug. 12, 1886; 11, Pac. Rep. 745.

34. **QUO WARRANTO—Right to Office—Suit by Rival Candidate—Justice of the Peace—Judicial Office—Office and Officers—Election to Office not Judicial—Township Trustee—Computation not Judicial.**—Proceedings between rival candidates to determine the right to office will not prevent the state from questioning the right of the party attempting to hold it. The office of justice of the peace is a judicial office under our constitution and statutes. A judicial officer may be elected to an office not judicial, before the expiration of his term, provided the term of the second office does not begin until after the expiration of the term of the judicial office. Appellant and M. were opposing candidates for the office of township trustee. M. held a commission as justice of the peace for a term of four years from April 17, 1882. The term of trustee began April 16, 1886. Held, that M.'s term as justice of the peace did not expire until midnight of April 16, 1886; that he was, therefore,

ineligible, and appellant, having received the next highest number of votes, was entitled to the office. *Vogle v. State ex rel.* S. C. Ind. Sept. 14, 1886; 8 N. East. Rep. 164.

35. **SALE.—Warranty.**—There is an implied warranty in the sale of hogs purchased for the market, that they are fit for that purpose, when the vendee, having no opportunity of inspection, trusts to the judgment of the vendor to select them, and both parties understand for what they are intended. In case of a breach of such warranty, the vendee can recoup the damages without a return of the chattels or an offer to return them. *Best v. Flint*, S. C. Vt. July 1, 1886; 2 N. Eng. Rep. 604.

36. **Wrongful Sale of Stock—Chargeable for Dividends Paid after Sale.**—Where a trustee under a will has wrongfully disposed of shares of stock held by him in trust, and appropriated the proceeds to his own use, but has constantly represented the stock as being in his possession, he is liable for the value of the same, as that value was at the date of the writ, in a suit brought for an accounting, and is chargeable for all dividends that were payable on the same up to that time, notwithstanding a power was given him in the will to sell and dispose of the trust property as he deemed advisable, and to change investments, and where the sale of the stock was a part of a transaction by which the funds were to be misappropriated. *McKim Judge etc. v. Hibbard*, S. J. Ct. Mass. Sept. 16, 1886; 8 N. East. Rep., 152.

37. **TENANTS IN COMMON.—Rights and Liabilities of—Action by and Against Each Other—Assumpsit Between Co-Tenants of Land for the Rents and Profits—Set-Off—Lime and Fertilizers.**—In 1874 A., and B., his ten-year old son, received a devise as tenants in common of certain land charged with the payment of certain legacies. A. took possession of the land, paid the above legacies, and all the taxes, farmed the land, fertilized it, repaired the fences when necessary, and received to his own use all the crops until his death in 1884. Until 1880 B. lived with his father, but had nothing to do with this land. From that time until his father's death he lived elsewhere, earning his own living. He never received any share of the profits of the land. In an action of *assumpsit* brought by B. against the executors of A. for his share of the rents and profits of this land: Held, that evidence as to the value of lime or other fertilizer used by B. in farming the land was admissible as a set-off. Query, whether an action of *assumpsit* for a proportion of the rents and profits of land held in common, can be maintained by one co-tenant against another. *Luck v. Luck*, S. C. Pa., Oct. 4, 1886; 18 Weekly Notes of Cases, 195.

38. **TROVER AND CONVERSION.—Evidence of Conversion—Defendant's Breach of Contract.**—To constitute a conversion of chattels, there must be some exercise of dominion over the property, in repudiation of, or inconsistent with, the owner's rights. In an action of trover for a horse hired by the defendant to go to and from a place named without stopping, his mere delay in returning is not sufficient evidence of a conversion. *Evans v. Mason*, S. C. N. H., July 30, 1886; 5 Atl. Rep. 766.

39. **TRUST.—Misappropriation of Funds—Sale of Stock—When Chargeable with Full Value.**—Where a trustee under a will has wrongfully dis-

posed of stocks, and appropriated the proceeds to his own use, he and his sureties, upon an accounting, are liable for the value of the shares as inventoried by the trustee at the time of the assumption of his trust, or for the market value of the same at the date of the writ, in a suit brought against the sureties, and where the value is more than the inventoried value, in the absence of evidence of what was actually obtained for the stocks. *McKim, Judge, etc. v. Hibbard*, S. J. Ct. Mass., Sept 16, 1882; 8 N. East. Rep. 152.

40. TRUSTS.—*Resulting Trust—Termination of Trust—Cemetery—Part of Land not Used for Cemetery—Abandonment of Cemetery—Re-Conveyance by Trustee—Adverse Possession by Trustee—Appointment of Trustees.*—The author of an express trust, not having provided, in the creation of such trust, to whom the property should belong upon a failure or termination thereof, has a right to transfer the property. The purchaser takes subject to the trust, and stands in the position which the grantor would have occupied but for the conveyance. Where land was conveyed to a trustee by the city of Los Angeles to be used for cemetery purposes, and only a small portion of the land was devoted to such purpose, there was, as to the portions not so used, when it was established that it could not be used for such purpose, a resulting trust in favor of the city and its assigns. By abolishing a cemetery, the land for which had been conveyed by the city of Los Angeles to a trustee to be used for cemetery purposes, the city terminated the trust relation, and it thereupon became and was the duty of the trustee to re-convey the property. A trustee cannot retain possession of lands held by him in trust after repudiating his trust, and claim adversely, until his claim ripens into a title under the statute of limitations. A court of equity will see to it that trustees are appointed to manage trust property when required for its safety or proper administration, but it will not do so when no good result is to be accomplished thereby. *Schlessinger v. Mallard*, S. C. Cal., July 30, 1886; 11 Pac. Rep. 728.

QUERIES AND ANSWERS.*

[Correspondents are requested to draw up their answers in the form in which we print them, and not in the form of letters to the editor. They are also admonished to make their answers as brief as may be.—Ed.]

QUERIES.

27. A. contracts to build a house for B. and in the contract there is a clause that A. will deliver the building free of mechanic or other liens. What effect would such a clause have on material men, sub-contractors and day laborers. If B. paid A. in full according to contract, and it turns out that A. has not paid for all the material and still owes sub-contractors and day laborers could they, under the above claim, file a lien on said building. Cite authorities.

J. W. S.

QUERIES ANSWERED.

Query 17. [28 Cent. L. J. 167].—A county purchases a tract of land (under the provisions of an act of Congress) upon which to locate a Co. seat. The town is platted into blocks, lots, streets and alleys. The plat is acknowledged by the county commissioner, and recorded. Would non-user of a street or alley for

25 years amount to an abandonment? If not, what length of time would amount to an abandonment.

W. H.

Answer:—It is sometimes held that private easements may be lost by non-user, but generally only in cases where adverse rights have intervened. *Corning v. Gould*, 16 Wend. 531; *Hall v. McCaughey*, 51 Penn. St. 43; *Owen v. Field*, 102, Mass. 90; *Wilder v. St. Paul*, 12 Minn. 192; *Veghte v. Rantan & Co.*, 4 C. E. Green, 142; *Arnold v. Stevens*, 24 Pick. 106; *Jewett v. Jewett*, 16 Barb. 150; 3 Kent's Com. 448. But the rights of the public in streets and public places are never lost by non-user; and many authorities hold that they cannot be lost even by adverse possession. 2 Dill. Mun. Corp. §§ 697-675 and cases cited. In this case an abandonment will never accrue from non-user. M.

RECENT PUBLICATIONS.

THE AMERICAN REPORTS. Containing all decisions of general interest decided in the courts of the last resort in the several States with notes and references by Irving Browne. Vol. LIV, containing all cases of general authority in the following reports: 77 Alabama; 8 Colorado; 78 Georgia; 112 Illinois; 104 Indiana; 65 Iowa; 15 Lea; 4 Mackey; 64 Maryland; 140 Massachusetts; 55 Michigan; 84 Missouri; 47 New Jersey Law; 101 New York; 43 Ohio State; 20 Texas Court of Appeals; 64 Wisconsin. Albany: John D. Parsons, Jr., Publisher, 1886.

We have had occasion more than once of late, to call the attention of our readers to this valuable compilation of adjudged cases. We can now add nothing to the commendation which we have hitherto bestowed upon it. The volume before us is uniform with its predecessors and fully up to their standard. There is, however, one feature in this volume upon which we may make a remark. Besides the customary index and table of cases, there is, prefixed to the book, a list of cases overruled, doubted or denied. This is an unusual appendage to volumes of reports and we think is worthy of adoption by all reporters.

JETSAM AND FLOTSAM.

A PROBLEM SOLVED.—In a book review the *Irish Law Times* recently said: "Those who may have been 'metagrobolised' by the Greek motto on the title page, have yet had no difficulty in 'incornifistibulating, and laying up into the hamper of their understanding' the instructive purport of his subsequent pages." This lets in a flood of light upon a problem hitherto inscrutable, to-wit: the origin of the Irish brogue. It is not strange that the tongues of people who use words of such dimensions should become twisted—the wonder is that they are not effectually tied into a hard knot.

A boy twelve years old was the important witness in a law suit. One of the lawyers, after cross-questioning him severely, said: "Your father has been talking to you and telling you how to testify, hasn't he?" "Yes," said the boy. "Now," said the lawyer, "just tell us how your father told you to testify." "Well," said the boy modestly, "father told me that the lawyers would try and tangle me in my testimony, but if I would just be careful and tell the truth, I could tell the same thing every time."—Ex.

The Central Law Journal.

ST. LOUIS, OCTOBER 29, 1886.

CURRENT EVENTS.

THE HOUSE OF LORDS.—On another page of this number will be found an interesting speech of Lord Coleridge on the House of Lords. It is remarkable if read judiciously between the lines, as well as upon the face of the paper, as indicating the present, and presaging the future tendency of enlightened public opinion regarding the venerable fossil of which it treats. He advocates a *reformed* House of Lords, composed of men who shall sit there, because they are "sent there by some system of choice." This, notwithstanding his careful hedging, "speaking roughly and off-hand, and I pray you remember, after dinner," means, when interpreted and read between the lines, and subjected to due judicial construction, that Lord Coleridge thinks that the House of Lords *as* House of Lords has outlived its usefulness, but that a second legislative chamber is essential to good government. He thinks that the members of such a chamber should not be born, and "swathed and dandled into legislators," but should be "chosen," and should be responsible for the due performance of their duties to the authority by which they are "chosen." He does not say so, certainly, but choice implies responsibility of the chosen to the chooser, and responsibility implies a fixed and definite term of service. His allusion to the American Senate is, in this point of view, very significant. Such a chamber as Lord Coleridge indicates would be a very good senate, provided its members shall be chosen by the proper authority and in such a manner as to secure adequate representation of the interests of the whole kingdom. It would, however, be in no proper sense a House of Lords. It is of the very essence of that body that its hereditary legislators represent nobody but themselves, and no interest except their own, are responsible to no constituency, and are amenable to no authority.

Whether there is among the peers a sufficient number of suitable persons to form the
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new chamber is an immaterial issue, for there are plenty of such persons outside of that charmed circle.

Any reform, any change worthy of the name, carried into effect in the spirit of Lord Coleridge's suggestions, must needs include three fundamental conditions: First, that the new legislators shall be "chosen and sent" by a body or bodies of persons who represent the interests of the whole kingdom. Second, that the choosing and sending bodies shall have full and free choice of the members from all classes of society, untrammelled by any relics of feudalism. Third, that the members so sent shall act under a proper sense of responsibility to their constituency, holding office for a definite, or at least, a terminable period, and amenable to all the impulses of an enlightened public opinion.

The existing House of Lords is manifestly an excrescence; for more than half a century its only political function has been, alternately to obstruct and succumb, and for that period England has had really but one legislative body. If it is expedient to have two, as is the received modern opinion, the new one must be created, but before that can be done a graver problem than is generally supposed will confront the innovators. The House of Lords must be abolished before the new chamber can be created, and if the great statesman to whom Lord Coleridge alludes, after having thought three times about abolishing the House of Lords, shall have finally resolved to do it, he will find before him an herculean undertaking.

As the House of Lords is an integral part of Parliament, its extinction can only be effected by revolution and re-construction, or by an act of Parliament, in assenting to which, that historic body would commit political suicide, decree its own dissolution and admit in the most solemn manner, that it is no longer worthy to bear more than a nominal part in the legislation of a great empire. That English peers could voluntarily do this is incredible; that they could be bribed or bullied into an act which to all the world would seem to be one of personal dishonor is equally impossible. What then remains except by the royal prerogative to fill the house with a sufficient number of new peers, who accept rank for a day only for the

purpose of dragging down to their own level those whose ancestors and predecessors have held that rank for centuries. Before any Statesman worthy of the name will (unless in the direst emergency) resort to such a measure for such a purpose, he will think, not three times, but three hundred times. The House of Lords may be undermined in the course of time by the steady growth of public opinion of which Lord Coleridge's speech is one of the most notable *indicia*, but most probably it will endure as long as any of the present elements of the English constitution.

NOTES OF RECENT DECISIONS.

NEGLIGENCE — CONTRIBUTORY AND IMPUTED NEGLIGENCE—MASTER AND SERVANT—PASSENGER IN PRIVATE CARRIAGE.—On the 1st of October, 1886, the Supreme Court of Minnesota took a new departure on the subject of contributory negligence, or, more properly speaking, made a distinction which has not heretofore been generally recognized. And in doing so, it cuts loose from a line of decisions founded upon a legal fiction which is not only absurd upon its face, but exceedingly unjust in its operation. In *Follman v. City of Mankato*,¹ the court held that a passenger in a private carriage, riding in it upon the invitation of the owner thereof, who was himself driving it, is not affected by his negligence contributing to the disaster by which she was injured. That negligence is not imputed to her, and the city by whose negligence the disaster was primarily caused, was responsible in damages to her. A distinction is taken between public and private carriages, which, in our judgment, is unnecessary and misleading. The ruling in many cases has been that a passenger in a public carriage, may be deprived of his remedy for injuries inflicted by third persons, by proof of the contributory negligence of the driver of the vehicle. In a leading English case,² a passenger in an omnibus was killed by an accident to which the negligence of the driver of the omnibus contributed. In an action by his administrator against the other party,

whose negligence had caused the disaster, the court held that the negligence of the driver of the omnibus must be imputed to the passenger, plaintiff's intestate, because he "identified himself" with the driver by voluntarily becoming a passenger. In a later English case,³ the court, Pollock, B., following *Thoroughgood v. Bryan*, comments on the language used in that case thus: "If it is to be taken that by the word 'identified' is meant that the plaintiff, by some conduct of his own, as by selecting the omnibus in which he was traveling, has acted so as to make the driver his agent, that would sound like a strange proposition, which could not be entirely sustained. But what I understand it to mean is that the plaintiff, for the purpose of the action, must be taken to be in the same position as the owner of the omnibus, or his driver." In a Wisconsin case,⁴ the English rule is followed. In that case the vehicle was hired and driven by one person, and another, the plaintiff rode in it and was injured by the negligence of the defendant, that of the driver contributing to the injury. The court held that the negligence of the driver must be imputed to the plaintiff on the ground of agency. It says:

"When the agency of a person in control of a private conveyance is express, there is no difficulty in the rule. The contributory negligence of the servant will defeat the master's action for negligence against a third person; and it seems that there ought to be as little difficulty in the rule when the agency is implied only. One voluntarily in a private conveyance, voluntarily trusts his personal safety in the conveyance to the person in control of it. Voluntary entrance into a private conveyance adopts the conveyance, for the time being, as one's own, and assumes the risk of the skill and care of the person guiding it. *Pro hac vice*, the master of a private yacht, or the driver of a private carriage, is accepted as agent by every person voluntarily committing himself to it. * * * There is a personal trust in such cases, which implies an agency."

The same rule has been followed in other

¹ 29 N. W. Rep., 317.

² *Thoroughgood v. Bryan*, 8 C. B. 115.

³ *Armstrong v. Lancashire, etc. Co.*, L. R. 10 Exch. 47.

⁴ *Prideaux v. City of Mineral Point*, 43 Wis. 513.

Wisconsin cases.⁵ And in Michigan there is a like ruling.⁶ And this it seems was a case similar to that in Minnesota in that it was a private carriage.

In a Pennsylvania case⁷ the court follows the English rule as to its conclusion, yet repudiates the "identity" doctrine and bases its decision upon considerations of public policy.

The Supreme Court of Minnesota declines to follow these rulings, and puts its dissent upon what strikes us as a very sensible ground, that the whole theory of "identity" of a passenger with the driver of a vehicle, or that the driver is in any fair sense the servant or agent of the passenger, is, in plain language, a mere folly. "We do not refer to cases recognized as being exceptional, where parties stand in peculiar relations to each other; such as that of parent and child, guardian and ward. The theory of 'identity' which may be taken as the ground of the decision in *Thorogood v. Bryan*, and other English cases, is so vague and undefined, as applied to circumstances such as are here presented, where no relation like that of master and servant, or principal and agent actually exists, and where the plaintiff is not only without fault, so far as appears, but without authority, respecting the conduct of the driver, that it is difficult to understand what is meant by it; and the explanatory remarks of Baron Pollock, *supra*, do not solve the difficulty of reconciling such a theory with the principle of law which affords a remedy to one who, being himself without fault, is injured by the wrongful act of another. It is enough to say, that this theory of identity has little or no support in this country; that the decision in *Thorogood v. Bryan* has not escaped criticism in the English courts, and has been generally repudiated in America."

It certainly seems ridiculous to say, that a gentleman entering an omnibus and paying his fare is "identified" with the driver in any other sense than that of a common humanity, or that a lady, (as in the case under consideration,) by accepting a gentleman's invitation to ride with him in his carriage, makes him

her servant" or "agent" in any sense whatever. The employment of such words in such a connection, and for such a purpose is not only an abuse of legal language, but a perversion of legal principles. In this connection the learned editors of *Smith's Leading Cases* say:⁸ "It is inconceivable that each set of passengers should by a fiction be identified with the coachman who drives them, so as to be restricted for remedy to one against their own driver or employee."

The Minnesota court is not without support in the stand which it has taken on this subject. In New York, in a case similar to that under consideration, a like conclusion was reached.⁹ And in a later case in the same State,¹⁰ the court explicitly denied the existence of a relation of agency under such circumstances, and in this was followed by a still later case.¹¹ The Supreme Court of the United States in a recent case,¹² held that the driver of a hired hack was not the servant of the passenger who had hired the vehicle, nor was his negligence imputable to the latter.

In New Jersey, there have been two cases sustaining the same view. One of these was the case of a passenger on a horse car who was injured by the concurrent negligence of the driver, and of the defendant;¹³ in the other case the plaintiff was a passenger in a hired hack.¹⁴ In both cases the doctrines of identity and agency were held inapplicable to cases in which a man merely pays a nickel or a quarter for a ride in a street car or a hack. In Ohio,¹⁵ and in Illinois,¹⁶ the courts have repudiated the doctrine of *Thorogood v. Bryan*,¹⁷ and refused to sanction the doctrines of identity or agency.

Upon the whole, we think that the Supreme Court of Minnesota has done wisely and well, in refusing to recognize the authority of a line of decisions founded upon a modern fiction of law, dependant upon a glaring and

⁸ 1 *Smith's Leading Cases*, 366.

⁹ *Robinson v. New York Central, etc. Co.*, 66 N. Y. 11.

¹⁰ *Dyer v. Erie, etc. Co.*, 71 N. Y. 228.

¹¹ *Masterson v. New York Central, etc. Co.*, 84 N. Y. 247.

¹² *Little v. Hackett*, 6 Sup. Ct. Rep. 391.

¹³ *Bennett v. New Jersey, etc. Co.*, 36 N. J. Law, 225.

¹⁴ *New York, etc. Co. v. Sternberger*, 20 Rep. 518 (1885).

¹⁵ *Transfer Co. v. Kelly*, 36 Ohio St. 86.

¹⁶ *Wabash, etc. Co. v. Shacklett*, 105 Ill. 364.

¹⁷ *Supra*.

⁵ *Honfe v. Fulton*, 29 Wis. 296; *Otis v. Janesville*, 47 Wis. 422.

⁶ *Lake Shore, etc. Co. v. Miller*, 25 Mich. 274.

⁷ *Lockhart v. Lictenthaler*, 46 Pa. St. 151.

fanciful perversion of a well defined legal relation, and usually operating to the hindrance of justice. The rule conflicts as well with common sense as with legal principle. To say that one who pays twenty-five cents to ride in an omnibus from a depot to a hotel is in any sense the "master" of the man who drives the vehicle, is simply and emphatically folly. A master is one who has the right to command; a servant is one whose duty is to obey, and neither command nor obedience is predicable of the relation between the parties. If the passenger orders the driver to go up A. street instead of B. street, he would probably be profanely snubbed for his impertinence, and to hold him responsible for the misdeeds of a man whom he cannot control, even in minor matters, is absurd as well as unjust.

JUDGMENTS AS EVIDENCE AGAINST THIRD PERSONS WHO ARE RESPONSIBLE OVER.

It is a general rule that a person who is responsible over to the defendant in an action at law for any loss or damage suffered by the latter in respect to the subject-matter of the suit, is concluded by a judgment recovered against the defendant without fraud or collusion, as to all the points necessarily determined by it, provided he had notice of the pendency of the suit and an opportunity to come in and make a defence.¹ Nor is this any relaxation of the rule that a judgment estoppel is binding only upon parties and privies. For the person so responsible, by being apprised of the action and by being granted an opportunity to interpose any defences which are available to him, and generally to controvert the adverse claim, is in effect made a party to the litigation, and can no longer be regarded in the light of a mere stranger.² And it is perfectly immaterial whether or not he does in fact participate in the defence of

the action. The two essentials are notice and opportunity to be heard. Given these, he stands in no better position than any defendant who neglects to interpose a meritorious defence; as to him the matter becomes *res adjudicata*.³

To apply these principles to a particular instance: where one who has conveyed land to another, with warranty of title, is vouched in by the latter, upon due and proper notice, to defend an action of ejectment brought by a third person against the warrantee for the recovery of the same land, the judgment in ejectment, if given for the stranger, is conclusive evidence, in a subsequent action by the covenantor against his grantor on the warranty of title, of the fact that the former has been evicted from his possession by a paramount title.⁴ But still—on the principle that a judgment is conclusive only of the matters necessarily determined by it—there are certain defences open to the grantor, even in this case, when sued on his warranty of title; such, namely, as could not have been involved in the controversy between the tenant and the evictor, and such as are not necessarily inconsistent with that judgment. Thus he may show that his covenant was special, or that he made no covenant, or that the recovery was upon a title derived from the warrantee himself or in consequence of some fact occurring after the date of the covenant.⁵

The same rule applies where the warrantee is plaintiff in a suit for the recovery of the

³ Love v. Gibson, 2 Fla. 598; Veazie v. Railroad, 49 Me. 119.

⁴ Knapp v. Marlboro, 34 Vt. 235; Swenk v. Stout, 2 Yeates, 470; Collingwood v. Irwin, 3 Watts, 310; Turner v. Goodrich, 26 Vt. 708; Ives v. Niles, 5 Watts, 323; Miner v. Clark, 15 Wend. 425; Pitkin v. Leavitt, 13 Vt. 379; Wilson v. McElwee, 1 Strobb. 65; Hinds v. Allen, 34 Conn. 195; Hamilton v. Cutts, 4 Mass. 349; Kelly v. Church, 2 Hill, 105; Chapman v. Holmes, 5 Halst. 90; Morris v. Rowan, 2 Harr. (Del.) 307; King v. Kerr, 5 Ohio, 158; Jones v. Waggoner, 7 J. J. Mar. 144; Cox v. Strode, 4 Bibb. 4; Middleton v. Thompson, 1 Spears, 67; Wimberly v. Collier, 32 Ga. 13; St. Louis v. Bissell, 46 Mo. 157; Graham v. Tankersley, 15 Ala. 634; Boyd v. Whitfield, 19 Ark. 439; Wendel v. North, 24 Wis. 223; Chicago, etc. R. R. v. Northern Line Packet Co. 70 Ill. 221; Davenport v. Muir, 3 J. J. Mar. 310; Williams v. Leblanc, 14 La. An. 737; Harding v. Larkin, 41 Ill. 413; Chamberlain v. Preble, 11 Allen, 370; Harbin v. Roberts, 33 Ga. 45. A contrary rule, however, prevails in North Carolina; Wilder v. Ireland, 8 Jones, 83; Martin v. Cowles, 2 Dev. & B., 101.

⁵ Chicago, etc. R. R. v. Northern Line Packet Co. 70 Ill. 221; Davenport v. Muir, 3 J. J. Mar. 310; Rawle on Cov. for Title, 209.

¹ Littleton v. Richardson, 34 N. H. 179; Salle v. Light, 4 Ala. 700; Mahaffy v. Lytle, 1 Watts, 314; Boston v. Worthington, 10 Gray, 496; Clark v. Carrington, 7 Cranch, 322; Hamilton v. Cutts, 4 Mass. 353; Bond v. Ward, 1 N. & McC. 201; Kip v. Brigham, 6 Johns. 158; Walker v. Ferrin, 4 Vt. 523; Tyree v. Magness, 1 Sneed, 276.

² Salle v. Light, 4 Ala. 700.

land. That is, where he brings ejectment against a person whom he finds in possession of the estate deeded to him by the warrantor, and gives the latter proper notice to join in the action and make good his title, and judgment passes against them, such judgment is conclusive evidence of a want of title in the grantor when the warrantee sues him on his covenant.⁶ But the grantee of land is not bound by a judgment in a suit commenced after such grant, by his own grantor against his immediate grantor upon the covenants in his deed.⁷ And where a grantor in a deed has once responded to a suit on his covenant of warranty, brought by a proper party, he is not liable to a second suit on the same covenant; and the judgment obtained against him in the first suit is admissible as evidence in the second.⁸ Where the warrantor is not notified of the pendency of the suit against his grantee, or has no opportunity to interpose a defence, the judgment against the warrantee cannot be used as evidence, in a subsequent action on the covenants of the deed, to show the superior title of the party recovering it, though it is admissible for the purpose of proving the *fact* of eviction.⁹ But this amounts, after all, to no more than saying that the judgment is competent evidence of its own existence.

When ejectment is brought against a tenant in possession of the land, and he gives due and legal notice to his landlord, and the landlord has an opportunity to come in and defend, the latter is bound by a judgment against the tenant.¹⁰

And even where the landlord receives no notice whatever of the action, and the stranger recovers judgment against the tenant, it is held, in Wisconsin, that the possession is adversely and completely changed by the judgment, and the landlord is so far bound by the judgment, notwithstanding his want

of notice, although he is not bound as to the title or future right of possession.¹¹ So a judgment in an action of ejectment cannot affect a person in possession of the premises when the suit is commenced unless he is made a party to the action.¹² But if a tenant of the defendant in such action has taken possession with actual notice of the pendency of the suit, he will be bound by the judgment as though a party.¹³ And where the terre-tenant has actually appeared and had an opportunity to make a full defence, even though he may not have availed himself of it, he is concluded to every intent.¹⁴

The same rule applies to the case of a sale of personal property with express or implied warranty of title. In a suit for a breach of such warranty of title, the record of a judgment for the value of the property, in favor of a third person and against the vendee (if it appears that the question of title was directly involved, and that the recovery was not upon a title derived from the vendee himself), is conclusive evidence against the vendor that the property was recovered by title paramount, provided it be shown that the vendee had given the vendor legal notice of the pendency of the action against him.¹⁵ On the same principle, where the assignor of a note warranted it free from set-off, and in a suit by the assignee against the maker, of which the assignor was notified, and in the prosecution of which he took part, there was a judgment for a set-off, it was held that in a subsequent action by the assignee against the assignor for deceit, that judgment was conclusive evidence of the set-off.¹⁶ And, in the language of Kent, J.: "It can make no difference that there are intermediate purchasers, and that the suit is against the last one, if the question of title is the sole matter in controversy. All the in-

¹¹ Striddle v. Saroni, 21 Wis. 173.

¹² Fogarty v. Sparks, 22 Cal. 142; Bradley v. McDaniel, 3 Jones (N. C.), 128.

¹³ Fogarty v. Sparks, *supra*.

¹⁴ Himes v. Jacobs, 1 Pen. & W. 152.

¹⁵ Marlatt v. Clary, 20 Ark. 251; Salle v. Light, 4 Ala. 700; Thurston v. Spratt, 52 Me. 204; Boyd v. Whitfield, 19 Ark. 447; Brown v. McMullen, 1 Hill (S. C.), 29; Barney v. Dewey, 13 Johns. 225; Pickett v. Ford, 4 How. (Miss.), 246; Blasdale v. Babcock, 1 Johns. 517.

¹⁶ Walker v. Ferrin, 4 Vt. 523; and see Tyree v. Magness, 1 Sneed, 276; Morgan v. Simmons, 3 J. J. Mar. 611.

⁶ Brown v. Taylor, 13 Vt. 631; Gragg v. Richardson, 25 Ga. 566; Pitkin v. Leavitt, 13 Vt. 379; White v. Williams, 13 Tex. 258; Farrell v. Alder, 8 Humph. 44.

⁷ Winslow v. Grindal, 2 Me. 64.

⁸ Vancourt v. Moore, 26 Mo. 92; Brady v. Spureck, 27 Ill. 478.

⁹ Hardy v. Nelson, 27 Me. 525; Stephens v. Jack, 3 Yerg. 408; Tam v. Shaw, 10 Ind. 469.

¹⁰ Chambers v. Lapsley, 7 Pa. St. 24; Ryers v. Rippey, 25 Wend. 432; Harvie v. Turner, 46 Mo. 444; Valentine v. Mahoney, 37 Cal. 389; Chant v. Reynolds, 49 Cal. 213; Van Alstine v. McCarty, 51 Barb. 326.

dividuals who have sold the property are alike warrantors, and can as well defend the title in the suit against the last purchaser as in a suit against themselves, if they have notice."¹⁷

An obligation to indemnify upon notice that suit has been brought, is also an obligation to defend the suit or to abide the consequences of a judgment, and the judgment will bind the indemnitor when the latter is notified to defend and fails to do so.¹⁸ The most familiar example of this species of responsibility is the case where the plaintiff in an execution gives the sheriff a bond conditioned to hold him harmless for selling property levied on under the execution and claimed by a stranger, and where the sale is made, and the real owner then recovers judgment against the officer for the property or its value. Under these circumstances, the judgment against the sheriff will be competent evidence, in a subsequent action by him against the indemnitor, that the plaintiff in the former suit has asserted his claim to the property in question in due form of law, and that what the sheriff has paid he was compelled to pay by legal proceedings; but it will not be evidence that the claimant against the sheriff, was, in fact, the real owner of the property and entitled to its possession, unless the indemnitor had notice of the suit and an opportunity to defend.¹⁹ But here, again, we find certain defences open to the person responsible over which were not included in the grounds of the former judgment, or are not inconsistent with it. Thus the indemnitor, though notified of the action against the sheriff and participating in its defence, will not be estopped to show that the verdict against the officer was rendered on account of his illegal conduct subsequent to the attachment of the property, or on account of his proceedings under other writs than that in which the indemnitor was plaintiff.²⁰

Another class of cases which furnish frequent opportunity for the application of the rule we are now considering, is that where an individual is liable over to a municipal corporation for damages which the latter has been

compelled to pay in consequence of the wrongful act or default of the former. Thus, where judgment is recovered against a town for injuries caused by a defective highway, and a certain railroad corporation is responsible over to the municipality for the damages so recovered, by reason of the fact that the defect in the highway was caused by the alteration thereof by the railway, the company, if notified of the pendency of the action and requested to assume the defence, are bound by the judgment, and it is conclusive upon them as to the cause of the injury and the extent of the damages, whether they appear in the case or not.²¹ Such is also the case where a person who places an obstruction in the public road is, by statute, liable over to the town for damages recovered by a traveller who was injured by such obstruction.²² And in the case of *Robbins v. Chicago*,²³ it was held that it is not necessary that express notice should have been given to the party secondarily liable to defend the suit against the municipal corporation, in order to make the judgment in such suit conclusive upon him; it is sufficient if he *knew* that the suit was pending, and could have defended it, *Clifford, J.*, saying: "The legal presumption is that he knew that he was answerable over to the corporation, and if so, it must also be presumed that he knew he had a right to defend the suit." In *Churchill v. Holt*,²⁴ it appeared that A. was the occupant of a building connected with which there was a hatchway in the street leading into the basement. The hatchway was once left open and unguarded, and M., a passenger in the street, fell into it and was injured. M. sued A. for damages and recovered a judgment, which A. paid. A. then sued B. for indemnity, alleging that the dangerous condition of the hatchway, on that occasion, was due to the negligent act of B.'s servant. On this state of facts it was held that the judgment in the suit of M. against the plaintiff was not conclusive against his right to maintain this action, *Morton, J.*, saying: "Under the pleadings in that suit, the judgment may have been rendered on the

¹⁷ *Kent, J.*, in *Thurston v. Spratt*, 52 Me. 204.

¹⁸ *Troy v. Troy*, etc. R. R. 3 Lans. 270; *Kip v. Brigham*, 6 Johns. 158.

¹⁹ *Burrill v. West*, 2 N. H. 190.

²⁰ *Boynton v. Morrill*, 111 Mass. 4.

²¹ *Venzle v. Railroad*, 49 Me. 119; *Portland v. Richardson*, 54 Me. 46.

²² *Littleton v. Richardson*, 34 N. H. 179.

²³ 4 Wall. 657.

²⁴ 127 Mass. 165.

ground that the plaintiffs were liable as occupants of the building, without any regard to the question whether they or a stranger to the suit removed the cover, or negligently left it unguarded. It conclusively shows that they were guilty of negligence in law as to the person injured, but it does not show that they were *participes criminis* with the defendants, and is not inconsistent with their right to maintain this action."

On a principle closely allied to those already discussed, it is held that a person who attends to the trial of a cause, not as a party, but upon notice by the defendant, on account of a liability of his, the amount of which will be affected by the judgment, may give evidence to lessen or defeat a recovery; and if he neglects to do so, he will not afterwards be permitted to give such evidence in an action directly against himself by the defendant in the first suit.²⁵

H. CAMPBELL BLACK.

Williamsport, Pa.

²⁵ *Mehaffy v. Lytle*, 1 Watts, 314.

LORD CHIEF JUSTICE COLERIDGE ON THE HOUSE OF LORDS.

At the Cutler's Feast, Lord Coleridge, C. J., responding to the toast of the "Houses of Parliament," said: "I thank you heartily for the gracious and cordial reception which you have been pleased to give to my name. But why I have been selected on the present occasion to return thanks for the toast which the Master Cutler has assigned to me, passes my imagination to conceive. I have always understood that the House of Lords represents, or is supposed to represent, what is called the principle of hereditary legislation. Now, what exactly that principle is, I will confess to you that from a very early period of my life I have never been able to comprehend, unless, indeed, it does rise to the dignity of a principle, that persons should be intrusted with the lawful and sacred power of making laws for one of the greatest and most magnificent empires upon which the sun has ever shone, not only when nobody knows that they are fit for it, but when everybody oftentimes knows that

they are perfectly unfit for it. But whatever the principle may mean I am no example of it. For in this single respect I am like Burke. I was not, as he said of himself: "Swathed and dandled into a legislator." I did not inherit the peerage, and I have gathered that a large section of the constituency of this great town of Sheffield is prepared to abolish the House of Lords, and I suppose me with it. Furthermore, as during the thirteen years which have passed away since I first entered into that ancient and august assembly I cannot remember one single solitary occasion upon which upon any party and political question I have had the good fortune to vote in the majority in that House; and as for five years before that time I was the law officer to a Government which had not the good fortune to agree with the majority in that House either, I cannot be expected in candor to speak with fanatical or even enthusiastic admiration of the course which their lordships have thought fit to pursue in the last twenty years. But I am told that politics are unknown in these walls. I believe it because I am told it. I believe it in faith. Faith is the substance of things hoped for; faith is the evidence of things not seen; and therefore I face the situation, and I am to return thanks for a most ancient and venerable assembly of which I am a very recent and a very obscure member. What can I say? Well, one thing I can say with perfect truth. In these days of change and flux, when the great wave of popular opinion is ever heaving and never continuing in one state, it is a comfort to some minds to be able to contemplate something fixed, immovable, unchanged, unaffected by the shock of circumstances or the lapse of time, which, braving the respectful, sometimes the disrespectful, curiosity of the nineteenth century, stands with exactly the same coolness and courage with which it confronted the inquiring reverence of the thirteenth and fourteenth centuries. It is certain that in that time empires have risen and have fallen; dynasties have waxed and waned in this country; religion has been changed more than once; one king has lost his head upon the scaffold, another been dethroned and banished by Act of Parliament; the science of political economy has been born, and from all I can learn seems about to die. The

franchise has been revolutionised, the House of Commons has been reformed again and again, and almost every municipal institution in the country has been either created or at all events recreated. Two institutions, and only two, remain as they were 500 or 600 years ago—the House of Lords and the Corporation of London. Alas, alas, for the instability of human affairs!—the Lord Mayor himself has been nibbled at; and the House of Lords has been told by him whom I follow Sir Michael Hicks-Beach in calling the most powerful statesman of the age that he is going to think three times before he abolishes it. It is pretty certain that, if not to him, at any rate to some one sooner or later will go forth that mandate — “mandate” is my noble friend’s word, and I take it with great satisfaction — that mandate to which all politicians of all sides bow down, to subject the great assembly for which I am returning thanks to that process of inquiry and of subsequent change which it does seem that every human institution of this country in this century is doomed to undergo. I have not disguised—why should I disguise?—that I am of opinion, with thirteen years experience of its working, and of the renewed flow of things that goes on all around us, that it cannot be expected that the House of Lords, any more than any other institution in this country, should be saved forever from change and reconstruction. But I will be equally frank, and I would say that I do hope that it will be dealt with in the way of change and reconstruction, and not by way of abolition. In every free country, I believe—I am sure in most—it is found necessary, or it is believed to be necessary, to have a second Chamber in the legislative machinery of the State, and I am certain that in the English House of Lords there is the most admirable material for the reconstruction of the Chamber. The English House of Lords never did want, and does not now want, grand commanding ability. A debate in which—to go no further than four names—a debate in which the Duke of Argyll, Lord Salisbury, and Lord Selborne, and the Bishop of Peterborough mingled is a thing, let me tell you, worth a man’s while to go many miles to listen to; and we find that still to great men of all sorts, to great contractors, to

great brewers, to great bankers, to great men of commerce, to great soldiers and sailors, and may I say, excluding myself, great lawyers, not only to men who are remarkable for nothing but the number of acres and the quantity of stock or consols they may own, the position of a seat in the House of Lords is still an object of ambition; and I would undertake to say, speaking with all reverence in presence of some of the foremost men in the House of Commons, that a man might now take up fifty men out of the House of Lords who, man for man, would be the equals in ability, with perhaps one enormous exception that will occur to every one, on whichever side of politics he may sit—absolute equals of any fifty men in the House of Commons. It is not in eloquence, it is not in learning and ability, it is not in knowledge, it is not in high character and noble ambition—nay, it is not in a certain sense in currency with affairs that the House of Lords is deficient. The House of Lords has lost its weight in the country, if it has lost it, from other causes—because, unfortunately, a vast majority of the peers never come near the House of Lords at all, and never take any part in its business; because those who do take part come there because they choose to come, and are responsible to no one but themselves, and it is impossible with all their ability that they should not to some extent lose touch of the people and get out of harmony with the times. But let this be altered. Let men sit in the House of Lords because some one thinks them fit to sit there; let them be sent there by some system of choice, some mode of election—I do not say necessarily directly from the people, but, speaking roughly and offhand, and, I pray you remember, after dinner, by some system as is so successful in the American Senate, and I will venture to say that the English House of Lords would be not only the most ancient, the most venerable, the most illustrious body, but one of the most powerful and the most popular legislative assemblies which the world has ever seen.

**ACTION AGAINST RAILROAD COMPANY
BY ADMINISTRATOR OF EMPLOYEE, ON
ACCOUNT OF DEATH FROM EXPLOSION
OF LOCOMOTIVE BOILER.**

**THE LOUISVILLE & NASHVILLE RAILROAD CO.
V. ALLEN.**

Supreme Court of Alabama, June, 1886.

1. Railroad Company—Neither Warrants nor Insures Against Accidents.—A railroad company is not required to warrant the perfection of its machinery or appliances, nor to insure its employes against injury from boiler explosions, or other like accidents; it is only bound to use due care and diligence—that is, the care and diligence which a man of ordinary prudence, engaged in a like business, would exercise for his own protection and the protection of his property: first, to furnish a safe and suitable engine, and then to keep it in that condition.

2. Negligence.—When Question for Jury and When for Court.—In cases of doubt—when the facts are disputed, or when different minds may reasonably draw different conclusions from the same undisputed facts—the question of negligence is a question of fact for the determination of the jury; but, when the facts are undisputed, and the inference to be drawn from them is clear and certain, it is a question of law for the decision of the court.

3. Latent Defects—Not Liable for Injuries from Unless Negligent.—For injuries suffered from the explosion of an engine, caused by a latent defect, which was not visible or capable of discovery by the closest inspection from within or without, and which was in fact not known to the defendant or any of its servants, the railroad company is not liable to an action, unless it was guilty of negligence in failing to discover the defects.

4. Negligence—Of Fellow-Servants—Special Statute.—If the injury occurred prior to the passage of the Act approved February 15, 1886 (Seas. Acts, 1884-86, p. 116), changing the rule as to the liability of the employer to one of his servants for injuries resulting from the negligence of other fellow-servants, the fact that a circumstance pointing to the defect was discovered a few hours before the explosion, by other workmen, who failed to report it, would not render the corporation or employer liable.

5. Negligence—Onus of Proof—Rule When Employee and When Passenger.—In an action by an employee or servant for a railroad company, to recover damages for injuries caused by the explosion of an engine, the onus of proving negligence is on him, and it is not enough to prove the fact of injury from the explosion; but the rule is different when the action is brought by a passenger.

6. Railroad Company—Rule as to Adoption of New Inventions.—A railroad company is not required by its duty to its employes and servants to adopt every new invention or appliance which may be useful in its business, and which may serve to diminish the risks to life, limb or property, incident to its service; it is sufficient to adopt such as are ordinarily used by prudently conducted roads engaged in like business, and surrounded by like circumstances.

7. Negligence—Tests to Discover Latent Defects.—The application of the steam test for boilers being shown to be neither practicable nor approved, on ac-

count of its danger; and the hydraulic test, as shown by the evidence, being extraordinary and rarely used, except when engines are first used, or fail to work well, or when they are overhauled periodically; the failure to apply either or both of these tests to the defective boiler is not negligence.

8. Negligence—When not Imputable for Failure to Apply Tests.—Nor can negligence be imputed to the company, on account of the failure to apply the hydraulic test to the engine when it was last overhauled at the shops, ten months before the explosion, when the evidence shows that the defect had not existed longer than from two to six months.

Appeal from Montgomery Circuit Court.

Tried before Hon. John Hubbard.

Thos. G. Jones, and J. M. Falkner, counsel for appellant, Watts & Son, contra.

The appellee, Flora A. Allen, administratrix of Daniel M. Allen, deceased, brought this action against the appellant, to recover damages for the killing of her intestate, while in the service of the appellant, by the explosion of the boiler of one of its engines. There was judgment in her favor in the court below for \$10,000.00.

The evidence was voluminous for and against the defendant, and it is unnecessary to set it out. Numerous exceptions were reserved, and the chief of which was the refusal of the court below to charge the jury, at the request of defendant, that "if the jury believe the evidence they must find for the defendant."

SOMERVILLE, J., delivered the opinion of the court:

The intestate of the plaintiff was accidentally killed in December, 1883, by the explosion of the boiler of a steam-engine, he being at the time in the employment of the defendant railroad company, and this action is brought to recover damages of the company for its alleged negligence as the proximate cause of the injury.

The whole controversy is, in our judgment, reduced to one single issue—that of negligence *vel non* on the part of the railroad company.

The defect in the boiler, which was the cause of the explosion, was a latent or secret one, not visible or capable of discovery by the closest inspection from within or without—being a flaw or crack in the upper part of one of the boiler sheets, between two plates where they overlapped. Neither the removal of the flues, nor the stripping of the outside of the boiler of the jacket and lagging, would have discovered it. Nor could it have been discovered by hammering on the boiler or from the sound of the hammering. It is shown that both the outer and inner sheets of the boiler were in apparently good condition. The existence of the fact was, for those reasons, unknown in fact to the defendant or any of its servants or employees.

It is insisted, however, that the railroad company was guilty of negligence in failing to keep the engine in proper repair, or rather in failing to discover the flaw or defect, which was the cause of the explosion, and upon the discovery of which

the duty to repair would depend; that there was evidence tending to prove this negligence, and that the question was one for the determination of the jury.

There was no absolute duty resting on the railroad to furnish a safe engine to be used in its service. It was not required to warrant the perfection of its machinery or appliances, or to insure its employees against injury from boiler explosions or other like accidents. Its duty to employees was only to use due care and diligence, first—to furnish a suitable and safe engine and then like care and diligence to keep it in that condition. And by due care and diligence we mean "the care and diligence which a man of ordinary prudence, engaged in a like business, would exercise for his own protection, and the protection of his property,"—a care which must be reasonably commensurate with the nature and hazards attending the particular business, *Mobile & Ohio R. R. Co. v. Thomas*, 42 Ala. 672; 713; *Smoot v. M. & M. R. R. Co.* 67 Ala. 18; *Pierce on Railroads*, 370-373.

In this case there neither can be, nor is, any negligence imputed in failing to furnish a good and safe engine originally. This is shown to have been done. The negligence charged is in failing to keep the engine in a safe condition. This charge can be sustained only by showing that there was negligence in failing to discover the defect in the boiler, which is supposed to have existed not longer than from two to six months previous to the date of the explosion.

The question is then resolved into the inquiry. Did the defendant use due care and diligence to discover the latent flaw or crack in the boiler which was the cause of the accident?

The question of negligence is one of fact for the determination of the jury in cases of doubt, either where the facts are disputed, or where different minds may reasonably draw different inferences or conclusions. It is a question of law, however, to be decided by the court, where the facts are undisputed, and the inference to be drawn from them is clear and uncertain. *City Council of Montgomery v. Wright*, 72 Ala. 411. The court will accordingly give a general charge, on the evidence, when requested, where the evidence bearing on the question of negligence *vel non* is such as that the court would feel authorized to sustain a demurrer to it. *Smoot v. the M. & M. Railway Co.* 67 Ala. 13.

The evidence contained in the bill of exceptions tends to show but two grounds upon which it can be claimed with any show of reason, that the defendant was negligent. The first is, the fact that three of the employees of the defendant, the engineer who carried the engine over to the yard, the night hostler whose business it was to look after engines when they come in at night, and the fireman on the engine, had each, a few hours before the explosion, noticed a small leak near the sand box from which there escaped a small amount of steam, which was supposed to be smoke com-

ing out of the side of the engine near the dome or sand box. It was no unusual thing for smoke to thus emanate from the lagging or jacket of the engine, and in such cases it could be stopped by pouring a few buckets of water upon it, which, in this case, Hicks, the night hostler, did successfully, and no report was made of the incident. We dispose of this first suggestion of negligence before proceeding to consider the second and more important one. If we admit that the several employees mentioned were negligent in failing to discern the difference between smoke and steam, and in not reporting this discovery to the proper superior officers of the company, the defendant would not be liable for this negligence of co-employees, or fellow-servants, in the same general business.

It was the settled law in this State, prior to the act of February 12, 1885, establishing by statute a contrary rule, that the employer is not liable in damages for an injury suffered by a fellow-servant by reason of the faults or negligence of another fellow-servant or co-employee, in the same general business, unless such employer was chargeable with want of due care in having employed incompetent or unskillful servants in the particular business in which the injury was received; *M. & M. Ry. Co. v. Smith*, 59 Ala. 248; *M. & O. R. Co. v. Thomas*, 42 Ala. 672. There is nothing in the record which would tend to challenge the skill, or impugn the competency of the engineer or other employees to whom we have referred. They were all very obviously fellow-servants of the plaintiff's intestate who was injured by their alleged negligence, and, under the rule above stated, no liability would rest on the defendant company for the want of care of their co-employees in this matter.

We now come to the second phase of the alleged negligence of the company in failing to use due care by resorting to proper tests for discovering the flaw in the boiler.

It has been said that this defect was latent, and very manifestly could not have been detected by the most careful inspection. It is shown, moreover, that inspections were made of this and other engines at stated times, and with sufficient frequency, and by competent officials, and they failed to detect the defect. No negligence can be based, therefore, upon the failure to discover it by inspection merely, because, we repeat, it was latent and not so discoverable.

The burden of proof in this case is on the plaintiff to prove negligence, and this is not shifted by proving only the fact of injury from the explosion of the boiler. Such is the rule where an employee or servant sues, although a different principle is held to prevail where an injury is received by a passenger on a railroad in consequence of a defect in any of its machinery or appliances. *M. & M. R. Co. v. Thomas*, 42 Ala. 672, 715; *Pierce on Railroads*, 382-383; *Illinois Central R. Co. v. Housk*, 72 Ill. 285.

The only two tests suggested are those of steam and water. The first, by reason of its danger, is shown rarely, if ever, to have been resorted to by railroads, or other companies using steam-boilers. It is neither practicable nor approved, because it serves to bring about the very thing it was intended to prevent. The one question then is, whether the company was guilty of a want of ordinary care by failing to resort to the water or hydraulic test, which consisted in applying a certain number of pounds pressure of water to the boiler by the aid of a suitable pump. It is testified by experts that such tests, when made, are liable to strain the fiber of the iron and impair the strength of the boiler, and thus in themselves tend to increase the hazard of explosion. The application of the hydraulic test, moreover, involved the stripping of the lagging on the outside of the boiler, and the removal of the flues from the boiler, a taking to pieces of the boiler, so to speak.

We conceive the correct and just rule to be, that a railroad company's duty to its employees does not require it to adopt every new invention or appliance useful in its business, although it may serve to diminish risks to life, limb or property, incident to its services. It is sufficient fulfillment of duty to adopt such as are ordinarily in use by prudently conducted roads engaged in like businesses, and surrounded by like circumstances. Nor can it be exacted of such common carriers, that they should adopt extraordinary tests for discovering defects in machinery, which are not approved, practicable and customary. They are not responsible for accidents from defects not discoverable by tests which are both practicable and usual, and such as persons of ordinary prudence, engaged in like business, are accustomed to adopt under similar circumstances. The law is reasonable and does not require such excess of caution, as to embarrass or render impracticable the operation of the road, although the degree of care and vigilance required is not to be made dependent upon the pecuniary condition of the company so as to expand or contract with the fluctuations of its finances. *Pierce on Railroads*, 273, 274; *Lake Shore R. Co. v. McCormick*, 74 Ind. 440; *Grand Rapids, etc. R. Co. v. Huntly*, 38 Mich. 537; *Smoot v. M. & M. R. Co.*, 67 Ala. 18; *De Craff v. New York Central, etc. Railroad*, 76 N. Y. 130.

The evidence shows without conflict that the hydraulic test, as applicable to steam-boilers, was an extraordinary and rare test, not in customary or common use by either railroads, or other persons, except when engines were first manufactured to be put on the road, unless they failed to work well; or except when engines were overhauled periodically in the workshops of the company.

It may be said that the engine here in question was repaired or overhauled in February, 1883, and that this was negligence. The answer to this suggestion is furnished by the record. This repairing was done about ten months prior to the

happening of the accident from which the injury occurred to the deceased, and there is no evidence tending to prove that the defect in the boiler existed at that time. On the contrary, the testimony shows, that it could not have existed longer than from two to six months. The failure of the company, therefore, to apply the hydraulic test ten months previous, if a negligence at all, had no proximate causal connection with the injury. The use of the test would not have discovered the defect.

Our conclusion is that the deceased was injured by a mere misfortune or accident, which he assumed as a risk of the business in which he was employed, and which was in no wise attributable to the negligence of the defendant or its servants. The evidence showing these facts clearly and without conflict, the court erred in refusing to give the general charge to find for defendant.

Reversed and remanded.

CLOPTON, J., not sitting.

NOTE.—Railroad Company—Warranty against Accident.—An employer may always be held liable for injuries arising from his own fault or negligence.¹ The law imposes upon him the duty of seeing that the servant shall be under no risk because of inadequate or defective machinery to the extent of reasonable care and prudence, no matter whether the defects are in the original construction of the machine or arise from want of repair.²

The relationship of employer to employee does not involve a guaranty by the employer of the employees safety.³ Neither is there an implied warranty that the machinery furnished shall be sound or fit for service nor that the servant shall not be exposed to ordinary risks.⁴

The master does not guarantee the soundness of the machinery nor insure the servant against accidents; and if the latter suffers injury from latent defects unknown to the master and not discoverable in the exercise of ordinary diligence the master is not liable.⁵

Negligence.—When Question for Jury and when for Court.—The question of negligence is one of fact except in some cases when it becomes a question of law and the case may be taken from the jury. It has been held in some cases that when the facts are undisputed or conclusively proved the question of negligence is one

¹ *Ryan v. Fowler*, 24 N. Y. 410; *Keegan v. West. R. Co.* 8 Id. 175; *Gitman v. Eastern R. Co.* 10 Allen, 236; *Snow v. Housatonic R. Co.* 8 Id. 441; *Marshall v. Stewart*, 33 E. L. & Eq. 1; *Wright v. N. Y. C. R. Co.* 25 N. Y. 572; *Noyes v. Smith*, 28 Vt. 59; *Faulkner v. Erie R. Co.* 49 Barb. 324.

² *King v. N. Y. Cent. R.* 4 Hun. 769; *Warner v. Erie R. Co.* 89 N. Y. 468; *Laning v. N. Y. Cent. R. Co.* 49 Id. 521; *Coughtry v. Woollen Co.* 56 Id. 126; *Wright v. N. Y. C. R. Co.* *supra*; *Gibson v. Erie R. Co.* 3 Hun. 31.

³ *Hadley v. Baxendale*, 6 H. & N. 443; *Priestly v. Fowler*, 3 M. & W. 1; *Wright v. N. Y. Cent.*, *supra*; *Tinney v. B. & A. R. Co.* 62 Barb. 218.

⁴ *Heyer v. Salisbury*, 7 Brad. (Ill. App.) 93.

⁵ *Tiefield v. Northern R. Co.* 42 N. H. 225; *Ormond v. Holland*, El. Bl. & El. 102; *L. R. & T. S. R. Co. v. Duffey*, 35 Ark. 602; *Galveston, etc. R. Co. v. Delahunty*, 53 Tex. 206; *Flyn v. Beebe*, 98 Mass. 575; *Ladd v. New Bedford R. Co.* 119 Id. 412; *Gibson v. Pac. R. Co.* 46 Mo.

of law.⁶ But in the *McLain v. Van Zandt*,⁷ a seemingly better view was adopted. It was there held, that in order to justify the court in taking the case from the jury, the facts of the case should not only be undisputed but the conclusion to be drawn from those facts indisputable whether the facts be disputed or not, some courts have held that if different minds may draw different conclusions from them, the case should properly be submitted to the jury.⁸

The rule has sometimes been laid down that if there be any evidence tending to prove a fact, the case should be submitted to the jury.⁹

The rule in England however, is laid down in *Toomey v. London etc. R. Co.*¹⁰ in the following language. "A scintilla of evidence or a mere surmise that there may have been negligence on the part of the defendants clearly would not justify the judge in leaving the case to the jury; there must be evidence upon which they might reasonably and properly conclude that there was negligence." This rule should be universally adopted in this country.¹¹

Negligence of Fellow-Servant.—The rule that the employee cannot recover of his employer for injuries received by reason of the negligence of a fellow-servant, in the same general employment, is well settled.

Burden of Proof.—In an action for injuries by an employee against his employer resulting from his alleged neglect, the burden of proof is on the employee.¹² Where the injury is caused by defective machinery or the negligence of agents or both, the plaintiffs must also show that the defendant did not employ competent servants or sound machinery¹³ or that he knew of the defect or incompetency or could have known it by using diligence.¹⁴

In *Rose v. Stephens & Condit Transp. Co.*,¹⁵ however, it was decided that the explosion of a boiler was evidence of negligence whether there was any relation

between the owner of the boiler and the person injured, or not. The presumption originates from the nature of the act and not the relation of the parties.

As to Adoption of New Inventions.—The master is not, under all circumstances, bound to discard one appliance and replace it with something which is safer. While there may be a moral obligation on his part to provide the latest improvements, still he is not legally bound to do so. He is only required to see that which he does employ, is safe and suitable for the purpose for which it is used.¹⁶ Some courts have gone so far as to hold that as between himself and the employee the master has the right to keep a machine in use after it has become old and defective, provided its defects do not expose the servant to some latent danger.¹⁷ But in Indiana, "It is negligence to use cars dangerous in their construction when there are others to be used which are not dangerous. Railroad companies are bound to procure the best; otherwise they must be held responsible."¹⁸ Judge Thompson in his very valuable work on negligence, lays down this rule. "The obligation of the master is one, not only of care, but of good faith. The obligation is discharged when the master fairly apprises the servant—the latter being *sui juris* of the nature and extent of the risks which he undertakes."¹⁹

The cases where the failure to make tests has been alleged as negligence are few.²⁰

Detroit, Mich.

A. G. McKean.

¹² *Ft. Wayne R. Co. v. Gildersleve*, 33 Mich. 133; *Botsford v. Mich. etc. R. Co.* Id. 256; *Stack v. Patterson*, 6 Phila. 235; *West. R. Co. v. Bishop*, 50 Ga. 405; *Wonderly v. Baltimore, etc. R. Co.* 32 Md. 411; *Jones v. Granite Mills Co.* 7 Rep. 145; *Piper v. New York, etc. R. Co.* 1 N. Y. (S. C.) 290; *Sabbers v. Delaware Canal Co.* 3 Hun. 333. ¹³ *Hayden v. Smithville Mfg. Co.* 23 Conn. 548; *Kelly v. Silver Spring Co.* 7 Reporter, 60.

¹⁴ *St. Louis, etc. R. Co. v. Valerius*, 56 Ind. 511; *Oting Toledo, etc. R. Co. v. Wand*, 48 Id. 476; *Smith v. N. Y. etc. R. Co.* 19 N. Y. 127; *Hegeman v. Western R. Corp.* 13 Id. 2.

¹⁵ *Thomp. Neg. p. 263*; *Oting Dewitt v. Pacific R. R.* 50 Mo. 102; *Dynw v. Leach*, 26 L. J. (Exch.) 321; *Wonderly v. Baltimore, etc. R. Co.* supra.

¹⁶ *Smoot v. M. & M. R. Co.* 67 Ala. 13; *Nashville, etc. R. Co. v. Jones*, 9 Heisk. 37; *Hegeman v. West. R. Co.* 18 Barb. 358; *Alden v. N. Y. C. R. Co.* 36 N. Y. 102.

⁶ *Gagg v. Vetter*, 41 Ind. 228; *Louisville Canal Co. v. Murphy*, 9 Bush. 523; *Costello v. Landwehr*, 28 Wis. 532; *Grigsby v. Chappel*, 5 Rich. L. 446; *Pittsburg, etc. R. Co. v. Evans*, 53 Pa. St. 250; *Fleming v. West. Pac. R. Co.* 49 Cal. 253; *Van Lien v. Scoville Man. Co.* 4 Daly, 554; *Foot v. Wiswall*, 14 Johns. 204; *Theings v. Cent. Park R. Co.* 7 Robt. 616; *Biles v. Holmes*, 11 Ired. 16; *Dascomb v. Buffalo, etc. R. Co.* 27 Barb. 221; *Dublin, etc. R. Co. v. Slatery*, 3 App. Cas. 1155, per Lord Blackburn.

⁷ *Jones & Sp. 347.*

⁸ *Jenkins v. Little Miami R. Co.* 2 Disney, 49; *Stoddard v. St. Louis R. Co.* 65 Mo. 514; *Norton v. Ittner*, 56 Mo. 351; *Wyatt v. Citizens R. Co.* 55 Id. 485; *Railroad Co. v. Stont*, 17 Wall. 657; *Fernandez v. Sacramento City R. Co.* 4 Cent. Law J. 82; *Detroit, etc. R. Co. v. Van Steinburg*, 17 Mich. 99; *State v. Railroad*, 62 N. H. 599; *Gaynor v. Old Colony, etc. R. Co.* 100 Mass. 208; *McGrath v. Hudson River R. Co.* 32 Barb. 144; *Bridges v. N. London R. Co.* L. R. 7 H. L. 213; *Beers v. Housatonic R. Co.* 19 Conn. 566; *Vinton v. Schwab*, 23 Vt. 612; *Penna. Canal Co. v. Bentley*, 66 Pa. St. 30.

⁹ *Cumberland, etc. Iron Co. v. Scolly*, 27 Md. 589; *Flori v. St. Louis*, 3 Mo. App. 231.

¹⁰ 3 C. B. (N. S.) 146, 150. This may be regarded as the settled law of England. See *Cornman v. Eastern Counties R. Co.* 4 H. & N. 781, 786; *Bramwell B.*; *Jackson v. Metropolitan R. Co.* 3 App. Cas. 198; *Ryder v. Wombwell*, L. R. 4 Exch. 38; *Jewell v. Parr*, 13 C. B. 916.

¹¹ *Brantlen v. Portland Co.* 48 Me. 291; *Greenleaf v. Illinois R. Co.* 29 Iowa, 22; *Lehman v. Brooklyn*, 29 Barb. 234.

¹² *Wharton Neg. §423*; *Shear & Red. Neg. §79*; 11 Thom. Neg. 1053; *Louisville & N. R. Co.* 84 Ind. 50; *Way v. Ill. Cent. R. Co.* 40 Iowa, 341.

¹³ *Hanrathy v. N. O. R. Co.* 46 Md. 280; See *Johnson v. Armour*, 18 Fed. Rep. 490.

¹⁴ *Columbus, etc. R. Co. v. Troesch*, 68 Ill. 545.

¹⁵ 11 Fed. Rep. 438.

CONSTITUTIONAL LAW—JURISDICTION OF CRIMES—INDIANS—TRIBAL RELATIONS—AUTHORITY OF CONGRESS—STATE AUTHORITY.

UNITED STATES V. KAGAMA.*

Supreme Court of the United States, May 10, 1886.

1. *Indians—Jurisdiction of Crimes—Constitutional Law.*—The ninth section of the Indian Appropriation Act of March 3, 1885 (Session Acts, p. 385), is valid and constitutional in both its branches, namely, that which gives jurisdiction to the courts of the territories of the crimes named committed by Indians within the territories, and that which gives jurisdiction in like cases to the courts of the United States for the same crimes committed on an Indian reservation within a State of the Union.

2. ———. *Crimes Enumerated.*—The crimes

*S. C. The Reporter, Vol. 22, p. 449.

mentioned in the act are murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny.

3. ———. *Authority of Congress.*—While the government of the United States has recognized in the Indian tribes heretofore a state of semi-independence and pupillage, it has the right and authority, instead of controlling them by treaties, to govern them by acts of Congress, because they are within the geographical limit of the United States, and are necessarily subject to the laws which Congress may enact for their protection and for the protection of the people with whom they come in contact.

4. ———. *State Authority—Tribal Relations.*—The States have no such power over them as long as they maintain their tribal relations. They owe no allegiance to a State within which their reservation may be established, and the States gives them no protection.

On a certificate of division in the opinion between the judges of the Circuit Court of the United States for the District of California.

The facts are to be found in the opinion.

The Attorney General, Mr. *Garland*, and the Solicitor General Mr. *Goode*, for plaintiff in error. *Joseph D. Redding, contra.*

MILLER, J., delivered the opinion of the court:

The questions certified arise on a demurrer to an indictment against two Indians for murder committed on the Indian reservation of Hoopa Valley, in the State of California, the person murdered being also an Indian of said reservation. Though there are six questions certified as the subject of difference, the point of them all is well set out in the third and sixth, which are as follows: "3. Whether the provisions of said § 9 of the Act of Congress of March 3, 1885, making it a crime for one Indian to commit murder upon another Indian upon an Indian reservation situated wholly within the limits of a state of the Union, and making such Indian so committing the crime of murder within and upon such Indian reservation 'subject to the same laws' and subject to be 'tried in the same courts, and in the same manner, and subject to the same penalties as are all other persons' committing the crime of murder 'within the exclusive jurisdiction of the United States,' is a constitutional and valid law of the United States? 6. Whether the courts of the United States have jurisdiction or authority to try and punish an Indian belonging to an Indian tribe for committing the crime of murder upon another Indian belonging to the same Indian tribe, both sustaining the usual tribal relations, said crime having been committed upon an Indian reservation made and set apart for the use of the Indian tribe to which said Indians both belong?" The indictment sets out in two counts that Kagama, alias Pactah Billy, an Indian, murdered Iyouse, alias Ike, another Indian, at Humboldt County, in the State of California, within the limits of the Hoopa Valley Reservation, and it charges Mahawaha, alias Ben, also an Indian, with aiding and

abetting in the murder. The law referred to in the certificate is the last section of the Indian appropriation act of that year, and is as follows: "Sec. 9. That immediately upon, and after the date of the passage of, this act all Indians committing against the person or property of another Indian or other person any of the following crimes, namely, murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny, within any territory of the United States, and either within or without the Indian reservation, shall be subject therefor to the laws of said territory relating to said crimes, and shall be tried therefor in the same courts and in the same manner, and shall be subject to the same penalties, as are all other persons charged with the commission of the said crimes respectively; and said courts are hereby given jurisdiction in all such cases; and all such Indians committing any of the above-described crimes against the person or property of another Indian or other person, within the boundaries of the United States, and within the boundaries of any state of the United States, and within the limits of any Indian reservation, shall be subject to the same laws, tried in the same courts and in the same manner, and subject to the same penalties, as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States." The above enactment is clearly separable into two distinct definitions of the conditions under which Indians may be punished for the same crimes as defined by the common law. The first of these is where the offense is committed within the limits of a territorial government, whether on or off an Indian reservation. In this class of cases the Indian charged with the crime shall be judged by the laws of the territory on that subject, and tried by its courts. This proposition itself is new in the legislation of Congress, which has heretofore only undertaken to punish an Indian who sustains the usual relation to his tribe, and the offense is committed in the Indian country, or on an Indian reservation, in exceptional cases; as where the offense was against the person or property of a white man, or is some violation of the trade and intercourse regulations imposed by Congress on the Indian tribes. It is new, because it now proposes to punish these offences when they are committed by one Indian on the person or property of another. The second is where the offense is committed by one Indian against the person or property of another, within the limits of a state of the Union, but on an Indian reservation.

In this case, of which the state and its tribunals would have jurisdiction if the offence was committed by a white man outside an Indian reservation, the courts of the United States are to exercise jurisdiction as if the offence had been committed at some place within the exclusive jurisdiction of the United States. The first clause subjects all Indians, guilty of these crimes committed within the limits of a territory, to the laws

of that territory, and to its courts for trial. The second, which applies solely to offences by Indians which are committed within the limits of a state and the limits of a reservation, subjects the offenders to the laws of the United States passed for the government of places under the exclusive jurisdiction of those laws, and to trial by the courts of the United States. This is a still further advance as asserting this jurisdiction over the Indians within the limits of the states of the Union. Although the offence charged in this indictment was committed within a state and not within a territory, the considerations which are necessary to a solution of the problem in regard to the one, must in a large degree affect the other.

The Constitution of the United States is almost silent in regard to the relations of the government which were established by it to the numerous tribes within its borders. In declaring the basis on which representation in the lower branch of the Congress and direct taxation should be apportioned, it was fixed that it should be according to numbers, excluding Indians not taxed, which, of course excluded nearly all of that race, but which meant that if there were such within a state as were taxed to support the government, they should be counted for representation, and in the computation for direct taxes levied by the United States. This expression, "excluding Indians not taxed," is found in the Fourteenth Amendment, where it deals with the same subject under the new conditions produced by the emancipation of the slaves. Neither of these shed much light on the power of Congress over the Indians in their existence as tribes distinct from the ordinary citizens of a state or Territory. The mention of Indians in the Constitution which has received most attention is that found in the clause which gives Congress "power to regulate commerce with foreign nations and among the several states, and with the Indian tribes." This clause is relied on in the argument in the present case, the proposition being that the statute under consideration is a regulation of commerce with the Indian tribes. But we think it would be a very strained construction of this clause, that a system of criminal laws for Indians living peaceably in their reservations, which left out the entire code of trade and intercourse laws justly enacted under that provision, and established punishments for the common law crimes of murder, manslaughter, arson, burglary, larceny, and the like, without any reference to their relation to any kind of commerce, was authorized by the grant of power to regulate commerce with the Indian tribes. While we are not able to see in either of these clauses of the Constitution and its amendments any delegation of power to enact a code of criminal law for the punishment of the worst class of crimes known to civilized life when committed by Indians, there is a suggestion in the manner in which the Indian tribes are introduced into that clause, which may have a bearing on the subject before us. The

commerce with foreign nations is distinctly stated as submitted to the control of Congress. Were the Indian tribes foreign nations? If so, they came within the first of the three classes of commerce mentioned, and did not need to be repeated as Indian tribes. Were they nations, in the minds of the framers of the Constitution? If so, the natural phrase would have been "foreign nations and Indian nations," or, in the terseness of language uniformly used by the framers of the instrument, it would naturally have been "foreign and Indian nations." And so in the case of *The Cherokee Nation v. State*, brought in the supreme court of the United States, under the declaration that the judicial power extends to suits between a state and foreign states, and giving to the Supreme Court original jurisdiction where a State is a party, it was conceded that Georgia as a State came within the clause, but held that the Cherokees were not a State or nation within the meaning of the Constitution, so as to be able to maintain the suit. 5 Pet. 20. But these Indians are within the geographical limits of the United States. The soil and the people within these limits are under the political control of the government of the United States, or of the States of the Union. There exists within the broad domain of sovereignty but these two. There may be cities, counties, and other organized bodies with limited legislative functions, but they are all derived from, or exist in subordination to, one or the other of these. The territorial governments owe all their powers to the statutes of the United States conferring on them the powers which they exercise, and which are liable to be withdrawn, modified, or repealed at any time by Congress. What authority the State governments may have to enact criminal laws for the Indians will be presently considered. But this power of Congress to organize territorial governments, and make laws for their inhabitants, arises not so much from the clause in the Constitution in regard to disposing of and making rules and regulations concerning the territory and other property of the United States, as from the ownership of the country in which the territories are, and the right of exclusive sovereignty which must exist in the national government, and can be found nowhere else. *Murphy v. Ramsey*, 114 U. S. 44. In the case of *American Ins. Co. v. Canter*, 1 Pet. 542, in which the condition of the people of Florida, then under a territorial government, was under consideration, Marshall, Chief Justice, said: "Perhaps the power of governing a territory belonging to the United States which has not, by becoming a State, acquired the means of self-government, may result necessarily from the fact that it is not within the jurisdiction of any particular State, and is within the power and jurisdiction of the United States. The right to govern may be the inevitable consequence of the right to acquire territory. Whichever may be the source whence the power is derived, the possess-

ion of it is unquestionable." In the case of *U. S. v. Rogers*, 4 How. 572, where a white man pleaded in abatement to an indictment for murder committed in the country of the Cherokee Indians, that he had been adopted by and became a member of the Cherokee tribe, Chief Justice Taney said: "The country in which the crime is charged to have been committed is a part of the territory of the United States, and not within the limits of any State. It is true it is occupied by the Cherokee Indians, but it has been assigned to them, and they hold with the assent and under the authority of the United States." After referring to the policy of the European nations and the United States in asserting dominion over all the country discovered by them, and the justice of this course he adds: "But had it been otherwise, and were the right and propriety of exercising this power now open to question, yet it is a question for the law-making and political departments of the government, and not for the judicial. It is our duty to expound and execute the law as we find it, and we think it too firmly and clearly established to admit of dispute, that the Indian tribes, residing within the territorial limits of the United States, are subject to their authority, and when the country occupied by one of them is not within the limits of one of these, Congress may by law punish every offence committed there, no matter whether the offender be a white man or an Indian." The Indian reservation in the case before us is land bought by the United States from Mexico, by the treaty of Guadalupe, Hidalgo, and the whole of California, with the allegiance of its inhabitants, many of whom were Indians, was transferred by that treaty to the United States. The relation of the Indian tribes living within the borders of the United States, both before and since the revolution, to the people of the United States has always been an anomalous one and of a complex character. Following the policy of the European governments in the discovery of America towards the Indians who were found here, the colonies before the revolution, and the United States since, have recognized in the Indians a possessory right to the soil over which they roamed and hunted and established occasional villages. But they asserted an ultimate title in the land itself, by which the Indian tribes were forbidden to sell or transfer it to other nations or peoples without the consent of this paramount authority. When a tribe wished to dispose of its land, or any part of it, or the State or the United States wished to purchase it, a treaty with the tribe was the only mode in which this could be done. The United States recognized no right in private persons, or in other nations, to make such a purchase by treaty or otherwise. With the Indians themselves these relations are equally difficult to define. They were, and always have been regarded as having a semi-independent position when they preserved their tribal relations; not as States, not as nations, not as possessed of the full

attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they resided. Perhaps the best statement of their position is found in the two opinions of this court by Chief Justice Marshall, in the case of the *Cherokee Nation v. Georgia*, 5 Pct. 1, and in the case of *Worcester v. State*, 6 Ib. 536. These opinions are exhaustive; and in the separate opinion of Mr. Justice Baldwin in the former case is a very valuable resume of the treaties and statutes concerning the Indian tribes previous to and during the confederation. In the first of the above cases it was held that these tribes were neither States nor nations, had only some of the attributes of sovereignty, and could not be so far recognized in that capacity as to sustain a suit in the Supreme Court of the United States. In the second case it was said, that they were not subject to the jurisdiction asserted over them by the State of Georgia, which, because they were within its limits, where they had been for ages, had attempted to extend her laws and the jurisdiction of her courts over them. In the opinions in these cases they are spoken of as "wards of the nation," "pupils," as local dependent communities. In this spirit the United States has conducted its relations to them from its organization to this time. But, after an experience of a hundred years of the treaty-making system of government, Congress has determined upon a new departure — to govern them by the acts of Congress. This is seen in the Act of March 3, 1871, embodied in § 2079 of the Revised Statutes: "No Indian nation or tribe, within the territory of the United States, shall be acknowledged or recognized as an independent nation, tribe, or power, with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3, 1881, shall be hereby invalidated or impaired." The case of *Crow Dog*, 109 U. S. 556, in which an agreement with the Sioux Indians, ratified by an act of Congress, was supposed to extend over them the laws of the United States and the jurisdiction of its courts, covering murder and other grave crimes, shows the purpose of Congress in this new departure. The decision in that case admits that if the intention of Congress had been to punish, by the United States courts, the murder of one Indian by another, the law would have been valid. But the court could not see, in the agreement with the Indians sanctioned by Congress, a purpose to repeal § 2146 of the Revised Statutes which expressly excludes from that jurisdiction the case of a crime committed by one Indian against another in the Indian country. The passage of the act now under consideration was designed to remove that objection, and to go farther by including such crimes on reservations lying within a State. Is this latter fact a fatal objection to the law? The statute

itself contains no express limitation upon the powers of a State or the jurisdiction of its courts. If there be any limitation in either of these, it grows out of the implication arising from the fact that Congress has defined a crime committed within the State, and made it punishable in the courts of the United States. But Congress has done this, and can do it, with regard to all offenses relating to matters to which the Federal authority extends. Does that authority extend to this case?

It will be seen at once that the nature of the offense (murder) is one which in most all cases of its commission is punishable by the laws of the States, and within the jurisdiction of their courts. The distinction is claimed to be, that the offense under the statute is committed by an Indian, that it is committed on a reservation set apart within the State for residence of the tribe of Indians by the United States, and the fair inference is that the offending Indian shall belong to that or some other tribe. It does not interfere with the process of the State courts within the reservation, nor with the operation of State laws upon white people found there. Its effect is confined to the acts of an Indian of some tribe, of a criminal character, committed within the limits of the reservation.

It seems to us that this is within the competency of Congress. These Indian tribes are the wards of the nation. They are communities dependent on the United States—dependent largely for their daily food; dependent for their political rights. They owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the executive and by Congress, and by this court, whenever the question has arisen. In the case of *Worcester v. State*, 6 Pet. 515, it was held that, though the Indians had by treaty sold their land within that State, and agreed to remove away, which they had failed to do, the State could not, while they remained on those lands, extend its laws, criminal and civil, over the tribes; that the duty and power to compel their removal was in the United States, and the tribe was under their protection, and could not be subjected to the laws of the State and the process of its courts. The same thing was decided in the case of *Fellows v. Blacksmith*, 19 How. 366. In this case, also, the Indians had sold their lands under supervision of the States of Massachusetts and of New York, and had agreed to remove within a given time. When the time came a suit to recover some of the land was brought in the Supreme Court of New York, which gave judgment for the plaintiff. But this court held, on writ of error, that the State could not enforce this removal, but the duty and the power to do so

was in the United States. See, also, the case of the *Kansas Indians*, 5 Wall. 737; *New York Indians*, 5 Ib. 761. The power of the general government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government, because it never has existed anywhere else, because the theater of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes.

We answer the questions propounded to us, that the ninth section of the Act of March 3d, 1885, is a valid law in both its branches, and that the circuit court of the United States for the District of California has jurisdiction of the offense charged in the indictment in this case.

NOTE.—The relations between the United States and the Indian tribes within their borders have always been anomalous, and especially have the powers of the Federal Government been circumscribed in the matter of criminal jurisdiction. Until the passage of the act of Congress, under which the indictment in the principal case was found,¹ Federal courts had no jurisdiction whatever of crimes committed by one Indian against another Indian within the "Indian country."² That country was defined by act of Congress of June 30, 1834,³ but the section of the act so defining it, not being included in the Revised Statutes, was repealed by their enactment but were referred to by the Supreme Court in deciding what was Indian country. In *Crow Dog's case* (1883),⁴ the court held that the term applies to all the country to which the Indian title has not been extinguished, within the limits of the United States, whether within a reservation or not, and whether acquired before or after the passage of the act of 1834. It is noteworthy that, before these cases were decided, it was held by the United States Circuit Court for the Ninth Circuit, that the act of Congress of June 30, 1834, which defined the limits of the Indian country,⁵ was simply a local act, and applied only to the territory described in it, and then within the sovereignty of the United States.⁶ And upon the same principle in the Circuit Court of the United States for Oregon, the court held in a criminal case,⁷ that Alaska was not Indian country, notwithstanding the sweeping definition of that term in *Crow Dog's Case*.⁸ The court seems to have regarded the *dictum* in the *Crow Dog Case* as *obiter*, not being necessary to the decision of the case, and therefore not binding upon the circuit court.

The act under which this indictment is found closes all controversy, so far as the crimes enumerated in it are concerned, committed by one Indian on or against another Indian, no matter where; unless, indeed, it infringes the right of a State in which a reservation inhabited by Indians is situated. In the principal case the court holds that the whole subject of criminal ju-

¹ Act of March 3, 1885; Sess. Acts of 1885, p. 385.

² Rev. Stat. U. S. § 2146.

³ 4 U. S. Stat. at Large, p. 729.

⁴ 109 U. S. 556; See also, *Bates v. Clark*, 95 U. S. 204.

⁵ 4 U. S. Stat. at Large, 729.

⁶ *United States v. Seveloff*, 3 Sawyer, C. C. 311; See also, *Re Carr*, 3 Sawyer, 317; *Waters v. Campbell*, 4 Sawyer, C. C.

131; *United States v. Stephens*, 8 Sawyer, C. C. 117.

⁷ *Kie v. United States*, 27 Fed. Rep. 351 (May 1, 1886).

⁸ 109 U. S. 556.

isdiction is within the control of Congress, because the Indians are the "wards of the nation." A better reason is that the Indian tribes, whether at large or upon reservations, are quasi independent powers, whose relations with the State or Federal governments can only be maintained through Congress; that the States cannot make treaties with them; that, under the Constitution, the Federal government only can deal with them as tribes, and regulate commerce with them as individuals; that holding an occupancy title to the lands included in the reservation, the State can acquire no rights over the reservation, inconsistent either with that title, or such supervision of Congress as may be necessary to the exercise of its constitutional functions respecting either public lands or Indian tribes.—ED. CENT. L. J.

WEEKLY DIGEST OF RECENT CASES.

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1. ATTORNEY AND COUNSELOR.—*Unauthorized Attorneys—Dower—Partition by Widow*.—Where proceedings in partition were instituted by an attorney in this State, who received his authority from another attorney residing in another State, who claimed to have been employed by plaintiff, but which authority she denied: *Held*, there being no proof of knowledge of the pendency of the proceedings on the part of the plaintiff, or proof of authority to bring the action, a sale under the partition would be set aside. In this State a widow is entitled to dower, or the use during her natural life of one-third part of all the lands whereof her husband was seized of an estate of inheritance at any time during the marriage, unless she is lawfully barred thereof. A mere dower interest is not sufficient to authorize the person entitled thereto to institute a suit in partition, and cause the estate of the heirs to be sold. *Hurste v. Hotelling*, S. C. Neb., Sept. 29, 1886; 29 N. W. Rep. 290.

2. COUNTIES.—*Township Organization—Change—Unauthorized Election—Change to Government*.—The question of adopting township organization was submitted to the legal voters of R. county at the general election in 1883, and was adopted by a majority of the legal voters of said county voting at said election, but no organization of the board of supervisors has yet taken place. *Held*, that township organization is in force in R. county, to be completed upon the organization of the board of supervisors as provided by law. An election to discontinue township organization, unless authorized by statute, is of no avail, and votes cast thereat are nullities. In a county which has adopted

township organization, the board of county commissioners continue to act until the board of supervisors have met and organized. *State, ex rel. v. Kinser*, S. C. Neb., Sept. 29, 1886; 29 N. W. Rep. 307.

3. COVENANTS.—*Running with the Land—Mortgagor of Leasehold Liable on—Assumpsit—Use and Occupation—Assignee of Lease*.—A mortgagor in possession is so far the owner of the mortgaged property that he is liable upon the covenants that run with the land, and therefore the assignee of a lease for 999 years is liable upon the covenant for rent during the time he holds the lease, notwithstanding he gave a mortgage back to his assignor upon receiving the assignment. *Assumpsit* for use and occupation will not lie against the assignee of a lease as such. *Trustees of Donations v. Streeter*, S. C. N. H., July 30, 1886; 5 Atl. Rep. 845.

4. CRIMINAL LAW.—*Assault and Battery—Intent—Striking with a Pistol—Self-Defense—Ejectment from Gambling-Room*.—An assault committed by striking with a pistol is, under the law of Texas (Pen. Code, arts. 46, 496), simple assault, notwithstanding the person assaulted was wounded by the accidental discharge of the pistol used in the assault, unless it is shown that a pistol was, when used in such a manner, a deadly weapon; or that by means of such use of it serious bodily injury had been inflicted, or that the assault was committed with premeditated design, and by the use of means calculated to inflict great bodily injury. *Held*, that the facts in the case were such that the trial justice should have charged upon the law of self-defense as set out in Pen. Code, arts. 570, 572. The law knows no reasonable rules for the protection of a gambling-room or games played in violation of law, and hence a gambler on trial for assault cannot justify on the ground that the assault was committed in ejecting the person assaulted from a gambling-room, for disorder. *Pierce v. State*, Texas Ct. App., June 28, 1886; 1 S. W. Rep. 463.

5. ———. *False Pretenses—False Statement by Lodger—Food Supplied Subsequently—Reasonable Inference for Jury*.—Prisoner went to the house of prosecutrix and requested to be taken in as a lodger. After having lodged with her for a day or two, he stated that he had come from another lodging where he had left some of his clothes, and requested to be furnished with board as well as lodging, for which he promised to pay. The prosecutrix, believing his statement as to his clothes, agreed to supply him, and did supply him with meat and drink as a boarder. A few days after the prisoner decamped without paying for his accommodation. At the trial of an indictment for obtaining goods by false pretenses, the jury were directed that they must be satisfied that the pretense was false; that it was acted upon by the prosecutrix in supplying the articles in question; and that it was made by the prisoner with intent to defraud. The jury having found a verdict of guilty, the question was reserved for this court, whether upon facts the prisoner was entitled to an acquittal. *Held*, that the direction was substantially accurate; that upon the evidence the jury might fairly infer that the prosecutrix had acted on what she believed; and that from the facts stated it was to be inferred that the jury meant she so acted because she believed to be true the statement of the prisoner, which was in fact false. *Regina*

- v. *Burton*, Eng. Ct. App., London L. T. Rep., Vol. 54, p. 765; Oct. 9, 1886.
6. ———. *False Pretenses—Passing Bank-Check—Evidence—Appeal—Admission of Evidence—By whom Error Assigned.*—On the trial of an information for obtaining property under false pretenses, an instruction that, to convict, it must be found that defendant said he had money in bank to pay a check given in payment for the property, would be error. A bank-check is a false token, if the drawer knows when he gives it, payable to a person other than himself, that he has neither funds to meet it, nor credit at the bank on which it is drawn. Evidence admitted in a party's favor cannot be assigned as error by him. *People v. Donaldson*, S. C. Cal., June 30, 1886; 11 Pac. Rep., 681.
 7. ———. *Homicide—Justifiable Homicide—Defendant Aggressor—Technical Trespasser—Test of Self-Defense—Danger of Life—Opinion of Reasonable Man.*—A person who, being on the land of another, is ordered off by the land-owner, and assaulted and threatened with death by him as he is obeying, may, if he kill the land-owner, prove the circumstances to sustain the plea of self-defense, notwithstanding that he was technically a trespasser, unless it is shown by the prosecution that he knew previously that the trespass would provoke a violent conflict with the land-owner. The question whether a reasonable man, in the situation of defendant at the time of the killing, would have conceived his life in danger at the hands of deceased, is no test of justifiable homicide. *State v. Archer*, S. C. Iowa, October 6, 1886; 29 N. W. Rep. 333.
 8. ———. *Trial—Evidence—Animus of Prosecuting Witness—Bills of Exception—Refusal to Grant Time to Prepare—Assault and Battery—Mutual Combat.*—The animus—the motive or the ill will—of a prosecuting witness, is never a collateral or irrelevant question in a criminal case; and it is error to reject testimony tending to show such bias, on the ground that the defense, by asking such witness on cross-examination, "Are you not unfriendly to the defendant?" had made the witness its own witness, and was bound by his answer in the negative. It rests with counsel to determine whether or not the exceptions he desires to have saved are of importance; but it is not reversible error to refuse time for the proper preparation of such exceptions, unless it is made to appear that injury resulted to the accused from such refusal. It is error in the trial of an indictment for assault with intent to commit murder, to charge upon the subject of mutual combat, when it appears from the evidence that either the accused or the prosecuting witness provoked or brought on the conflict. *Roseborough v. State*, Texas Ct. App., June 25, 1886; 1 S. W. Rep. 459.
 9. *DEED.—Easement—Mistake.*—Where a deed is accepted by the purchaser and the price paid, under the belief that it includes the conveyance in fee of a certain easement over adjoining land, which had been included in the contract of sale, the purchaser is not precluded, by the acceptance of the deed, from recovering from the vendor the value of the easement, the mistake, although one as to the legal effect of the deed, having in it a sufficient element of fact. The facts that the grantor in the deed reserves therein a right to connect with a sewer on adjoining land owned by him and another as tenants in common, leading from the deeded premises, an easement in which had been contracted for but was not included in the deed, and subsequently, together with his co-tenant, conveys such right on the sale of said adjoining land to a third person, do not, under the facts of the case, raise an implication that said adjoining land is subject to an easement in the purchaser of the land first conveyed. *Butterfield v. McNamara*, S. C. Conn., August, 1886; 2 N. Eng. Rep. 751.
 10. *DEED.—Marriage a Consideration.*—Marriage is a valuable consideration for a deed; and a deed executed for such consideration will not be set aside in behalf of existing creditors, unless it appears that both parties to the deed intended by the conveyance to delay the creditors of the grantor, or at least unless the grantee knew that the grantor so intended. *Pierce v. Harrington*, S. C. Vt., Aug. 25, 1886; 7 East. Rep. 75.
 11. *EQUITY—Judicial Sales—Injunction, after Term, to Restrain Collection of Bond for Purchase Money.*—A purchaser of land sold under decree of court, who has neither resisted the order confirming the sale, nor attempted, during the term, to have that order set aside, may, after the term has closed, institute a suit to enjoin the collection of a bond given by him for the purchase money, where the title to the land is not good, and the description is so vague that it cannot be identified, and he has been led by the conduct of the parties in the sale proceedings to postpone a motion to have the order ratifying the sale, set aside until after the term of court has come to a close. *Morrow v. Wessell*, Ky., Ct. Appl. Sept. 23, 1886; 1 S. W. Rep. 439.
 12. ———. *—Jurisdiction—Injunction—Decree—Party Deprived of Defense.*—A court of equity having obtained jurisdiction of a cause, will retain it for all purposes, and render such decree as will protect the rights of the parties before it, and thus avoid unnecessary litigation. Where a decree has been improperly obtained, and a party defendant has been deprived of his defense by the conduct of the successful party, who had no cause of action, and whose rights had been adversely adjudicated in another suit, he will be enjoined from enforcing such decree. See *Buchanan v. Griggs*, 24 N. W. Rep. 452. *Buchanan v. Griggs*, S. C. Neb. Sept. 29, 1886; 29 N. W. Rep. 297.
 13. *EVIDENCE.—Bill of Sale Absolute on its Face is Conditional—Estoppel—Lex Loci—Estoppel.*—In a suit between a vendor and a creditor of the vendee, parol evidence is not admissible to prove that a sale is conditional, when it is evidenced by a writing that imports an absolute sale, where the creditor made his attachment relying upon the writing, and the vendee's representations that the sale was as the writing showed it to be. But a conditional sale not evidenced by a writing, valid in New Hampshire, will be held valid in Vermont, if the vendor has done nothing by which he is estopped. *Dixon v. Blondin*, S. Vt. 7. East Rep. 66.
 14. *EXECUTORS—Curators—Grant of Servitude in Land Without Order of the Court—Injunction—Continuing Trespass—Multiplicity of Suits.*—Under sections 21, 22, art. 1, c. 38, Gen. St. Ky., a curator has no right to the possession of the real

estate of a decedent, unless such possession is vested in him by order of court; and where the land contains stone valuable for fences, he has no power to contract with the tenant, authorizing him to remove the stone, whether lying loose on the surface or imbedded in the ground. Injunction will lie, at the suit of a purchaser of land sold by an executor, to restrain the tenant in possession from removing stone therefrom, where it appears that, if the writ is denied, there will result a continuing trespass and a multiplicity of suits. *Ellis v. Wren*, Ct. Appl. Ky. Sept. 23, 1886; 1 S. W. Rep. 440.

15. FRAUD—*Statute of Frauds—Verbal Agreement to Sell Horses—Delivery*.—A verbal agreement to sell a number of unbroken horses at a price exceeding \$200, there being no delivery of them except that part of the number were corralled, broken, and turned into the vendor's pasture, and no part of the purchase money being paid, is a contract within the statute of frauds, and void. *Terney v. Doten*, S. C. Cal. Aug. 12, 1886; 11 Pac. Rep. 743.

16. HIGHWAY.—*Pent Roads—Presumption—Agency Estoppel—Evidence—Judicial Notice*.—The judgment of the county court in establishing a highway will be sustained unless substantial injustice has been done, or a writ of *certiorari* would be granted; and this writ is often denied where there is no injustice, though some formal legal error has been committed. The selectmen laid a highway two rods wide in a village, and on petition the county court appointed commissioners, who reported that they adopted the survey of the selectmen and recommended that the highway be established as laid by them; this report was confirmed by the court, and the petitioners excepted because the road was laid less than three rods in width. The record did not designate whether it was an open road, a cross-road, or pent road; and by statute some roads must be laid three rods wide and some may be two rods. Held (1), that the presumption is, that this is such a highway as may be legally established of the width of two rods; (2) and it was not error that permission was not given for the erection of gates and bars, as it does not appear that there was any necessity for them. The highway was laid across land owned by the Methodist Episcopal Society, whose stewards had agreed with their grantors that the church lot should remain open and unobstructed, but without any vote of the quarterly meeting conference, as required by R. L., § 1961, and the society had acquiesced in the acts of its stewards for more than twenty years; \$250 were allowed as damages if the agreement was still binding, and \$300 if it was not. Held, that the society, by retaining the benefit of the acts of its agents, is now estopped from denying their validity. The commissioners properly took judicial notice of the statutes and geography of the State in their finding that Barre was not an incorporated village. *French v. Town of Barre*, E. C. Vt. Aug. 21, 1886; 7 East Rep. 807.

17. INSURANCE — *Life — Acceptance of Proposal—Accident before Payment of Premium*.—An insurance company wrote accepting a proposal by C. to insure his life, his declaration as to his being then in good health, &c., to be the basis of the contract. At the bottom of the letter there was a note, "No assurance can take place until the first premium is paid." Before the time for payment of the premium, C. met with an accident, of which he afterwards died: Held, that there was no com-

plete contract, and the risk having changed before tender of the premium, the company was entitled to refuse completion. *Canning v. Farquhar*, Eng. Ct. App. London Law Times Rep. Vol. 54, p. 350. Oct. 9, 1886.

18. ———. —*Life—Want of Insurable Interest—Wagering Policies—Recovery of Premiums*.—J. H. effected with the defendant company two policies of insurance on the life of his father J. H., in which he had no insurable interest; according to the policies, the premiums were to be paid in weekly payments. J. H., the son, continued to make these weekly payments for some years. J. H., the father, had at first no knowledge of the insurance effected on his life, but when he became aware of them he objected to their being continued, and gave notice to that effect to the company. J. H. the son, then gave notice to the defendants that the policies were at an end, and claimed the return of the amount of the premiums. The defendants refused to pay, and J. H., the son, brought his action for their recovery, and the County Court judge gave judgment for the plaintiff. The defendant appealed. Held, on appeal, that, under the circumstances of the case, the policies were wagering policies, and consequently the premiums paid in respect to them could not be recovered. *Howard v. Refuge, etc. Society*, Eng. Ct. Appl. London Law Times, Rep. Vol. 54, p. 644, Oct. 9, 1886.

19. INTOXICATING LIQUORS. — *Pleading — Abatement of Nuisance—Lawful Business—Iowa Statute of 1885—Constitutionality of—Constitutional Law—Due Process of Law—Proceeding in Equity—Trial by Jury—Constitution of the United States—Trial in State Courts*.—A pleading which alleges that a building was erected and used "as a place for the sale of beverages such as the law at that time authorized," and that the defendant purchased the property for the purpose of using it in "a business at that time authorized by the laws of said state," is bad, as stating a conclusion of law rather than matter of fact. In a suit in equity to enjoin a saloon keeper from selling intoxicating liquors, and to have his establishment abated as a nuisance, before it can be said that defendant has been unlawfully deprived of his property without compensation, it must be made to appear that such property was owned by him, or by those under whom he claims, prior to the enactment of the statute of Iowa of 1885 declaring such an establishment a nuisance. A proceeding in equity is due process of law. The constitution of the United States has no bearing upon the question of the right of trial by jury in the state courts. *McLane v. Leicht*, S. C. Iowa, Oct. 5, 1886; 29 N. W. Rep. 327, 328.

20. LIMITATIONS.—*Statute of Limitations*.—Where the statute of limitations would be a bar to a direct proceeding by the original owner, it cannot be defeated by indirection within the jurisdiction where it is law. Hence, where certain counters were attached to premises, and in the adverse possession of the owner of such premises, sufficiently long to satisfy the Statute of Limitations, they cannot be recovered by the original owner in a replevin suit. A purchase from one against whom the remedy is barred entitles the purchaser to stand in as good a position as his vendor. Hence, a purchaser at a foreclosure sale of the premises will be protected by the statute. *Chapin v. Freeland*, S. J. Ct. Mass., Sept. 8, 1886; 2 N. Eng. Rep. 732.

21. **LIMITATIONS—Statute of Limitations—Mortgage—Debt—Foreclosure—Evidence—Notes—Limitations.**—The Act of 1869, by extending the period of limitation of mortgages of real estate to ten years, necessarily extended the limitation of the debt secured by the mortgage, where it is sought to enforce a sale of the mortgaged premises in satisfaction of said debt, to the same period as the mortgage. In an action to foreclose a mortgage of real estate given to secure certain promissory notes, the note may be set out as the evidence of the debt, even if the action is brought but a few days before the expiration of ten years from the time the cause of action accrued. For the purpose of foreclosure, the notes continue as evidence of the debt until the mortgage is levied. *Cheney v. Woodruff*, S. C. Neb. Sept. 22, 1886; 29 N. W. Rep. 276.

22. **MASTER AND SERVANT—Safe Machinery—Duty of Master—How Affected by Servant's Knowledge of Defects.**—An employer, being in duty bound to provide safe machinery for use by his employees, cannot divest himself of liability by trusting the performance of such duty to a servant. A master's liability for injuries to a servant caused by defective machinery does not apply to a case where the servant, knowing, or having the means of knowing, of the defects, and knowing of the perils to which they exposed him, pursued his employment in spite of them. *Sanborn v. Madera, etc. Co.*, S. C. Cal. July 28, 1886; 11 Pac. Rep. 710.

23. **MORTGAGE—Assumption by Vendee—Payment—Subrogation—Estoppel.**—To secure his note for \$2,000, E. mortgaged certain land, which, subject to a mortgage to S., was owned by him, to H. The collection of the note was guaranteed by G. and R. E., by warranty deed, conveyed the land to W., subject to both mortgages; W., in the deed, and as part of the consideration thereof, assuming to pay both. W., by warranty deed, conveyed the land to M., subject to both mortgages; M., in the deed, and as part of the consideration thereof, assuming to pay both mortgages. Subsequently the S. mortgage was duly foreclosed, and on the next day after the expiration of the period of redemption the purchaser at the foreclosure sale executed to M. a quitclaim deed of the land. E. having failed to pay the guaranteed note at maturity, G. and R., the guarantors, immediately after his default, paid to H. the amount due thereon, and some six years afterwards, and after the commencement of this action, took an assignment of the mortgage from H. Six hundred and eighty-five dollars and seven cents of the amount of the H. note and mortgage has not been paid to G. and R. Held, (1) that M. is estopped to set up the title acquired by him through the foreclosure as against the H. mortgage; (2) that G. and R., as sureties, had the right to pay the H. note, after it fell due, for their own safety and protection, and without reference to whether H. could collect of E. or not, and upon such payment they were immediately entitled to be subrogated to the securities held by H., and, among others, to the H. mortgage, and M.'s obligation to pay the same; (3) that the fact that the right of action of G. and R. against E. is barred by the statute of limitations does not extinguish the lien of the H. mortgage, against which the statute has taken effect, or take away their right of subrogation to it. *Connor v. How*, S. C. Minn. Sept. 30, 1886; 29 N. W. Rep., 814.

24. **MORTGAGE—Chattel Mortgage—Description of Property—Identification—Evidence—Evidence Admissible—Right of Mortgagee—Conversion by Stranger.**—A chattel mortgage of "all that certain stock of one-inch seasoned lumber, being one car load of about 12,000 feet," and further describing the property as being at a particular place in the city of M., may, as between the parties, or as to a subsequent purchaser with notice, or a stranger, be shown by evidence to be applicable to a carload of such lumber standing at a different place in the city from that named in the mortgage. Evidence showing that the parties understood that the property was to be removed to the place designated in the mortgage would be admissible to apply the mortgage to property otherwise correctly described. A mortgagee, having the right of possession, may recover the full value of the property even in excess of his debt, in an action against a stranger who shows no right to the property. *Adamson v. Peterson*, S. C. Minn. Oct. 1, 1886; 29 N. W. Rep. 321.

25. —. **Debt Secured—Forged Notes.**—To secure the price of a harvester, O., as principal, and J., the plaintiff, as surety, executed three notes, and delivered them to defendants' agents, by whom the harvester was sold to O. Afterwards, and before the notes were handed over to defendants, the agent permitted O. to take up the notes, and substitute for them three others, purporting to be signed by him and J., but upon which the signatures of J. were forged; the agents knowing that they were not written by J. The agents forwarded the notes to defendants, who had no notice of any facts affecting their genuineness till about the time of the commencement of this action, before which time, acting in good faith, and without any notice or knowledge that the notes forwarded to them were not the original notes given by O. and J., defendants, through their attorney, took from plaintiff three other notes executed by him, and secured by mortgages of his real estate, which notes and mortgages were taken ostensibly to secure the notes upon which plaintiff's signature was forged, but which both parties supposed to be the original notes; so that, in the intention of the parties the mortgages and notes secured by them, were in fact taken to secure the indebtedness evidenced by the original notes. Held giving effect to the intention and common purpose of the parties, that the mortgages, and notes secured by them, must be taken and treated as given and received to secure the original indebtedness. *Egan v. Fuller*, S. C. Minn. Sept. 30, 1886; 29 N. W. Rep. 813.

26. **NEGLIGENCE—Evidence—Prima Facie Case—Contributory Negligence—Prudence Required in Danger.**—Where a plaintiff shows that she was injured by the overturning of a coach, caused by the breaking of one of its wheels while it was being driven round a curve, down grade, on a mountain road, where one side of the track was about a foot lower than the other, she has made out a *prima facie* case; and if no evidence is given to show that there was no defect in the wheel, and that the defendant was not guilty of negligence, she is entitled to recover. It is error for the court to instruct the jury "that a coach proprietor is never responsible for the imprudence of his passengers." The real question is whether, assuming the person injured to be ordinarily reasonable and prudent, the circumstances were so alarming as to de-

prive her of her ordinary reason, and to induce her instinctively to seek safety by an act which, although not such as the jury might believe to be prudent or discreet, was such as the generality of persons would have adopted in the dilemma in which she was placed. *Laurence v. Green*, S. C. Cal. Aug. 17, 1886; 11 Pac. Rep. 750.

27. ———. *Railroads—Unsuitable Stopping Places—Trial—Statements by Counsel not in Evidence.*—In an action for personal injuries sustained on leaving the rear car of a train at a station, evidence that others had previously been directed to take that car, and in alighting from it as the plaintiff did, had been injured, is competent to show negligence in the defendants in not providing a suitable stopping place, and to show want of negligence in the plaintiff. When counsel in argument makes a statement of a material fact not in evidence, against the objection of the other party, he violates the right of a fair trial, and his client assumes the burden of presenting and proving his claim that the decision was not affected thereby. *Bullard v. Boston, etc. Co.* S. C. N. H. July 30, 1886; 5 Atl. Rep. 838.

28. ———. *Injury to Child by Dump Cars Used in Grading Street—Duty of Contractor.*—The defendant was employed in grading and improving a public street under a contract with the municipal authorities of a city, and, in the lawful occupation thereof for such purpose, was engaged in transporting earth a considerable distance along the same to make a fill. The cars moved slowly, and were dangerous only to persons attempting to ride upon, or accidentally falling upon, the track in front of the wheels. Held, in respect to the risk of such accidents, that the measure of defendant's duty was reasonable care, and that such duty did not extend to the employment of men specially to keep watch of the approach of children or others to prevent them from invading and riding upon the cars when in actual use, but where, in the use of ordinary care, their presence was discovered, to use due diligence to prevent any injury to them. *Emerson v. Peterler*, S. C. Minn. Sept. 6, 1886; 29 N. W. Rep. 311.

29. *NOVATION—Assignment of Future Wages—Acceptance.*—When the acceptor of an assignment of future wages informs the assignee, after the wages are earned and due, that he will pay them to him, the assignment is completed, and there is a novation of parties and debt. *Clough v. Giles*, S. C. N. H. July 30, 1886; 5 Atl. Rep. 835.

30. *PAYMENT.—Presumption of Payment—Lapse of Time—Note.*—In an action upon a promissory note, the jury are authorized to consider, with other circumstances upon the issue of payment, the length of time which has elapsed since the time of the alleged payment, no matter what is alleged in the answer as to the manner of payment. *Manning v. Meredith*, S. C. Iowa, Oct. 7, 1886; 29 N. W. Rep. 336.

31. *Pleading.—Answer—General Denial—Mechanic's Lien—Foreclosure.*—An answer consisting of a general denial of each and every allegation in the petition, places in issue all the allegations contained therein. *Donovan v. Fowler*, 17 Neb. 247; s'c., 22 N. W. Rep. 424. In an action to foreclose a mechanic's lien on real estate for material furnished in the construction of a building thereon, an answer consisting of a general denial is a de-

nial of the allegations of the sale of the material for the purpose alleged, and of the ownership of the real estate upon which the lien is sought to be established; and the burden of proof is upon the plaintiff to prove all facts necessary to the existence of such lien. *Hassett v. Curtis*, S. C. Neb., Sept. 29, 1886; 29 N. W. Rep. 295.

32. ———. *General Denial—Negative Pregnant—Accession and Confusion of Goods—Grain—Claims of Owners.*—A general denial is the same in effect as a specific denial of each of the allegations in the whole or in the part of the pleading so denied, and is a negative pregnant only where a mere specific denial would be. Where, without fraudulent intent, goods of the same nature and value, belonging to different owners, are mixed, if a division can be made of equal value, as in case of a mixture of grains of the same kind, quality and value, then each owner may claim his aliquot part of the whole mass. *Stone v. Quale*, S. C. Minn., October 6, 1886; 29 N. W. Rep. 324.

33. *PRACTICE.—Trial—Findings—Equitable Point—Issue—Witness—Cross-Examination—Question not Responsive—Ejectment—Instructions to Jury—Bad Instruction.*—A defendant cannot complain that the court made no finding upon an equitable point involved in the cause, when, by his own neglect to meet such point in his answer, no issue thereon has been raised. A question put in cross-examination as to a "side-line monument," not mentioned in the examination in chief, to a witness examined upon a certain map in evidence, is not responsive to such examination in chief. In an action to recover possession of a mine, an instruction informing the jury, as a matter of law, that the mere fact that the locators did not place a monument at a certain corner of the claim they intended to locate would be fatal to the plaintiff's right of recovery, when, according to all facts in evidence, the location was distinctly marked, so that its boundaries could be distinctly traced, would be in contravention of the statute, and would invade the province of the jury. *Anderson v. Black*, S. C. Cal., July 27, 1886; 11 Pac. Rep. 700.

34. *SALE.—Warranty—Quality of Wheat—Appeal—Instructions—Exceptions.*—Evidence considered as justifying a ruling by the jury, that certain wheat sold as "genuine Saskatchewan Fife wheat" was not warranted to be pure, or absolutely free from other seeds, and that there was no breach of warranty, although there were some impurities. Instructions to a jury not excepted to will not be reviewed. *Shatto v. Abernethy*, S. C. Minn., Oct. 1, 1886; 29 N. W. Rep. 325.

35. *SUNDAY.—Signing Note on Sunday—Delivery on Monday—Alteration of Instruments—Note—Substituting New Payee's Name—Ratification of Alteration—Requesting Extension after Knowledge of Alteration.*—A promissory note becomes a contract at the time of its delivery, and a note signed on Sunday, but not delivered until Monday, is not subject to the objection that it is a Sunday contract. The alteration of a promissory note by erasing the name of the original payee, and inserting another name, without the knowledge of one of the two makers of the note, is a material alteration, and the maker, who is ignorant of the alteration, will not be bound by the note unless he sub-

sequently ratifies the alteration. Requesting and obtaining an extension of time for the payment of a promissory note which has been materially altered by substituting the name of a new payee in place of the original name, after knowledge of such alteration, is such a ratification of the alteration as will bind the maker requesting the extension. *Bell v. Mahin*, S. C. Iowa, Oct. 5, 1886; 29 N. W. Rep. 331.

36. **VENDOR AND VENDEE.**—*Assumpsit for Purchase Money—Sale of Equitable Interest.*—A., holding a bond for a deed of certain real estate from B., in whom was the legal title, to secure a certain sum of money, sold his equitable interest to C., who paid a part of the consideration. C. subsequently paid B. the amount due him, and took a transfer of the legal title from B. to himself. In an action brought by A. against C.: *Held*, that A. could maintain *assumpsit* to recover the balance of the purchase price, less the amount paid B. in discharge of the incumbrance. *Bartlett v. Baker*, S. J. Ct. Me., Sept. 23, 1886; 5 Atl. Rep. 847.

37. ———. *Deferred Payment—Unpaid Matured Notes—Judgment for Total Amount of Lien and Sale of Land*—Upon default being made in the payment of such of several notes given in a land purchase as are then due, personal judgment may be had against the maker for the amount of the matured notes, but not judgment for the amount of all the notes, and a sale of the entire property to satisfy the vendor's lien. *Leopold v. Furber*, Ky. Ct. App., Sept. 11, 1886; 1 S. W. Rep. 404.

38. **WATERS AND WATER-COURSES.**—*Dam—Complaint—Description of Land Damaged by Overflow of Dam.*—In a suit for damages for overflowing land, and to have the dam which caused the overflow lowered, a description in the complaint of the land on a part of which the damage is claimed, is sufficient which locates it by government subdivisions as a 100-acre tract, "except eleven acres heretofore conveyed to the Milwaukee, Lake Shore & Western Railway Company for a right of way and depot grounds;" and the description of the land overflowed, as 44 acres on the easterly half of plaintiff's farm, is sufficiently definite. *Lake v. Loysen*, S. C. Wis. Sept. 21, 1886; 29 N. W. 214.

39. ———. *—Rights of Mine Operators—Riparian Rights—Pollution of Stream through Natural Use and Development of Coal Property*—*The Doctrine of Fletcher v. Rylands, L. R. 1 Ex. 280, Considered—Sanderson v. The Pennsylvania Coal Company, 5 Norris, 401 Overruled.*—Every man has the right to the natural use and enjoyment of his own property, and if, whilst lawfully in such use and enjoyment, without negligence or malice on his part, an unavoidable loss occurs to his neighbor, it is *damnum absque injuria*; for the rightful use of one's own land may cause damage to another without any legal wrong. The right to mine coal is not a nuisance in itself, it is a right incident to the ownership of coal property, and when exercised in the ordinary manner, and with due care, the owner cannot be held liable in damages for permitting the natural flow of mine water over his own land into a water course by which the natural drainage of the country means is effected. The removal of water from the workings being essential to the business of mining, its dis-

charge into the natural water course and the consequent pollution of that stream is *damnum absque injuria* to lower riparian owners. *A fortiori* is this the case where the water flowing naturally from the tunnels is sufficient to cause the pollution, independently of the water pumped from the lower levels of the mines. That a case might arise in which such pollution by its injurious effects upon the general health would amount to a public nuisance of which the public interest, as involved in the general health and well being of the community, would require the abatement, is not denied. But no such question is involved in the present case. The doctrine of *Fletcher v. Rylands (L. R. 1 Ex. 280)* is subject to many exceptions in England, and has not been generally accepted in this country. That rule, moreover, is inapplicable to the present case. In this case defendants brought nothing upon their land, and the pollution complained of, was the result of natural, and not of artificial causes. *Pennsylvania, etc. Co. v. Sanderson*, S. C. Penn., Oct. 4, 1886; 13 Weekly Notes of Cases 181.

40. **WAYS.**—*Land-Owners not Assessable When not Specially Benefitted—Act Unconstitutional.*—The change of a turnpike to a common, free public road confers no special benefit upon the land-owner, and the statutory provision authorizing the assessment of the price of the turnpike upon the land-owners is unconstitutional and void. *State v. Essex Public Road Board*, N. J. Ct. Errors and Appeals, July 1, 1886; 5, Atl. Rep. 784.

41. ———. *—Public Highway—Dedication—Animus Dedicandi—Trial—Findings of Court—Issue Made Immaterial by Findings—Damages—Damnum Absque Injuria.*—Dedication of a public highway by the owner of the soil to the use of the public is never to be presumed without evidence of an unequivocal intention to dedicate on the part of the owner. The findings of facts by the trial court must be responsive to and cover all the material issues; but a material issue may become immaterial, so as to require no findings, by reason of findings upon other issues. No damage can be recovered for the consequences of a lawful act properly performed. If an injury is sustained, it is *damnum absque injuria*. *Quinn v. Anderson*, S. C. Cal., Aug. 26, 1886; 11 Pac. Rep. 746.

42. ———. *—Townships—Road Money—Apportionment.*—At the regular spring election Matawan township voted \$700 for their highways. Notice was posted, and on March 13th the township committee met, and apportioned to each overseer the share of money to be used by each. On March 17th part of the township voted to become an incorporated borough, and, in pursuance of the statute, elected, on April 7th, street commissioners, who have charge of the streets and highways. The collector of the township not having paid over to the overseers the amount apportioned by the township committee, and refusing to pay it to the commissioners of the borough, a writ of *mandamus* was asked to compel him to. *Held* that, as the inhabitants of the borough were voters who elected the township committee that made apportionment, they were actors therein, and the writ must be refused. *Board of Comrs of Matawan v. Horner*, S. C. N. J., Sept. 20, 1886.

43. **WILL.**—*Probate.*—In an action to set aside the probate of a will, on the ground of undue influence expressed by one of the legatees, a statement made

out of court by such legatee, tending to show that he had used undue influence on the testator, and inconsistent with his testimony in court, is admissible both as an admission of a fact in issue by a party to the controversy, and also to affect his credibility as a witness. An objection, based merely on the order of proof, that evidence of such statement was admitted before the evidence sought to be contradicted by it had been given, is untenable. *Saunders' Appeal*, S. C. Conn., Aug. 1886; 2. N. Eng. Rep. 753.

44. **WITNESS.**--*Refreshing Memory*--*Private Cash-Book*--*Memoranda*--*Partnership*--*Dissolution*--*Accommodation Note*--*Accounting*--*Bill in Equity*.--A witness may refer to and read the items in his private cash-book as memoranda of payments made at the time of the transaction, to refresh his recollection. When on the dissolution of a firm, one of the partners, by agreement, is to wind up its affairs, and account to the others on the basis of their sharing equally in the assets, or equally assuming any deficit, and he, for the purpose of convenience only, takes up an accommodation note of the firm by giving his own note therefor, which he is afterwards obliged to pay, the others will be liable for their proportionate share of it. When, on the dissolution of a firm, it is agreed that there shall be an accounting after the claims are collected and the debts are paid, a bill in equity is an appropriate proceeding therefor. *Converse v. Hobbs*, S. C. N. H., July 20, 1886; 5 Atl. Rep. 832.

QUERIES AND ANSWERS.*

[Correspondents are requested to draw up their answers in the form in which we print them, and not in the form of letters to the editor. They are also admonished to make their answers as brief as may be.--Ed.]

QUERIES.

28. Section 1776, R. S. says: "Any affidavit or information may be amended in matters of form or substance, at any time, by leave of court before the trial and on the trial as to all matters of form and variance at the discretion of the court." What is the difference between an amendment as to "form or substance," and an amendment as to "form and variance"? H.

QUERIES ANSWERED.

Query 45. [22 Cent. L. J. 479].--In city of the 4th class, organized under charter granted to such cities by Revised Statutes of 1879 of Missouri, in case of a tie in vote for Mayor, have Board of Aldermen, under § 4937, Rev. Stat. of Mo., the power to contest the election by casting out votes which are proven to be illegal? Have they the power to go behind the return of the judges of the election and decide on the illegality of votes? S. W.

Answer.--The law is invalid, and the Board of Aldermen cannot institute nor pass on any contest of election. Const. Mo. Art. 8, § 9; State, *ex rel. v. John*, 81 Mo. 13. R. B.

RECENT PUBLICATIONS.

LEADING CASES IN THE COMMON LAW, With Notes, (Third Edition). By Walter Shirley Shirley, M. P., Barrister-at-Law, of the Inner Temple, and the North-Eastern Circuit; Author of "A sketch of the Criminal Law," "An Elementary Treatise on Magisterial Law," etc. London: Stevens and Sons, 119 Chancery Lane, Law Publishers and Booksellers, 1886.

This is an admirable collection of leading cases and we are not surprised, after an examination of it, that it has been received in England with phenomenal favor, and has so soon reached its third edition. The cases, which are much more numerous than is usual in such collections, are very well selected and include almost every conceivable phase of the common law, and appended to each case is a note in which the principle established is very carefully and thoroughly brought down to date.

Mr Shirley takes in the whole range of the common law (excluding, however, cases which relate to title and tenure of land), and, in point of time, the work extends from such as *Twyne's Case*, the *Six Carpenters' Case*, *Semayne's Case*, down to the latest modern deliverance on the subjects of negligence and contributory negligence. The statement of facts of each principal case and of the doctrine which it embodies is clear and remarkably brief, and the note sets forth, with much precision, the application or modifications of the doctrine to be found in subsequent cases.

The work of Mr. Shirley is especially designed and adapted to the use of law students, and will undoubtedly be found very serviceable to them, but is hardly, if at all, less valuable to the practitioner who will find in it clear and concise statements of the law bearing upon a great variety of subjects, and fully fortified by ample citations of authorities.

There are three appendices, which are quite useful to the English reader, and in a less degree to the American. In the first (A) will be found the more important sections of the principal statutes referred to in the work. The second (B) contains short abstracts of equity and conveyancing leading cases. The third (C) is a list of the principal legal maxims.

In the preface is an apology which is certainly unique and, we think, utterly superfluous. Mr. Shirley says: "The tone of flippancy and jocularly, modified to some extent in the second edition has been almost discarded in this." We are light-minded enough to lament the excisions. If Mr. Shirley is able to infuse anything of fun or "jocularly" into so dry a bundle of sticks as a collection of leading common law cases, we say: May he live long and prosper. "Dost think that because thou art virtuous there shall be no more cakes and ale?" And because thou art learned, shall there be no more--

"Quips and cranks and wanton wiles,
Nods and becks and wreathed smiles."

Mr. Shirley's style, notwithstanding his merciless exclusion of wit and humor, is neither stilted nor severe, and, taken altogether, we think his book is worthy of very high commendation.

AMERICAN CRIMINAL REPORTS. A series designed to contain the latest and most important criminal cases determined in the Federal and State Courts in the United States, as well as selected cases important to American lawyers from the English, Irish, Scotch and Canadian Law Reports, with notes and references, by John Gibbons, LL.D., of the Chicago Bar. Vol. V. Chicago: Callaghan & Co., Law Book Publishers. 1886.

This is manifestly a valuable series for the use of lawyers engaged in the practice of criminal courts. The volume before us is well arranged, the cases judiciously selected, and the annotations learned and pertinent. Appended to the volume is a succinct account of the latest sensational criminal case—that of the Chicago anarchists, Spies and others, which is sufficiently full up to the rendition of the verdict. As the case will be revised by the Supreme Court, such questions of law as are involved in it, will doubtless appear in a future volume.

It is almost superfluous to say that, like all the books issued by Messrs. Callaghan & Co., the volume before us is, in every respect, typographically perfect.

JETSAM AND FLOTSAM.

"Why do you refuse to answer the question, madam?" asked a lawyer of a lady witness, scenting a favorable disclosure.

"Because my answer ought not to be heard by any honorable person," replied the witness.

"Well, then, madam," said the counsel, "whisper it in the ear of the judge."

MOTHERS-IN-LAW.—Mothers-in-law are no doubt a nuisance, and some abuse of them is to be naturally expected from all right-minded sons-in-law. One Seymour has, however, now learnt that, although it may be quite safe to call his mother-in-law "a vicious nasty old cat" to her face, it is not advisable to tell her so on a post-card. Many other dreadful things did the defendant write about his mother-in-law. Evidently his feelings to her could not have been friendly. Hearing that she had kissed his child in the street, he had the youngster stripped, ducked in water, and cleansed from the pollution of her kiss. The luxury of abusing a mother-in-law in this way cost, however, £100, and probably the defendant will now expend less on post-cards.—*Gibson's Law Notes, Eng.*

Served him right! Who takes care of baby when papa and mamma go to the picnic? Who lets in dear Thomas when he comes home from the lodge, anywhere between midnight and day, too indisposed to be able to fit his latch-key in the key-hole? And who next morning holds his poor head when it is splitting because of the oysters he had eaten at the lodge supper?

And how mean! To attack her with a postal card, "for all the world to see." A man who will send a postal card to a woman, "save in the way of kindness"—we forget the rest of the quotation, but feel safe in saying "is fit for treason, stratagems and spoils."

AN INSANE ADVOCATE.—Appended to the Forty-ninth Annual Report of the Managers of the State Lunatic Asylum at Utica, for the year 1885, is a paper on insanity, in which the author gives the following case interesting to lawyers: "A lawyer telegraphed me from Syracuse that he would be at the asylum at a certain hour. I was absent in the city when the telegram came, and when he called, being told this, he left. Two days afterwards I got a telegram from him at Albany, saying that he would call again at a given hour, and requested me to have Governor Seymour and Judge Denio to meet him. He came at the appointed hour, and said to me: 'I called yesterday to consult you because I have for some time past felt so strangely that I thought I might be out of my mind, but I have just been to Albany and argued an important case before the Court of Appeals, and feel satisfied

that I do not need advice.' I saw from his manner and speech that he was very insane, and said to him, 'You seem to be very insane now.' He said, 'Well, perhaps I am excited. I have been at times irrational, I know, but for the most part I am rational.' Soon afterwards he was brought to the asylum, and declared himself to be President of the United States, and finally said that he was the Ruler of the Universe. Judge Grover, of the Court of Appeals, said to me that he had heard his 'argument,' which was partly a Fourth of July oration, and partly an attack on the courts, and that he was an insane man."—*Albany Law Journal.*

A NICE POINT OF LAW.—In 1878 a Mexican soldier deserted from Nuevo Laredo, while the company were at the river bank, and swam to this side. The guards and officers fired at him until he had reached the middle of the river, when all ceased but one, a captain named Rafael Pinal, who continued, and finally, after the deserter had reached this side, the captain shot him. He dropped dead in his tracks. The captain never crossed to this side and consequently was not arrested. To-day Deputy Sheriff Yglesias saw him on the streets of the city and forthwith arrested him, and he is now lodged in jail. A nice point of law is embodied in this case, as the murderer was in Mexico when he committed the deed, although the victim was in the United States.—[Laredo, Tex., Oct. 5, special to *Globe-Democrat.*]

The following will was filed in the register's office for registration, which we give verbatim:

13 Civil Deestrict Oct 1 | 886

a Will Made By Henry Lewis to his wife and 3 Children and 1 Grand Son Wife An Lewis oldest Son Samuel Lewis daughter Emer Lewis youngest Son Henry Lewis Grand Son Jonney Gilliland I do Will all that I persess to these four pursons

Cows 9 calfs 9 Horseses 3 one Gray Mare an one Bay horse Pony one Soll Pony

Made By Henry Lewis

on his dying Bed
Witness
Samual H Jones
Samual Louis

THE LAW AS SHE IS WRIT.—We were shown this morning by Constable Robinson, of this city, a unique and decidedly original legal document prepared by a landlord of this city, who believes "in every man being his own lawyer." It is a "Notice to Leave Premises" served on one of his tenants, and prepared by filling out the usual blank forms. The *rara avis* is before us, and we submit a copy, thinking it may interest your readers. The words italicized are those filled in.

"NOTICE TO LEAVE PREMISES.

To Mr. John Handlen:

You are hereby notified to leave the following premises, now occupied by you, to-wit: *That you have not payed Your Rent According to Contract, so you must leave within 3 days after date by the law of Franklin City,* and all the appurtenances thereto belonging and rented within three days from the date hereof: And that upon your failure to do so I shall have recourse to legal measures to obtain possession of the same Dated at *March 6th* this *Being the day of Judgment* 1886.

L. S. (In German.)"

It is unnecessary to state that the startling announcement at the close had the desired effect of making the tenant in every instance "git." While the landlord's name in bristling German letters must have appalled and terrified him in the highest degree, We give the notice *verbatim et literatim.*—[Columbus, Ohio, correspondence *Ohio Law Bulletin.*]

The Central Law Journal.

ST. LOUIS, NOVEMBER 5, 1886.

CURRENT EVENTS.

PRISONERS AS WITNESSES.—An interesting and instructive article on this subject by Hon. Mr. Justice Stephen, appears in the *Nineteenth Century* for October. It is of the greater value because it is the result of the observations of an eminent judge upon the operation of the law in cases actually tried in his own court. It may, however, be remarked that the law authorizing prisoners to testify in their own behalf is, in England, of recent origin and partial operation. The Criminal Law Amendment Act passed in 1885 authorized prisoners to testify in their own favor in cases of sexual crime, there having been an epidemic of crime of that character, and of false accusations of such crime, and, under this act, nearly or quite all the cases bearing upon the subject, have been tried.

Mr. Justice Stephen treats the subject very fairly and judicially, sets out the arguments on both sides, and arrives at the conclusion, which, however, he announces at the beginning of the article, that "the examination of prisoners as witnesses, or at least their competency, is favorable in the highest degree to the administration of justice." In the course of his article, however, if we may say so without presumption, we think he "admits himself out of court." He says that "the evidence of a deeply interested witness * * * is of no value if the circumstances are such that he cannot be contradicted." He adds, with regard to offenses committed at night: "When you say I was committing burglary or night-poaching, I was, in fact, at home and asleep in bed, and both my wife and I are prepared to swear to it, now that the law has opened our mouths." This sort of evidence, also, he admits, is of no value.

Evidence that, in the nature of things, cannot be believed is of no value, and evidence which is of no value should not be given or received. The law does not compel a vain thing, nor should it require or permit it. If evidence as to circumstances upon which the prisoner cannot be contradicted is of no val-

ue, so also is his testimony on points on which he can be contradicted, that is, if he *shall be* contradicted by disinterested and reputable witnesses. It appears, therefore, that the only evidence which a prisoner can give, which is not necessarily worthless, is evidence on points on which he might be, but is not, contradicted by credible testimony. This rule, it will be observed, limits the usefulness of the prisoner to himself, as witness, to very narrow bounds, and even within that contracted sphere, he has to encounter the strong suspicion necessarily attaching to his deep personal interest in the matter, and the odium and distrust which pertains to his position as a man accused of grave crime.

The common law presumes every man innocent until he shall be proved guilty. It says to the accuser: "You charge this immaculate citizen with murder, you must prove his guilt beyond a reasonable doubt, or we will discharge him." Public opinion takes a different view, and so (except theoretically) does the jury. When a grand jury has returned an indictment "a true bill" an inefaceable stigma is fixed upon the character of the average defendant, and the legal presumption of his innocence, however theoretically strong, become practically as weak as the seven green withs with which Delilah bound Samson.

We do not know that we can better express our views on this branch of the subject than we did in a former article: "Besides this the average defendant in criminal cases is 'unaccustomed to public speaking,' and by no means in the habit of arranging his ideas in logical sequence or expressing them in apt terms. Under the literally and metaphorically 'trying' circumstances of a trial for a felony, it would not be remarkable that he should 'lose his head' and say things that could easily be construed into a confession of guilt. That sort of thing has often happened. Many a man has tied a rope around his neck with his tongue. Fluttered and frightened, agitated by the novel circumstances under which he is placed, awed by the solemnity of the proceeding, and anxious beyond measure as to the grave consequences of an error, it is not remarkable that in every point of view, he does himself much more harm

than good, and, whether innocent or guilty, gives testimony the direct tendency of which is to convict, not to acquit him. He is in a position almost identical with that of the wretches of olden times to whom the wisdom of the law denied the aid of counsel, and who, whether old or young, learned or ignorant, male or female, were obliged to defend their lives by their own eloquence.

The truth is, there are but two words which a person accused of serious crime, should, if he is well advised, say upon the subject, from the hour of his arrest to the rendition of the verdict, and those two words are 'not guilty.' "

Mr. Justice Stephen admits that "though the evidence of an accused person on a point in which he is interested and cannot be contradicted, ought to be regarded as worthless in the way of proving his innocence, the absence of such evidence may, under particular circumstances go far to prove his guilt."

And just here is where the hardship, and, we may be permitted to add, the folly and wickedness of the whole innovation comes in. Reduced to its lowest denomination, the matter amounts to this: if the average defendant elects to testify, the jury will not believe his statements, but will believe that he has committed perjury, if he declines to testify, the jury will think that if he were innocent he would not hesitate to swear to his innocence.

Mr. Justice Stephen favors two other innovations which are of the gravest and most radical character. One is "to make the accused person not merely a competent but a compellable witness at every stage of the inquiry." In other words the proposition is to abrogate the legal maxim old as the hills and deeply imbedded in the very foundation of English jurisprudence, that no man can be compelled to accuse himself. The other innovation is, that if defendants shall be permitted to testify freely, "it would be necessary to modify the old doctrine about proving beyond a reasonable doubt the guilt of the accused person, for it would be a matter of moral certainty that whenever a plausible story consistent with innocence could be devised, the prisoner would swear to it and find others to help him."

We have not space at present to comment

upon these new departures, but will return to the subject in a later number.

At present, we must conclude by expressing our astonishment that an English Judge in advocating a proposed change in the law which, upon his own showing, can have little other effect than producing a luxuriant crop of perjury should in aid of that innovation favor the abrogation of one of the most ancient principles of the law, and the serious modification of another, both of which have always been regarded as essential to personal liberty and security.

NOTES OF RECENT DECISIONS.

ATTACHMENT—CHAMPERTY — MAINTENANCE — ATTORNEY.—In Oregon, during the past summer, was decided a case¹ of some interest involving the liability to attachment of money taken from a prisoner by the sheriff, and also an interesting ruling on the subject of champerty. Keltner was a prisoner on civil process and confined in jail; the jailor took from him his money, some \$800, and delivered it to the sheriff. That officer had in his hands attachments against Keltner which he levied on the money so taken from the defendant. Keltner assigned his claim to his attorney Dahms, who brought suit in his own name against the sheriff and the plaintiff in the several attachments to whom the sheriff had paid the money, that had been taken from Keltner by the jailor. Upon the question whether the money was liable to the attachment, the court says:

"I am of the opinion, that property taken from a prisoner under such circumstances is not the subject of attachment or levy by virtue of an execution. The security of the public may justify the searching of a prisoner confined in prison upon criminal or even civil process, and the taking from him of any property in his possession that would aid him to make an escape. It would probably be regarded, under such circumstances, as a reasonable search and seizure; but to allow private parties to take advantage of the circumstances in order that they may secure a personal benefit would be a violation of that

¹ Dahms v. Searj, 11 Pac. Rep. 891.

faith which the commonwealth owes to persons held in custody under its authority and laws. It would lead to oppression and abuse."

The court, however, held that the assignment of the claim to Dahms, an attorney at law, was champertous and void.² In a Missouri case, however, it was held that a contract between an attorney and his client was not champertous, because the former agreed to receive for his compensation a part of the property sued for, unless he also agreed to pay some portion of the costs and expenses of the litigation.³ This ruling, however, is exceptional, and, as we believe, is not fully in accord with the current of the decisions on the subject.

TAXATION — EXEMPTION — CHURCH PROPERTY—BASE FEE.—It is the rule in most, if not all, of the States, to exempt from taxation, church property used exclusively or chiefly for religious purposes. How far this exemption extends was a question in a case decided last summer by the Supreme Court of Connecticut.⁴ The Spiritualistic Association being duly incorporated had a camp ground on which was erected a building called a Pavilion, the principal room of which was used on Sundays, and sometimes on other days for religious purposes; it was, however, sometimes used for dancing, and for roller skating, for which a small fee was charged, and refreshments were sold upon these festive occasions. Rooms on the second floor were rented to visitors, and all the emoluments from these uses of the building were turned into the treasury of the association, which was authorized by its charter to use its aggregate income for religious, charitable or social purposes. Upon this state of facts the ques-

tion was raised whether the Pavilion was taxable property or exempt on account of the religious character of the use to which it was chiefly devoted.

The court laid down what is manifestly the proper rule, thus:

"The determination of the question presented, does not depend upon the proportion which the time given to the religious bears to that given to the secular use, nor upon the amount of resulting income, because the statute does not intend to exempt any building earning money applicable to secular uses. Upon the facts, therefore, there was error in exempting the 'pavilion.' "

Upon another issue raised by the pleadings, the court said:

"A further question is made with regard to the party who should be taxed for the cottages erected upon the camp-meeting ground. These lots were leased by the association to the different occupants for a sum paid down in advance for the entire term of the lease; the lease being to the lessee, and 'his heirs and assigns, forever,' but forfeitable upon the breach of certain conditions. Upon these lots the lessees have erected cottages. We think the title of the lessees to be what is known in law as a determinable or base fee, and that the lessees are to be regarded as the owners, and that the lots and buildings are to be taxed as their property, and not that of the association. In 4 Kent, Comm. (5th ed.) 9, it is said: 'A qualified, base, or determinable fee (for I shall use the words promiscuously) is an interest which may continue forever, but the estate is liable to be determined, without the aid of a conveyance, by some act or event circumscribing its continuance or extent. Though the object on which it rests for perpetuity may be transitory or perishable, yet such estates are deemed fees, because it is said they have a possibility of enduring forever.' "

² *Arden v. Patterson*, 5 Johns. 48; *Key v. Vattier*, 1 Ohio, 132; *Weakley v. Hall*, 13 Ohio, 175; *Backus v. Byron*, 4 Mich. 535; *Scobey v. Ross*, 13 Ind. 117; *Martin v. Clarke*, 8 R. I. 389. See, also, *Robinson v. Howard*, 7 Cush. 257; *Morris v. Penniman*, 14 Gray, 220; *Drake, Attachm.* §§ 503-505; *Clymer v. Willis*, 3 Cal. 364; *Wilder v. Bailey*, 3 Mass. 289; *Pollard v. Ross*, 5 Mass. 319; *Commercial Exchange Bank v. McLeod*, 19 N. W. Rep. 329; s. c., 22 N. W. Rep. 919; *Pomroy v. Parmlee*, 9 Iowa, 140; *Isley v. Nichols*, 12 Pick. 270; *Hunt v. Stevens*, 3 Ired. 365.

³ *Duke v. Harper*, 66 Mo. 54.

⁴ *Conn. Spiritualistic, etc. Assn. v. Town of East Lyme*, 5 Atl. Rep. 849.

SALE OF PERSONAL PROPERTY TO DEFAUD CREDITORS.

Introductory.

A. Statute of Fraud.

B. Divisions of Fraud.

1. Actual, definition.
2. Constructive, definition.

Inadequacy of Consideration.

A. What is.

B. Roman law.

Vendor retaining possession after sale is made.

A. Possession presumes ownership.

B. *Bona fide* purchaser.

C. Twyne Case.

D. Lord Coke's advice.

E. Fraud, *per se*.

1. Common law decisions.
2. Statutory enactments.

F. *Prima facie* fraudulent.

1. Common law decisions.
2. Statutory enactment.

G. Nature of article will sometimes excuse delivery.

H. Distinction between antecedent debt and new consideration.

I. Charge to the jury commended by the Supreme Court of Texas.

Introductory.—A. The law upon the sales made by debtors in fraud of creditors was originally considered as governed by the statute of 13 Elizabeth, c. 5, and the decisions made under it; but it is said that other statutes had even been passed previous to that time, and in *Cadogen v. Kennett*,¹ Lord Mansfield said that the principles and rules of the common law as now universally known and understood, are so strong against fraud in every shape, that the common law would have attained every end proposed by the statute of 13 Elizabeth.

This statute, which in substance declared that all conveyances of goods and chattels, not made *bona fide* and upon a good consideration, but in trust for the use of the person conveying them, or made to hinder, delay or defraud creditors, were void; which, with variations, has been re-enacted in most of the States of the Union.

And under certain circumstances, this statute was construed to mean subsequent as well as existing creditors.²

To attempt to define fraud in all its manifold forms is an impossibility; to circumscribe its bounds is to limit man's ingenuity and propensity to do evil.

B. Jurists have, however, been able to give

a pretty fair logical classification into actual and "constructive," "presumptive" or "legal" fraud.

1. Actual fraud is a question of fact. The essential element here is untruth, and may be reduced to two essential forms—false representations and fraudulent concealments; *suggestio falsi* and *suppressio veri*.

2. "Constructive," "presumptive," or "legal" fraud, is an inference of law, not to the effect that an actual fraud has, in the absence of explanation, been clearly proved; but either that, judging men as fallible beings and likely to yield to strong temptations, it is probable that fraud was committed; or that the existence of certain things in the relation or conduct of the parties, begets a probability of actual knowledge of fraud, or what will lead to fraud on the part of the person complained of. These presumptions may be conclusive or rebuttable.

It is under constructive fraud that the subject in question will be found.

Among the most important indications of intent to defraud creditors upon the part of the vendor in the sale of his chattel property is inadequacy of consideration, and the retaining of possession after the sale is negotiated.

Inadequacy of Consideration.—Naturally persons do not dispose of their worldly effects without being fairly compensated for them; to do otherwise is not natural and looks suspicious.

If the vendor is able to contract and is not tricked into making what the law terms an unconscionable bargain, and he is in solvent circumstances, the law says to him that he can dispose of his property in any manner he may see fit. But when he is insolvent, the law then looks upon him as a trustee to hold and dispose of his property for the benefit of the creditors in general; he can, however, prefer his creditors, and make a valid sale of his effects to such of them as he may choose, but it must be for a fair price.³ The law will compel a man to be just before it will allow him to be generous.

A. The consideration paid need not be the full value of the property, but it must be such as will not cause surprise or warrant a

¹ Cowp. 432.

² *Graham v. Furber*, 14 C. B. 410; 23 L. J. C. B. 51.

³ *Sprett v. Willows*, 3 DeG. J. & S. 293, § 30.

suspicion of fraud or contrivance upon the part of the purchaser.⁴ And if the price paid be grossly below the value of the property the purchaser cannot hold the property as against a creditor, though in fact his purchase was made without any knowledge of any fraudulent intent on the part of the vendor.⁵

Inadequacy of consideration may be evidence of fraud, slight or powerful, according to its amount and other circumstances. When it is satisfactory and the evidence is decisive, when from the proof of inadequacy the court or jury are convinced that fraud as a fact did exist, then relief is granted.⁶

Another very able jurist is quoted as having said that "An inequality so strong, gross and manifest that it must be impossible to state it to a man of common sense without producing an exclamation at the inequality of it,"⁷ will be presumed fraudulent.

B. The Romans had a fixed standard by which to determine cases of inadequacy which was one-half of the real value of the subject matter. It seems, however, that this was limited to the sale of immovable property.⁸ The French code has a similar provision. Such arbitrary rules are not in keeping with the spirit of our laws, and with our methods of administering the law. Less than half price, unless it was shown that it was intended as a gift, would be strong evidence of fraud, and such as between the vendee and creditors would justify a finding of fraud.

In order that the inadequacy may prove to be fatal it must exist at the time of the conclusion of the contract; none can arise from subsequent events or change of circumstances.⁹

Vendor Retaining Possession After Sale is Made.—A. The person having the possession of a chattel is presumed to be the owner. Possession implies ownership. And at one time it was held that even as between vendor and vendee a sale was not valid and complete until delivery, either actual or constructive of the thing sold. But such is not the general

rule now, and, with a few exceptions, a sale can be valid, as between the original parties even though no delivery be made.

B. *Bona Fide Purchaser.*—It is well settled that a purchase made *bona fide* upon a good and sufficient consideration of a chattel of a person in rightful possession, will convey a good title.¹⁰

Some courts make a distinction between a new consideration between the parties and a pre-existing indebtedness, but this is in opposition to the holdings of the large majority.¹¹

How the retaining of possession by the vendor affects creditors, is a somewhat difficult question. Is it *per se* fraudulent, or is only *prima facie* so?

C. The leading case upon this subject in early times was the celebrated *Twyne* case,¹² in which the facts were shown to be that a debtor had sold to *Twyne*, a creditor, by general deed, his goods and chattels, pending an action of another creditor. The debtor continued in possession of the goods, and sold some of them, and the sheep were sheared by him and marked with his mark. The second creditor took the goods in execution, and *Twyne* resisted, but was defeated.

D. Upon the decision in this case, Lord Coke advises: "Reader, when any gift shall be made to you in the satisfaction of debt by one who is indebted to another also. 1. Let it be made in a public manner, and before the neighbors, and not in private; for secrecy is a mark of fraud. 2. Let the goods and chattels be appraised by good people to the very value, and take a gift in particular satisfaction of your debt. 3. Immediately after the gifts take possession of them, for continuance of possession of the donor is the sign of a trust. And because fraud and deceit abound in these days more than in former times, it was resolved in this case by the whole court, that all statutes made against fraud should be liberally and beneficially construed to suppress fraud."

In *Edwards v. Harben*,¹³ it was said by Judge Buller: "This has been argued by the defendant's counsel as being a case in which

⁴ Big. on Fraud, 812.

⁵ *Worthy v. Caddell*, 76 N. Car. 82; *Fullenwider v. Roberts*, 4 Dev. & B. 278.

⁶ 2 Pom. Eq. 480, n.

⁷ Lord Thurlow in *Gwyne v. Heaton*, 1 Bro. ch. 1, 9.

⁸ Code lib. 14, tit. 44, § 2.

⁹ 2 Pom. Eq. 481, n.

¹⁰ See 49.

¹¹ See 50.

¹² 3 Coke, 80; 1 Smith, L. C. 1.

¹³ 2 T. R. 587.

the want of possession is only evidence of fraud, and that it was not such circumstances *per se* as makes the transaction fraudulent in point of law, that is a point which we have considered, and all are of the opinion that if there be nothing but the absolute conveyance, without possession, that, in point of law, is fraudulent."

Apart from this very exceptional case, says a learned author,¹⁴ the authorities all are in accordance in treating the question of *fraus vel non* is one of fact for the jury, even where the vendor remains in possession.

A great many of the States have statutes upon this subject substantially alike, while in others the common law still prevails.

E. *Per se Fraud—Common Law Decisions.*

—1. In Pennsylvania,¹⁵ Kentucky¹⁶ and Connecticut,¹⁷ it was held, without statutory enactments, that the retention was fraud in law, where the subject of the sale was capable of delivery, and no honest and fair reason could be given for the retention of the possession by the vendor.

In *Hull v. Sigisworth*,¹⁸ the facts were found to be, that Rev. W. H. H. Murray owned and kept the horse upon his farm for three years prior to May, 1879; that, in 1877, the defendant, then in his services, bargained with him for the purchase of the horse as soon as he could earn the money to pay for it; that in May, 1879, Murray sold and delivered the horse to him, taking a receipt in full for wages earned in payment; that thereafter he continued in the service of Murray, keeping the horse in his stable, and feeding it from his hay and grain as before, paying Murray two-dollars and a half per week for the hay and grain; that he took exclusive care of it, broke it to harness and shod it, claiming to own it, and be in possession of it, and that

while it was so kept it was attached as the property of Murray. It was held that the title did not pass as against Murray's creditors.

In rendering the opinion, the court quoting from *Norton v. Doolittle*,¹⁹ says: "The rule of law which requires a change of possession, is one of policy. Its objects is the prevention of fraud. The policy which dictates it, and the prevention at which it aims, require its rigid application to every case where there has not been an actual, visible, and continued change of possession, and in applying the rule we must look beyond the good faith, or secret, technical feature of the transaction; so purchasers must learn and understand that if they purchase property, and, without legal excuse, permit the possession to remain, in fact, or apparently and visibly, the same, or if changed for a brief period, to be in fact, or apparently and visibly continued as before the sale, they hazard its loss by attachment for the debts of the vendor, as still in the view of the world and in the eye of the law, as it looks to the rights of the creditors and the prevention of fraud, his property.

In Vermont, it is said that the law is well-settled that there must be a substantial and visible change of possession to protect property from attachment by the creditors of the vendor; but what facts constitute such a change of possession, must necessarily depend upon the circumstances of each case. It is always a question of fact, and if there is any evidence in the case tending to show such change of possession, it should, under proper instruction, be submitted to the jury. It is only in cases where there is no conflict in the evidence, or where admitting all to be true which the testimony tends to show, the facts would be legally insufficient, that the court are justified in withdrawing the subject-matter from the consideration of a jury, and passing upon it as a matter of law.²⁰

2. *Statutory Enactments.*—In California,²¹

¹⁹ *Norton v. Doolittle*, 32 Conn. 406.

²⁰ *Rothchild v. Rowe*, 44 Vt. 389; *Foster v. McGregor* 11 Vt. 596; *Jewett v. Guger*, 38 Vt. 218; *Leavitt v. Jones*, 64 Vt. 423.

²¹ Civil Code, § 3440; *Lay v. Neville*, 25 Cal. 562; *Parks v. Barney*, 55 Cal. 239; *Woods v. Bugbey*, 29 Cal. 446.

¹⁴ Benj. on Sales, 543.

¹⁵ *Dawes v. Cope*, 4 Binn. 258; *Young v. McClure*, 2 W. & S. 147; *Hulbrigs v. Guthrie*, 4 Barr. 124; *Haak v. Linderman*, 64 Penn. St. 499; *McBride v. McClelland*, 6 W. & S. 94; *McKibbin v. Martin*, 64 Penn. 352; 3 Am. R. 588.

¹⁶ *Robbins v. Oldham*, 1 Duvall, 26; *Cumings v. Griggs*, 2 Duvall, 87; *Morten v. Ragan*, 5 Bush. 334; *Brummel v. Stockton*, 3 Dana, 135.

¹⁷ *Elmer v. Welch*, 47 Conn. 36; *Capron v. Porter*, 43 Conn. 383; *Lake v. Morris*, 30 Conn. 201; *Norton v. Doolittle*, 32 Conn. 406; *Crouch v. Cavier*, 16 Conn. 506; *Hatstat v. Blakesdale*, 41 Conn. 301; *Kirtland v. Shaw*, 20 Conn. 23; *Mead v. Morris*, 44 Conn. 487.

¹⁸ 48 Conn. 258; 40 Am. R. 167.

Missouri,²² Delaware,²³ Nevada,²⁴ and Illinois,²⁵ it is enacted by law that every sale not accompanied by an immediate delivery, and followed by an actual and continued possession of the thing sold, shall be conclusive evidence of fraud as against the creditors of the vendor or subsequent purchaser in good faith. But whether the possession is actual and continued as against a creditor, must be ordinarily determined by a jury.²⁶ In Maryland it is provided by statute, that unless the bill of sale is recorded, it is invalid as to third persons.²⁷

F. Prima Facie Fraudulent.—The large majority of the States hold, that whether or not a fraud has been committed by the vendor, is, taking all the circumstances into consideration, a question for the jury.

That the mere fact of the vendor retaining possession is *prima facie* fraudulent, and that the burden is upon him to show that the transaction was fair, honest and free from fraud.²⁸

1. Common Law Decisions.—In Webster v. Anderson, the facts were found to be that Anderson was at work for Hooper on his farm; that Hooper owed him \$100; that Anderson requested him to pay him, and it was agreed between them that the latter should transfer to him twenty hogs, then on his place, with others, at the price of \$96, and that Anderson should receive them at that price; that the parties went where the hogs were, and those to be taken by Anderson were pointed out and specified, and Hooper charged Anderson the purchase price on account; that it was a part of the arrangement that the hogs should remain in the same pasture as before with the other hogs, and be fed and cared for by Anderson with the others until an opportunity should be found for

selling them. It was held that there was a sufficient delivery even as to attaching creditors.²⁹

The facts in the case are very much similar to Hull v. Sigisworth,³⁰ where the conclusion reached was just the opposite. In Packard v. Wood,³¹ it was held that the deed of a bakehouse and land in a distant place, and a bill of sale including all the implements in the house and a bread cart standing under an open shed upon the land, accompanied by a delivery by the vendee to the vendor of a lease of the house, land, cart and implements, is not sufficient evidence of a delivery of the cart as against an attaching creditor of the vendor.

In the same court in Dempsey v. Gardner,³² it was held that when it had appeared that the plaintiff had from time to time advanced sums of money to his mother, equal to or greater than the value of the horse, and about three months prior to the attachment, in consideration of the payment of fifteen dollars additional, the mother executed a bill of sale of the horse to the plaintiff. The horse was kept in the barn of the mother before and after the sale. She did not live with her son, but he frequently went to see her and often saw the horse. It was held that the title had not passed as against a creditor of the mother.

In delivering the opinion in this case, C. J. Gray, now of the U. S. Supreme Court said, "But by the law as established in this state it was necessary, as against subsequent purchasers or attaching creditors, that there should be a delivery of the property. No delivery actual or symbolical, was proved. The buyer did no act by way of taking possession or exercising ownership, and the seller did not agree to hold or keep the horse for him, there was no evidence of the delivery for the consideration of the jury, except such as might be implied from the execution and delivery of the bill of sale. That was not enough.

A somewhat similar case was Nesbit v. Bank of Montreal,³³ in which it was shown

²² Wagner's Sta. 281, § 10; Claffin v. Rosenberg, 42 Mo. 439; Bishop v. O'Connell, 56 Mo. 158; Wright v. McCormick, 67 Mo. 626.

²³ Laws of 1874, p. 366, ch. 65, § 4; Taylor v. Richardson, 4 Houst. 300.

²⁴ Laws. 1873, § 292; Conway v. Edwards, 6 Nev. 190.

²⁵ Tickner v. McClelland, 84 Ill. 471; Hart v. Wing, 44 Ill. 141; Allen v. Carr, 85 Ill. 388; Davis v. Ransom, 18 Ill. 396; Goodheart v. Johnson, 88 Ill. 58; Greenebaum v. Wheeler, 90 Ill. 296.

²⁶ Herthal v. Myles, 53 Cal. 623.

²⁷ Rev. Code, 1878, p. 391; Kruezer v. Conway, 45 Md. 562; Thompson v. B. & O. R. R. 28 Md. 376.

²⁸ Nelson v. Good, s. c. 8 C. Jan. 1884; 18 Cent. L. J. 139.

²⁹ 42 Mich. 554.

³⁰ *supra* 18.

³¹ 4 Gray, 307.

³² 127 Mass. 381.

³³ 9 Low Can. 193.

that the appellant had purchased certain articles from one Maguire, and had caused them to weighed and measured and had also paid for them. By a memorandum at the foot of the bill, it was agreed that the goods were to remain in the vendors store until he should send a carter for them. Maguire had caused the goods to be set apart in his cellar, and had given instructions to his clerk to deliver them to appellant whenever he should send for them. These goods were seized by the creditors of Maguire, and it was held that there had not been sufficient delivery as against them, although the officer had been told before he seized the goods that they were the appellants.

In Rhode Island,³⁴ Ohio,³⁵ and Massachusetts,³⁶ it has been held that the retention by the vendor is only *prima facie* evidence of fraud.

2. *Prima facie*. Fraudulent by statutory enactment.

The States of New York,³⁷ Indiana,³⁸ Iowa,³⁹ Minnesota,⁴⁰ Wisconsin⁴¹ and Nebraska,⁴² it is provided by statute that the retention by the vendor is only *prima facie* evidence of fraud subject to explanation, &c.

G. Sometimes the nature of the article sold will excuse an immediate change of possession as a sale of 12,000 bushels of charcoal,⁴³ in pits in the vendor's land, a kiln of

bricks,⁴⁴ or a large quantity of flour,⁴⁵ or one hundred and fifty acres of hay in the field,⁴⁶ or a large quantity of lumber, conspicuously marked but left in the yard of the vendor until the weather was favorable for its removal.⁴⁷

In the case of the sale of the furniture of a large hotel, when the furniture could not be removed without great deterioration and expense, and was mainly valuable for the purposes of a hotel, and at the place where situated, it was held sufficient for the vendee to assume the direction and control of the property in an open and notorious manner.⁴⁸

H. A distinction has grown up between sales made in payment of an antecedent debt and those made on a new consideration, paid, or promised.

First as to sales made upon a new consideration.

If the seller be insolvent or in failing circumstances, and the purchaser knows, or is in possession of information reasonably calculated to stimulate inquiry, and which, if followed up, would lead to the discovery that the purpose of the seller is to put his property beyond reach or otherwise to delay, hinder, or defraud his creditors, then a purchaser under these circumstances, though full consideration be paid, is invalid as against creditors. But if the purchase be made without such knowledge, and without such information as reasonably to put him on inquiry, he acquires a good title, no matter how fraudulent the intent of the seller. There is this qualification, however, if the purchaser, before full payment, is chargeable with knowledge of the fraudulent intent of the seller, he is not permitted to make further payments to the seller, but must withhold the same for the paramount claims of his creditors.⁴⁹

Second. When the sale is in payment of

³⁴ Godell v. Fairbrother, 12 R. I. 233; Sarie v. Arnold, 7 R. I. 532; Mead v. Gardner, 13 R. I. 257.

³⁵ Collins v. Myers, 16 Ohio, 547; Rogers v. Dare, Wright, 136; Thorne v. Nat'l Bank, 37 O. St. 254.

³⁶ Ingalls v. Herrick, 108 Mass. 351; Shurtleff v. Wilhand, 19 Pick. 202; Green v. Rowland, 16 Gray, 58; Harlow v. Hall, 132 Mass. 232; Thorndike v. Bath, 114 Mass. 116.

³⁷ 3 R. S. p. 2328; Hanford v. Archer, 4 Hill, 271; Mitchell v. West, 55 N. Y. 107; May v. Walter, 56 N. Y. 8; Husted v. Ingraham, 75 N. Y. 251; Mumper v. Rushmore, 79 N. Y. 19; Blant v. Gabler, 77 N. Y. 461; Steele v. Benham, 84 N. Y. 634; Southerd v. Benner, 72 N. Y. 424.

³⁸ Rev. Stat. 1881, § 4911; New Albany Ins. Co. v. Wilcoxsen, 21, 4 Pl. 355; Rose v. Cotter, 76 Ind. 590; Kane v. Drake, 27 Ind. 29.

³⁹ Code, § 1923; Boothly v. Brown, 40 Io. 104; Prother v. Parker, 24 Io. 26.

⁴⁰ Laws of Minn. 1878, p. 543; Blackmen v. Wheaton, 13 Minn. 326; Benton v. Snyder, 22 Minn. 247; Camp v. Thompson, 25 Minn. 175.

⁴¹ Rev. Sta. of Wis. 1878, p. 655, § 2310; Grant v. Lewis, 14 Wis. 186; Osen v. Sherman, 27 Wis. 505; Blakesley v. Rossman, 43 Wis. 116.

⁴² Sts. of Neb. 1881, p. 237; Uhl v. Robinson, 8 Neb. 272; Densmore v. Torner, 1883.

⁴³ Tognini v. Kyle, 17 Nev. 209.

⁴⁴ Woods v. Bugby, 29 Cal. 472; Allen v. Smith, 10 Mass. 308.

⁴⁵ Cartwright v. Phoenix, 7 Cal. 287.

⁴⁶ Choffin v. Doub, 14 Cal. 334.

⁴⁷ Haynes v. Hunsicker, 26 Pa. 58; Chase v. Ralston, 30 Pa. 539.

⁴⁸ McKibben v. Martin, 64 Pa. 352; 3 Am. R. 568; a very important case with an exhaustive opinion by Judge Sharswood.

⁴⁹ Hall v. Heydon, 41 Ala. 242; Green v. Tanner, 8 Metc. 411; Crawford v. Kirksey, 55 Ala. 282; 28 Am R. 704.

antecedent debts, if there be no secret trust⁴ or benefit or reservation, reserved to the grantor, an actual sale made by such debtor, at a fair and reasonable price, will be upheld, although it be known to both contracting parties that such sale will leave the debtor unable to pay his other debts. To hold otherwise, would be to declare that the vigilant creditor, who stipulates for security of his claim against a failing debtor loses his claim by attempting to save it. But the creditor must not go beyond the permissible purpose of securing his own demand. If he go beyond this, and secure a benefit to the debtor, he will thereby violate both the letter and the spirit of the law and the sale will be set aside for fraud.⁵⁰

What the law is in each state can only be determined by an examination of its own statutes and supreme court decisions.

5. The following was very highly commended by the Supreme Court of Texas as a proper charge to the jury. As between the parties delivery of possession is not essential to the completion of a sale of chattels, unless made so by the terms of the bargain; but as against an attaching creditor, such delivery of possession, actual or constructive, is essential to the completeness of such sale.

The change of possession, like other parts of the transaction, must be the will of both parties and with the design of rendering the sale complete. If anything remains to be done by the vendor which is material or important before the vendee can identify or possess the thing sold, or before it becomes deliverable, the sale is executory and incomplete, and the property does not pass absolutely to the vendee."⁵¹

WM. M. ROCKEL,

Springfield, Ohio.

CRIMINAL LAW—LARCENY — EMBEZZLEMENT — CONSTITUTIONAL LAW — NATIONAL BANKS.

PEOPLE V. FONDA.

Supreme Court of Michigan, July 15, 1886.

1. Congress alone has jurisdiction of the affairs of National Banks, and the power to punish offenses arising under the National Banking Law is reserved by that law to the Federal courts.

2. State courts have no power, either under State statutes, or at common law, to punish embezzlements committed by the officers of National Banks.

The complaint against the respondent in this case is criminal, and was made by Charles W. Cond, President of the Farmers' National Bank of Constantine, in behalf of the bank, for the larceny and embezzlement of its funds, while the respondent was engaged in its employment as clerk or servant. The Farmers' National Bank of Constantine, at the time the alleged crime was committed, was "an incorporated banking institution, organized and existing under the laws of the United States, providing for the creation of National Banking Associations."

The information against the respondent contains nine counts, upon two of which, the third and fourth, he was tried and convicted of the offense stated therein, in the St. Joseph Circuit Court at the last October term, and was, upon such conviction, sentenced to imprisonment at Jackson for the period of three years and six months.

The case is now before us for review on error.

The counts upon which the conviction was had will be found in the margin.

The statute under which the conviction was had at the circuit, read as follows:

"If any officer, agent, clerk or servant of any incorporated company, or of any city, township, incorporated town or village, school district, or other public or municipal corporation, or if any clerk, agent or servant of any private persons, or of a co-partnership, except apprentices and other persons under the age of sixteen years, shall embezzle or fraudulently dispose of, or convert to his own use, or shall take or secrete with intent to embezzle and convert to his own use, without the consent of his employer or master, any money or other property of another, which shall have come to his possession, or shall be under his charge by virtue of such office or employment, he shall be deemed by so doing to have committed the crime of larceny." How. Stat. § 9151.

This statute was passed by the legislature prior to the national banking system, and could not have therefore special reference to the national legislation creating that system, however clearly the crime of the respondent may be described in the statute. Rev. Stat. 1838, p. 360, § 27; Rev. Stat. 1846, p. 666, § 29.

⁴ Johnson v. Thweatt, 18 Ala. 741; Kling v. Kenan, 38 Ala. 63; Holbird v. Anderson, 5 T. R. 23; Burrill on Assignments, 3 ed. § 13; Croanhaven v. Hart, 21 Pa. St. 496; Pearson v. Rockhill, 4 B. Monr. 296; U. S. Bank v. Huth, 4 B. Monr. 423; McMenomy v. Murray, 3 Johns. Ch. 436.

⁵¹ Morgan v. Taylor, 32 Tex. 363. For additional authorities bearing on the same subject, see 2 Kent. 515; Ryan v. Young, 17 Cent. L. J. 499; Nelson v. Gaul, S. C. So. Car. 1884; Harlow v. Hall, 132 Mass. 116; Laughten v. Harden, 68 Me. 208; Claffin v. Mess, 30 N. J. 211, 358, 530; 1 Chit. on Cont. (11th ed.) 571, 572; Peggall v. Miller, 53 Am. R. 684.

At the time the alleged act of embezzlement was committed, the respondent was in the bank and in its service as clerk.

The question raised in this case is, the Federal government having declared the act charged against the respondent a criminal offense, and provided for the apprehension, trial and conviction of the offender under its laws, had the State court any jurisdiction, concurrent or otherwise, to deal with the respondent under the State statute making the same act criminal and providing for its punishment?

The learned counsel for the respondent claim that the jurisdiction of the Federal Court in the case is complete and exclusive.

That the offense charged in the information is for the violation of a Federal law, and that the punishment therefor has been fixed and established and the whole subject has been covered by the legislation of Congress.

The Constitution of the United States provides as follows: "This Constitution and the laws of the United States which shall be made in pursuance thereof, and all the treaties made or which shall be made under the authority of the United States shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." Const. U. S. Art. VI.

The statute passed by Congress punishing the offense charged in the information is as follows:

"Every president director, cashier, teller, clerk or agent of any association, who embezzles, abstracts or wilfully misapplies any of the moneys, funds or credits of the association, or who, without authority from the directors, issues or puts in circulation any of the notes of the association, or who, without such authority, issues or puts forth any certificate of deposit, draws any order or bill of exchange, makes any acceptance, signs any note, bond, draft, bill of exchange, mortgage, judgment or decree; or who makes any false entry in any book, report or statement of the association, with intent in either case, to injure or defraud, the association or any other company, body politic or corporate, or any individual person, or to deceive any officer of the association, or any agent appointed to examine the affairs of any such association; and every person, who with like intent, aids or abets any officer, clerk or agent in any violation of this section, shall be deemed guilty of a misdemeanor, and shall be imprisoned not less than five years nor more than ten."

An examination of this statute, I think must convince any one that, the offense described in this information is clearly defined therein, and falls within the scope of the act and within the jurisdiction of the Federal Court, and if that jurisdiction is exclusive in the case, but little remains to be said. If it is, the conviction cannot be sustained. Is the jurisdiction concurrent with that of the State is the only remaining question.

"Section 711 of chapter twelve of the Revised Statutes of the United States provides that, "jurisdiction vested in the courts of the United States in the cases and proceedings hereinafter mentioned, shall be exclusive of the Courts of the several States. First, of all crimes and offences cognizable under the authority of the United States."

The other clauses of the section need not be here given, as none of them relate to criminal jurisdiction.

Congress by law created the National Banking system and provided for their internal workings and prescribed a punishment for the offence charged against the respondent, Rev. Sate. U. S. Title 62.

It seems to me clearly the case is one falling within the paragraph of section 711 above quoted, and that by the federal law itself the jurisdiction of the State is expressly excluded.

Chancellor Kent in his Commentaries in concluding his discussion of the matter says: "In judicial matters the concurrent jurisdiction of the State tribunals depends altogether upon the pleasure of Congress and may be revoked or extinguished whenever they think proper, in every case in which the subject matter may be made cognizable in Federal courts; and that without an express provision to the contrary, the State courts will retain a concurrent jurisdiction, in all cases where they had jurisdiction originally over the subject matter."

First Kent, Com.p. 400, and there are other authorities to the same effect, *De lafield v. State of Illinois* 2, Hill 159; *Houston v. Moore*, 5 Wheat. 22; *Harlin v. the People*, 1 Doug. Mich., 207; *Snoddy v. Howard*, 51 Ind. 411; *Hendrick's Case* 5 Leigh 713; Hill's case 97 Mass. 570.

It is also held that in cases to which the jurisdiction of the State courts might extend, in the absence of any action by Congress, where Congress does assume jurisdiction, its control then becomes paramount and exclusive.

The *Moses Taylor* 4 Wallace 411; *Ex-parte Bridges*, 2 Woods Rep. 418; *Ex-parte Houghton* 7 Fed. Rep. 657; *Brown v. U. S.* 14 Am. Law Reg. 566; *Sturges v. Crowninshield*, 4 Wheat. 539; *Prigg v. Commonwealth*, 16 Pet. 539; *Martin v. Hunter* 1 Wheat. 304; *Houston v. Moore*, 5 Wheat 1; *State v. Pike*, 15 N. H. 83; *State v. Adams*; 4 Blackford 146; *Com. v. Fuller*, 8 Met. 313; *Com. v. Tenney* 97 Mass. 50. *Commonwealth v. Felton*, 101 Mass. 204; *The People v. Kelly*, 38 Cal. 145; 3 Story Com. on Const. 623.

Commonwealth v. Felton states the conclusion of the matter in that case in language quite applicable to the present. The respondent was charged in that case, with being an accessory to an embezzlement by officer of a National Bank. In delivering the opinion of the court, Mr. Justice Ames said, "The difficulty in the way of holding the defendant upon the present indictment is, that the Act of Congress has taken the crime of

the principal out of our jurisdiction and our courts cannot deal with him upon that charge."

As the case comes to us upon this record, I do not think the judgment should be allowed to stand. The Circuit Court was without jurisdiction. The judgment must be reversed and the prisoner discharged.

R. T. Sherwood, James V. Campbell, J. W. Champlin.

NOTE.—An examination of a good many cases bearing on the subject of the concurrent jurisdiction of the State courts over matters which have been legislated upon by Congress, shows that the decisions on the subject are not altogether harmonious and that it would be almost impossible, from the decisions alone, to draw a clear line between the exclusive jurisdiction of the federal courts and the concurrent jurisdiction of the State courts, over questions upon which there has been federal legislation. In a Pennsylvania case,¹ it was held that embezzlement from a National bank is not punishable by a State court of Pennsylvania. In Connecticut it was held, that where an act of Congress creating a corporation provides a punishment to be inflicted upon any officer of the corporation who embezzles its property, it is not competent for the State legislature to make the same act an offense against the laws of the State. But when an act of Congress creates a corporation within a State, and authorizes it in general terms to pursue the business of banking, it is competent for a State legislature to protect the bank, and those who deal with it, in that business, by suitable penal enactments. Such an enactment is not predicated on, and has no relation to any law of Congress or offense created thereby. Therefore when the act of Congress authorizing the establishment of National banks, provided a punishment to be inflicted upon the officers of the bank who should embezzle its property, but made no provision for such punishment in case of the embezzlement or theft of the property of its customers, and a teller of the bank purloined a package of bonds, specially deposited in the vault of the bank by one of its customers, it was held that, the act was within the purview of the statute of the State punishing officers of banks for embezzling the property of third persons deposited therein, and within the jurisdiction of our courts.²

A State court has no jurisdiction of criminal offenses against the United States, nor can such jurisdiction be conferred upon them by an act of Congress.³ The offense of fraudulent conversion by an officer of a National bank of property of individuals deposited in such bank is not punishable under any existing law of the United States and the courts of the commonwealth have jurisdiction thereof.⁴ The act of the State of Pennsylvania that the officers and privates of the militia of the State, neglecting or refusing to serve when called into actual service by the President of the United States, shall be liable to the penalties defined in the act of Congress of February 28th 1795, and also providing for the trial of such delinquents by a State Court martial is not repugnant to the constitution and laws of the United States.⁵

The statute of the United States are as much the law of the land in any State as are those of the State,

and although exclusive jurisdiction for their enforcement may be given to the Federal courts, yet when it is not given, either expressly or by necessary implications, the State courts, having competent jurisdiction in other respects, may be resorted to.⁶ In the Cornell case it was held that the right of exclusive legislation carries with it the right of exclusive jurisdiction.⁷

A state has the same undeniable and unlimited jurisdiction over all persons and things within its territorial limits, as any foreign nation, when that jurisdiction is not surrendered or restrained by the constitution of the United States.⁸ The statutes of the several States regulating the subject of pilotage, are in view of the numerous acts of Congress recognizing and adopting them to be regarded as constitutionally made, until Congress by its own acts supersedes them.⁹

The power vested in Congress by the Federal constitution, "to provide for the punishment of counterfeiting the current coin of the United States" may be exercised by the several States concurrently with Congress.¹⁰ The jurisdiction of the Federal courts is not exclusive of the jurisdiction of the State courts, over offenses against State laws, making it punishable to counterfeit such coin.¹¹ An indictment lies, under the statute of the State for counterfeiting the current coin of the United States.¹² The Courts of Indiana have jurisdiction of the offense of retaining in possession, apparatus made use of in counterfeiting gold or silver coin of the United States current in this state.¹³ A teller of a National bank may be convicted in a State court upon an indictment charging him with fraudulently making false entries, reports, and statements of the bank with intent to injure and defraud said bank.¹⁴

Although the offender be indictable in the courts of the United States for an offense against the laws of the United States, he is also indictable in the courts of Virginia for the offense against the laws of the State.¹⁵ It is no objection to an indictment for an offense against a statute of a State, that the defendant is liable to punishment, for the same act, under a law of the United States.¹⁶ The jurisdiction of the State courts extends to the case of a forgery of powers of attorney to receive warrants for lands granted by acts of Congress for military services.¹⁷

The courts of Massachusetts have jurisdiction of an action by an informer against a collector of customs to recover a share of a penalty or forfeiture recovered by the latter for smuggling.¹⁸ The courts of Maryland have jurisdiction in cases instituted to recover double the amount of interest unlawfully taken by a National bank.¹⁹ The court of Common Pleas of Pennsylvania has jurisdiction of returns arising under the act of Congress imposing new duties on licenses to distillers of spirituous liquors.²⁰ Trover may be maintained in the courts of New York against a postmaster for improperly detaining a newspaper, although such deten-

⁶ *Claffin v. Houseman*, 98 U. S. 180.

⁷ *U. S. v. Cornell*, 2 Mason, 91.

⁸ *City of New York v. Miln*, 11 Pet. 102.

⁹ *Ex parte McNeil*, 13 Wall. 240.

¹⁰ *Harlan v. People*, 1 Doug. (Mich.) 207.

¹¹ *Id.*

¹² *Chess v. State*, 1 Blackf. 198.

¹³ *Snoddy v. Howard*, 51 Ind. 411.

¹⁴ *Luberg v. Commonwealth*, 94 Pa. St. 85.

¹⁵ *Hendricks v. Commonwealth*, 5 Leigh, 707.

¹⁶ *State v. Moone*, 6 Ind. 436.

¹⁷ *Commonwealth v. Shaeffer*, 4 Dal. 23.

¹⁸ *Lapham v. Almy*, 13 Allen, 301.

¹⁹ *Ordway v. Central Nat. Bank*, 47 Md. 317.

²⁰ *Buckwalter v. U. S.*, 11 S. & E. 198.

¹ *Ketner v. Commonwealth*, 92 Pa. 372.

² *State v. Fuller*, 34 Conn. 280.

³ *U. S. v. Lathrop*, 17 Johns. 4.

⁴ *Commonwealth v. Tenney*, 97 Mass. 50.

⁵ *Houston v. Moore*, 5 Wheat. 1.

tion is under color of the laws of the United States and the regulations of the post-office department.²¹

In order to settle in my own mind, at least, the question of the extent of the concurrent jurisdiction of the State courts, I have gone directly to the constitution of the United States and made an exhaustive, logical analysis of Art. X. of the Amendments. This article is known usually, as the "States Rights" article. It reads as follows:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

It follows from this article that there are three depositories of power, viz: the United States, the States and the people. There are eight classes of powers, viz:

- 1 Powers delegated to the United States.
- 2 Powers not delegated to the United States.
- 3 Powers prohibited to the States.
- 4 Powers not prohibited to the States.
- 5 Powers reserved to the States.
- 6 Powers not reserved to the States.
- 7 Powers reserved to the people.
- 8 Powers not reserved to the people.

With regard to the extent of these several classes of powers, the article in question gives us the following rules:

1 The powers delegated to the United States are, either prohibited to the States and not reserved to the States and not reserved to the people (i. e. exclusive); or they are not prohibited to the States but are reserved to the States and not reserved to the people (i. e. concurrent).

2 The powers not delegated to the United States are, either reserved to the States, or they are prohibited to the States and reserved to the people.

3 The powers prohibited to the States are, either delegated to the United States and not reserved to the people; or they are not delegated to the United States and are reserved to the people.

4 The powers not prohibited to the States are, either delegated to the United States and reserved to the States (i. e. concurrent): or they are not delegated to the United States but are reserved to the States.

5 The powers reserved to the States are, either delegated to the United States (i. e. concurrent): or they are not delegated to the United States and not reserved to the people (i. e. exclusive).

6 The powers not reserved to the States are, either delegated to the United States and prohibited to the States; or they are not delegated to the United States but are prohibited to the States and reserved to the people.

7 The powers reserved to the people are not delegated to the United States and are prohibited to the States.

8 The powers not reserved to the people are, either delegated to the United States and prohibited to the States; or they are delegated to the United States and reserved to the States; or they are not delegated to the United States and not prohibited to the States but are reserved to the States.

It follows necessarily from these rules that the powers reserved to the States are always concurrent with the powers delegated to the United States, unless the powers are prohibited to the States or are reserved to the people; and, consequently, Congress cannot either exercise or confer exclusive powers unless the constitution of the United States prohibits the States from a concurrent exercise of the same powers; and any at-

tempt on the part of Congress to deprive a State of any of its reserved powers is unconstitutional and void. There is no provision, either direct or implied, in the constitution of the United States which prohibits a State from exercising legislative or judicial power over the subject of offenses against National banks, and consequently it comes under the reserved powers of the States. "A different rule obtains in interpreting the powers in the constitutions of the United States and the States. In ascertaining the powers of the former, we examine to see what powers are expressly granted or are necessarily implied for their exercise. In the latter we only examine to see what are denied by the Federal and State constitutions; and my view of the law-making power of these State governments is, that they can do any act not prohibited by the constitution; and without and beyond these limitations and restrictions, they are as absolute, omnipotent, and uncontrollable as Parliament."²² The powers proceed not from the people of America, but from the people of the several States, and remain what they were before the adoption of the constitution, except so far as they may be abridged by that instrument.²³ The State legislature retains all the powers of legislation delegated to it by the State constitution, which are not expressly taken away by the constitution of the United States.²⁴

THOS. D. HAWLEY.

East Tawas, Mich.

²² *Mason v. Walte*, 4 Scam. 134.

²³ *Sturges v. Crowninshield*, 4 Wheat. 121.

²⁴ *Calder v. Bull*, 3 Dall. 386; 2 Root, 350; *Commonwealth v. Kimball*, 41 Mass. 359; *People v. Naglee*, 1 Cal. 221.

RESULTING TRUST—EQUITABLE TITLE— VENDOR AND VENDEE—"STRANGERS" —BROTHER AND SISTER—STATUTE OF FRAUDS.

HARRIS v. MCINTYRE AND OTHERS.*

Supreme Court of Illinois, October 5, 1886.

1. *Vendor and Vendee—Equitable Title—Possession—Notice.*—Where a sister who has paid the larger part of the purchase money of a farm, the title without her knowledge or consent being taken in the name of her brother, who paid the balance, acts as housekeeper only, and the brother manages the farm, and is commonly known as the owner, such possession of the sister will not put one advancing money to the brother on a deed of trust on the farm, without actual knowledge of the sister's rights, upon constructive notice as to her equitable lien.

2. *Trust—Resulting—"Strangers"—Brother and Sister.*—A brother and sister are "strangers," within the rule of resulting trusts.

3. *Trust in Fractional Interest—Statute of Frauds.*—Where part of the money for the purchase of land is supplied by one person, and the title to the land when purchased is taken in his own name by another, who has supplied the remainder, equity will declare a proportionate resulting trust in favor of the first, and the fact that the agreement for the joint purchase was not in writing will not bring the case within the statute of frauds.

²¹ *Teall v. Felton*, 1 Comst. 537.

*S. C., 8 North Eastern Reporter, 182.

4. *Equity—Limitations—Inequitable Bar.*—Where no statute of limitations applies, the time in which a party will be barred from relief in a court of equity necessarily depends upon the circumstances of each case; and, where an excuse for delay is given which renders it inequitable that the bar should be interposed, no lapse of time, however great, will bar a recovery.

Appeal from Carroll county.

M. Y. Johnson and Geo. L. Hoffman, for appellant, *Harris*.

A resulting trust arises by implication of law, and does not depend on any agreement between the parties; and hence is not affected by the statute of frauds. *Mahoney v. Mahoney*, 65 Ill. 406; *Wilson v. Byers*, 77 Ill. 76; *Smith v. Smith*, 85 Ill. 189; *Loften v. Witboard*, 92 Ill. 461; *Roberts v. Opp*, 56 Ill. 34; *Boyd v. McLean*, 1 Johns. Ch. 582; *Story*, Eq. Jur. § 1201.

The grantee, with notice, of a trustee under a resulting trust, stands in his shoes, and is a trustee for the owner who paid the money. *West v. Fitz*, 109 Ill. 425.

The law presumes that a prudent man, before purchasing, will, if the land is occupied, make necessary inquiry to ascertain by whom and by what right he is there. *Truesdale v. Ford*, 37 Ill. 214; *Clevinger v. Ross*, 109 Ill. 349; *Rupert v. Mark*, 15 Ill. 540; *Brooks v. Brown*, 18 Ill. 542; *Lyman v. Russell*, 45 Ill. 281; *Hubbard v. Kiddo*, 87 Ill. 578; *Story*, Eq. Jur. § 400.

James Shaw, for appellees, *McIntyre* and others.

Parol evidence to establish resulting trusts is received with great caution. *Perry, Trusts*, 110, note, §§ 137-139; *Lantry v. Lantry*, 51 Ill. 458; *Mahoney v. Mahoney*, 65 Ill. 406; *Enos v. Hunter*, 4 Gilman, 218, 219; *Maple v. Nelson*, 31 Iowa, 322.

If the transaction can be called a loan, no resulting trust arises. *Perry, Trusts*, 106, note; *Steele v. Clark*, 77 Ill. 474; *Doyle v. Murphy*, 22 Ill. 502; *White v. Carpenter*, 2 Paige, Ch. 238, 239.

If the statute of frauds is set up as against express trusts resting in parol, its effect is inexorable on express trusts not in writing. *McDonald v. Stow*, 109 Ill. 44; *Perry, Trusts*, §§ 126-135; *Hovey v. Holcomb*, 11 Ill. 660; *Greene v. Cook*, 29 Ill. 193; *Kane Co. v. Herrington*, 50 Ill. 237; *Carpenter v. Davis*, 72 Ill. 17; *Holmes v. Holmes*, 44 Ill. 169; *Sheldon v. Harding*, Id. 69.

Parties must act with promptness, or show good and legal cause for long delays. *Perry, Trusts*, §§ 141, 870; *Hall v. Fullerton*, 69 Ill. 448; *Carpenter v. Carpenter*, 70 Ill. 457; *Williams v. Rhodes*, 81 Ill. 571; *Castner v. Walrod*, 83 Ill. 171; *McDonald v. Stow*, 109 Ill. 44; *Breit v. Yeaton*, 101 Ill. 244; 2 *Story*, Eq. Jur. § 1520.

Where possession is relied on as notice to purchasers of land of equitable claims not of record, it must be so open and notorious as to indicate to neighbors, who has the control and management. *Hubbard v. Kiddo*, 87 Ill. 580; *Truesdale v. Ford*, 37 Ill. 214; *Strong v. Shea*, 83 Ill. 578; *Smith v. Jackson's Heirs*, 76 Ill. 254.

SHORE, J., delivered the opinion of the court:

It is not alleged in the bill that appellees Ashway and Marks, or either of them, had actual notice of the equitable rights of appellant set up in her bill; and unless she had such possession of the land in question as would put them upon inquiry as to her rights therein, it is not contended that they had any notice whatever.

We have carefully considered the evidence preserved in the record, and find the facts proved to be these: In February, A. D. 1869, appellant, being a widow with two children, and having \$1,600 in money, joined with her brother, Neil McIntyre, in the purchase of 152.84 acres of land known as the "Bellows Farm," for the purpose, as she claimed, of making it a home for herself and children, and the said Neil, who was a bachelor; that the land cost \$2,100, she contributing \$1,600, and said Neil \$500, of the purchase money; that it was understood they should own said land as tenants in common, but said Neil, without the knowledge or consent of appellant, took the title to himself individually; that the deed was so taken February 6, 1869, and soon after recorded on the land records of Carroll county; that immediately after the acquisition of said land, appellant and her family and said Neil moved into the house on the premises, and from that time until the summer of 1881 continued to occupy it, all together, as one family, appellant being the housekeeper, and said Neil having control and management of the farm. It does not appear that she assumed or exercised any control or management of the premises or crops grown; or was in any way known, except as housekeeper for her brother. Neil was the owner of record, in possession, and in the actual control and management of the premises; disposed of the crops, and assumed to be the exclusive owner at the time of the loan by Mark of the money secured by the trust deed to Ashway. The premises were about to be sold upon a trust deed upon the whole land executed by said Neil to one Becker to secure a loan from Gillispie, and said Neil applied to Ashway for a loan upon the land to pay off such prior encumbrance. This being refused, an arrangement was subsequently made by which the said Neil agreed to and did convey the land to his brother, Daniel McIntyre, and the loan was made by Ashway to him of the money of Mrs. Mark, and the trust deed to Ashway, as trustee, taken to secure the same. This was on the 26th day of March, 1879. It appears, therefore, that there was nothing but the bare fact that appellant resided with her children upon the premises, ostensibly as the housekeeper of her brother Neil, to put them or anyone upon inquiry. This condition had continued from the spring of A. D. 1869, when they went into possession. That the loan by appellee Ashway for Mrs. Mark was made in perfect good faith, and without any actual notice of any claim of appellant to the land in controversy, is abundantly shown by the evidence.

If appellant was, at the time of taking the trus

deed by Ashway, in open and visible possession of the land, the law would charge appellees Ashway and Marks with notice of her equitable interest. Or, if the circumstances were such that an ordinarily prudent and cautious man would have inquired as to her claim upon the land, they will be held to have been bound to make inquiry, and be chargeable with such notice as diligent inquiry would disclose. Persons acquiring title to or liens upon land cannot shut their eyes willfully or negligently, where proper observation would lead to knowledge of the rights of others, and then be heard to insist they had no notice of that which, by the exercise of ordinary care and prudence, would have been apparent to them. The possession, however, which will protect the holder of an equitable title, must be such as to put purchasers upon inquiry which, if followed, would lead to notice of such equity.

It will be unnecessary to review here the numerous adjudications upon this subject. It will be found that at last each case must be determined by the circumstances of that particular case. The chancellor was called upon to say whether the possession of appellant was such as should, under the rule, have put the appellees upon inquiry, and he determined it in the negative, and with that finding we are not dissatisfied. Appellant had permitted, for over ten years, the title to remain of record in her brother. Other mortgages or trust deeds, securing substantially an amount equal to one-half the value of the land, had been executed by the apparent owner, and for some years remained of record, unchallenged by her. She had permitted Neil McIntyre, who was invested with the legal title, to exercise, so far as the public could see, exclusive control and management of the farm and its products, without objection by her, or the assertion of any right on her own behalf. While she, to all appearances, was simply the housekeeper for her brother, and, so far as shown by the proof, apparently to the world occupied the premises in no other capacity, we are of opinion that, under these circumstances, appellee Ashway was warranted in relying upon the record and the combined declaration of Neil and Daniel McIntyre as to the state of the title, and that there was no such condition of affairs apparent as, in the exercise of common prudence, would suggest that inquiry would disclose any equitable title in appellant to this land.

As to the appellee, Daniel McIntyre, we are of opinion that the decree should be reversed in part. It is true that the evidence is conflicting; but, after careful consideration of it, we are satisfied that the decided weight of the evidence sustains the allegations of appellant's bill of complaint.

It will serve no good end to go into an extended discussion of the evidence, but it will be sufficient to say that appellant and Neil McIntyre both testify to the principal fact that \$1,600 of appellant's money went into the purchase, and that the premises first bought were intended for a home for

herself and family; and they are corroborated by Bankin, whose advice appellant sought in reference to the investment, and by others; while the evidence in contradiction consists, in the main, of declarations of appellant, testified to after a considerable lapse of time, and many of them, when considered in the light of the surrounding circumstances, really not necessarily inconsistent with the theory of appellant's case. She is represented as at various times calling the farm Neil's farm; on several occasions saying that she had loaned her brother Neil her money; that she had trusted her brother, and had nothing to show for it, and like expressions. Five witnesses thus testify to conversations of appellant at various times from about the time of the purchase up to within a few years of the litigation. Some of them say she "claimed" to have loaned her money to said Neil, without giving her language, and all testifying to loose conversations, occurring several years before giving their testimony, relating to subjects in which they had no personal interest, and very few of them pretend to give the particular phraseology, or to reproduce the exact conversation in which the language was employed. In many of the declarations testified to, the change of a word, or the form of expression, would render it consistent with the theory of appellant's claim to the land. Of the same character is the evidence introduced by appellant of declarations of appellee, Daniel McIntyre, alleged to have been made at various times prior to this litigation some of which will be further considered hereafter. This testimony must be received with great caution, and, of itself, would not be sufficient to entitle appellant to recover; but much of it is strongly corroborative of the testimony of appellant and Neil McIntyre, both go to the main fact, and as to Daniel's knowledge of the equitable interest of appellant in the land.

We are satisfied from the evidence that, Daniel McIntyre must have known of the equitable rights of appellant, and of the purpose and object of the purchase, and the character of her occupancy. Appellant testifies that before the purchase, Daniel McIntyre, who was also her brother, wanted to know what she was going to do with her money, and that she then told him, she and her brother Neil contemplated purchasing the Bellows farm for a home, and he approved of it. Afterwards, when ill, she was worrying about her children, and again her interest in the land was the subject of conversation between them. Neil McIntyre testifies to a full understanding on the part of Daniel of Mrs. Harris' relations to this farm, both before and after the purchase. Shortly after the purchase, in the summer of 1869, Robinson, assessor of taxes, finding the title in Neil's name, told Daniel about it, and told him that, as he was appellant's elder brother, he ought to advise her what to do, as her money might be lost if Neil should die; to which Daniel replied, in substance, "He guessed they could attend to their own business, if other people let them alone." Another

witness testified that Daniel said he knew Mrs. Harris (appellant) had money invested in the place; another that he said, in speaking of the farm, "It is a place Neil and my sister bought—she put in some \$1,500 or \$1,600;" another that he said, in speaking of a controversy over a log-chain, if Neil had his debts paid, and Annie (appellant) had her money out of the farm, Neil wouldn't have money enough left to buy a log-chain; another, that Daniel said to him that "the Bellows farm belonged to his sister, Annie;" and another that he asked Daniel how he was going to get possession of the farm, and said to him, "You know Mrs. Harris' money is in there," to which Daniel replied he knew her money was in the land, but she had nothing to show for it; and other witnesses testify to similar statements and declarations, made at various times between the purchase in 1869, and the filing of appellant's bill.

It is just to say that Daniel McIntyre denies having made these statements, and all knowledge of appellant's having any interest, legal or equitable, in the land; but insists that whatever money Neil received of appellant was as a loan. We think, however, that the testimony, when all considered, clearly preponderates in appellant's favor. Nor can the fact that said Neil McIntyre mortgaged the premises to Bemis and Gillispie militate against this view. It is doubtful if appellant knew of them prior to the conveyance of the land to her brother Daniel. There is abundant evidence to establish that she knew nothing of any advances by Daniel to Neil on account of this land. Both of the brothers seem to have sedulously kept that knowledge from her. Neil swears positively that he purposely kept her in ignorance of his acts, and Daniel nowhere testifies to having told her of his advances, or of any interest he claimed in the land. The witness Kelly swears that three years before giving his testimony Daniel told him that appellant did not know Neil borrowed money on the land, and he (Daniel) did not believe she knew it then. After Neil had deeded the land to Daniel, and at a time when Daniel received \$500 as damages for a right of way through the land, he said to the witness William Fulton: "Suppose I should meet Annie, what would I say to her?" Witness replied, "Tell her the truth," and Daniel replied, "I can't meet her." She testifies that she had no knowledge whatever of any advances by Daniel, or of any mortgages on the land, or of the conveyance to Daniel, until in 1881.

As between appellant and said Neil the execution of these mortgages, to which she in no way consented, could not defeat her equitable title; and Daniel having, as we have found, notice of her rights at the time he took his deed, stands in no better position. It is, however, insisted that the bill proceeds upon an express trust created by agreement; that as it is alleged in the bill of complaint that it was expressly agreed and understood that appellant and said Neil should purchase

the land, and hold it as tenants in common, in proportion of sixteen to five parts, etc., that the proof does not sustain the bill, and also that the case falls within the statute of frauds. This, we think, is a misapprehension. It is true the bill alleges the fact stated, and that appellant and Neil McIntyre were to own the land in the proportion, that each advanced of the purchase money; that this was not done, said Neil taking the title in his own name. The facts proved show a resulting trust. As said by this court in *Smith v. Smith*, 85 Ill. Ill. 189, "it was none the less such a trust because the money was paid in pursuance of a prior express contract between the parties." The agreement was not that said Neil should convey to her, but that they should purchase and own the land in the proportion that each contributed to the purchase money; and when Neil, acting for both, took the title to himself in fraud of her rights, he held the title so acquired in trust for her in the same proportion the money she paid bore to the whole consideration paid. *Smith v. Smith*, *supra*; *Springer v. Springer*, 2 N. E. Rep. 527, (opinion filed September 28, 1885.)

A resulting trust arises by implication of law when land has been purchased with the money of one person, and the deed taken to another, who is a stranger; that is, not a wife or child, or standing in that relation. Appellant was a stranger within this rule. *Perry, Trusts*, 143; 2 Washb. Real Prop. 441; 4 Kent, Comm. 306. It cannot be material whether the complainant is entitled in equity to the whole land, or only a moiety. If a joint purchase is made in the name of one of the purchasers, and the other pays his share of the purchase money, equity will lay hold of the circumstance of the title being in one only, and a resulting trust will be declared in favor of the other for his share. 2 Story, Eq. 1206. The trust here arises upon the allegation and proofs of the ownership of the funds used in making the purchase, and does not depend upon the contract of the parties made anterior thereto, and hence is not affected by the statute of frauds. *Wallace v. Carpenter*, 85 Ill. 590; *Ward v. Armstrong*, 84 Ill. 151; *McDonald v. Stow*, 109 Ill. 44.

It is next argued that a court of equity will not enforce this trust because of its staleness, and the laches of appellant in asserting her rights. We have already adverted to some of the features of the case bearing upon this question, and it will be unnecessary to go over them again. However, it appears that the deed to the Bellows' farm was made in February, 1869, and possession taken, as already described, in the spring of that year, and that appellant with her children resided upon the land with her brother Neil until 1881, and, upon his abandoning the farm in the summer of that year she continued in possession, and still resides thereon. The deed from Neil McIntyre to Daniel McIntyre was made March 28, 1879. The bill in this case was filed December 16, 1881. It is the settled doctrine that courts of equity will not en-

fore resulting trusts after an unreasonable delay in seeking their enforcement, unless there is shown an equitable excuse for the delay. *Perry, Trusts*, 141; 2 Story, Eq. Jur. 1520.

When the statute fixes the time within which the claim would be barred if asserted at law, courts of equity will refer to the statute as the means of ascertaining the reasonable period in which the bar will be complete in equity; thus, by analogy, following the law. In cases, however, where there is no statute applicable, the time in which a party will be barred from relief in a court of equity must necessarily depend upon the peculiar circumstances of each case. *Castner v. Walrod*, 83 Ill. 171; *Kane Co. v. Herrington*, 50 Ill. 239, and authorities cited. These principles are sanctioned by an unbroken line of decisions, and it will need the citation of no further authority to sustain them. It is, however, to be observed that mere lapse of time, however great, will not bar a recovery if an excuse therefor be given which takes hold upon the conscience of the chancellor, and is such as renders it inequitable that the bar should be interposed. As we have seen, when Neil McIntyre and appellant moved upon this land known as the Bellows farm, it was understood between them that it had been purchased for a home for herself and children, and her brother Neil. They were to occupy as one family, while owning the land as tenants in common. The occupancy was in fact under that agreement until in the summer of 1881, when said Neil abandoned the premises; and while appellant may have so permitted said Neil to control and manage the farm that, with the title in his name, she would be precluded from asserting her title as against strangers who might become purchasers from or acquire liens thereon through said Neil, without notice, yet, as between themselves, the holding of Neil was in no sense hostile or adverse to her. She was in the actual occupancy under an express stipulation and agreement as to the holding. Daniel McIntyre, as we have seen, had actual notice, not only of her equitable title, but the character of her possession—the purpose and object of the purchase,—and occupancy of the land, and he took whatever title he acquired by his deed with all the infirmities of the title of his grantor, Neil McIntyre.

Again, it is apparent from the record that appellant relied implicitly upon her brother Neil from the inception of the transactions between them. He, as shown by his own testimony, and that of appellant as well, persistently deceived her as to his dealings in respect to this land. We think it is shown that the fact of his taking the deed to himself, the execution of the trust deed to Becker, the mortgaging to Daniel in 1878, and the sale and conveyance to Daniel in 1879, was, by artifice and the most shameless duplicity kept from her knowledge. Nor does it seem quite clear that Daniel McIntyre was wholly guiltless of the deception practiced upon appellant. Be-

that, however, as it may, as late as the fall of 1879 or 1880,—it does not clearly appear which,—when the rent corn was being hauled to Daniel from this place, she inquired why Daniel was getting the corn, and Neil explained to her that he owed Daniel, and might as well pay him off that way as to haul it to market and bring him the money.

We cannot go further into the testimony, but the whole record shows that appellant had great confidence in her brother, and trusted implicitly to his management for her in respect to this property, and that the trust thus reposed was shamefully betrayed. Daniel had been told by Robinson of his duty as elder brother to advise appellant so she might not lose her money. He had applied, in substance, that they could manage their own business if other people would let them alone; and with full knowledge, as we find from the weight of testimony that the money his sister had received as the proceeds of a policy on the life of her deceased husband had been used in the purchase of a farm as a home for herself and children he, in 1875, to secure a debt from Neil to himself, took a mortgage on this land, and afterwards in March, 1879, assumed the trust deed given to Becker to secure the Gillisple debt, and took an absolute conveyance from Neil to himself of all this land, including the 40-acre tract mentioned in the bill, without, according to his own showing, giving appellant any notice, or saying a word to her upon the subject. It appears, it is true, that appellant was told shortly before the making of the deed from Neil to Daniel that the land was advertised for sale, under the Becker trust deed, but it is not shown that she was then told the state of the title, or how, if at all such sale, if made, would affect her interest in the land.

In no view of the case, accepting as we do what we regard as the preponderance of the evidence, was there such laches, even if Daniel is in position to set it up, as would preclude appellant from enforcing this trust in a court of equity as to the 152.84 acres known as the "Bellows Farm," as against the said Neil and Daniel McIntyre. As to the 40-acre tract afterwards purchased, as it is alleged by appellant and said Neil, and paid for out of the proceeds of the timber cut from the Bellows farm, no such equities arise. It does not satisfactorily appear that Daniel had any notice of any equitable title of appellant thereto, or that she furnished any portion of the purchase money. This tract was disconnected from the other lands. Appellant never was, so far as shown by the evidence, in the actual possession of it. It was included in the deed of March 26, 1879, from Neil to Daniel, and we think, under that deed, he took the title disincumbered by any equities appellant might have had therein.

We are of opinion that the decree of the circuit court should have found appellant equitably entitled to 16-21 parts of said tract of land known as the "Bellows Farm," and conveyed by Sarah Bel-

lows to Neil McIntyre by deed dated February 6, 1869, as set forth in the bill and exhibits thereto; and should have declared the trust in her favor, therefore, as prayed in her bill; and found the said Daniel McIntyre the owner of the 5-21 parts of said lands, and made partition thereof accordingly; subject, however, to the lien of the deed of trust to appellee Ashway thereon for the amount of money remaining due thereunder, and requiring that the interest of the said Neil in said 152.84 acres of land now owned by said appellee Daniel McIntyre be first exhausted in satisfaction of the sum secured by said trust deed before resorting to the interest of appellant in said lands to satisfy the same; and finding that as to the said 40-acre tract, to-wit, the N. W. 1-4 of the N. W. 1-4 section 18, township 25, range 3 E., fourth principal meridian, the complainant was not entitled to relief.

The decree of the circuit court dismissing the bill will be reversed, and the cause remanded to that Court for further proceedings not inconsistent with this opinion.

NOTE.—The rule is well established by all the cases without a single exception, that the trust of a legal estate, however the legal title may be held, results to the party who has paid the purchase money.¹ And it is equally true that a trust results in favor of one who paid part of the purchase money of land, the title to which is taken in the name of another, but only to the amount so actually advanced.² And the advance or payment must be actual, for such a trust does not arise upon agreement or contract.³ It is held, however, that a resulting trust is not created in favor of one who pays part of the purchase money, unless such payment is made for some aliquot or specific part, or distinct interest in the estate.⁴ It is said that a general contribution of a sum of money toward the entire purchase is not sufficient.⁵

There are, however, some exceptions of a serious character to the general rule. A resulting trust will not be raised when it would contravene a statute of the States, founded upon considerations of public policy.⁶ Nor will a resulting trust be implied against an adequate rebutting presumption, for the trust itself is, at best, a matter of presumption, and may be rebutted even by parol evidence.⁷

And where the alleged *cestui que trust* bears such a relation to the holder of the legal title as implies a duty or obligation of a moral character to provide for him, no trust will be presumed from the advance of the purchase money. On the contrary, the presumption will be that the advance was a gift. A usual instance of this is the case of title to land purchased being taken in the name of a son, the father paying the purchase money.⁸

The resulting trust arising from the payment of the purchase money may be rebutted by the counter presumption growing out of the relation of the parties, and this latter may itself be rebutted by circumstances going to show that the intention of the parties was that the transaction should be upon the general principle, irrespective of parental or other like considerations.⁹

Among the circumstances which have been held to rebut the rebutting presumption is the fact that the father, paying for land conveyed to his son, has already made due provision for his son. [This has been held to have rebutted the presumption arising from the relationship and to restore the resulting trust to its full operation.¹⁰ And yet the court conceded that it is a well established rule of equity that a father is the only judge of the character and extent of the provision he will make for his son. This rule, although sanctioned by Lord Nottingham and Lord Hardwicke, has not been adhered to in every instance. The rule, therefore, may be stated to be that when one person advances the money to pay for land of which another holds the legal title, a trust results in his favor, and this trust can only be defeated by proof of circumstances which show that the parties did not intend that any such trust should result. And chief among such circumstances is the relation of parent and child between the parties, but that the presumption growing out of that relationship is by no means conclusive, and may be itself rebutted, not only by proof of prior adequate provision for the son by the father, but also by proof of such other facts as will establish the trust, such as the father collecting rents of his son's land for which he, the father, has paid, or the son signing receipts for such rents as agent of his father.]

For the rest it need only be said that the validity of resulting trust is in no respect affected by the Statute of Frauds,¹¹ being a creation of the law and not of the parties, and that the relation of brother and sister is not one of those relations out of which can arise a presumption tending to rebut a resulting trust.

ED. CENT. L. J.

Graham v. Graham, 1 Ves. Jr. 275; Botsford v. Burr, 2 Johns. Ch. 405; Benbow v. Townsend, 1 Mylne & K. 506.

⁸ Sidmouth v. Sidmouth, 2 Beav. 447; Bennet v. Bennet, 10 Ch. Div. 474; *In re Der Visne*, 2 DeGex, J. & S. 17; Farrell v. Lloyd, 69 Pa. St. 329.

⁹ Marshall v. Crutwell, L. R. 20 Eq. 328.

¹⁰ Dyer v. Dyer, 2 Cox, 92.

¹¹ Boyd v. McLean, 1 Johns. Ch. 582. See, also, Gascoigne v. Theving, 1 Vern. 366; Lane v. Dighton, Amb. 409; Ryall v. Ryall, 1 Atk. 59; Willis v. Willis, 2 Atk. 71; Leach v. Leach, 10 Ves. 517.

¹ Lee v. Browder, 51 Ala. 228; Pinney v. Fellows, 15 Vt. 368; Hays v. Quay, 68 Pa. St. 263; Harvey v. Ledbetter, 48 Miss. 95; Hutchins v. Hayward, 50 N. H. 491; Woodford v. Stevens, 51 Mo. 443; Pamphrey v. Brown, 5 W. Va. 107; Blodgett v. Eldredge, 103 Mass. 481. And many other cases, English and American, might well be cited in support of this principle.

² Kelly v. Jenness, 50 Me. 455.

³ Remington v. Campbell, 60 Ill. 516; Holmes v. Holmes, 44 Ill. 168; Sheldon v. Harding, 44 Ill. 68; Bruce v. Roney, 18 Ill. 67.

⁴ McGowan v. McGowan, 14 Gray, 119; Olcott v. Bymun, 17 Wall. (U. S.) 44.

⁵ Crop v. Norton, 2 Atk. 74; Sayre v. Townsend, 15 Wend. 647; White v. Carpenter, 2 Paige, 217; Perry v. McHenry, 18 Ill. 227; Baker v. Vining, 30 Me. 121. But see Jenkins v. Eldredge, 3 Story, 181.

⁶ Harvey v. Varney, 98 Mass. 118; Haigh v. Kaye, L. R. 7 Ch. 469; Miller v. Davis, 50 Mo. 572; Wheeler v. Kirtland, 23 N. J. Eq. 18.

⁷ Dyer v. Dyer, 2 Cox, 92; Lloyd v. Read, 1 P. Wms. 607;

WEEKLY DIGEST OF RECENT CASES.

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1. **BOUNDARY—Highway—Old Fence—Evidence—Ways—Grading—Injunction—Acts of Selectmen of Town—Cutting Down Trees—Irreparable Injury.**—The fact that an old fence, running parallel to the highway has stood in the same place for 40 years is not conclusive that it is coincident with the line of the highway, as dedicated, or that the premises of the abutting owner may not extend beyond the fence. The acts of selectmen, who are about to enter upon private premises to grade the same as a part of the highway, acting under the authority of votes passed by the town, are so far the acts of the town itself that the town can be enjoined. The selectmen are not to be regarded as acting merely for the public, or as agents of the law. Threatened entry upon private premises to grade the same as a highway, involving the cutting down of ornamental trees, may, upon a finding that the same would cause irreparable injury, be enjoined. *Wetherell v. Town of Newington*, Supreme Court of Errors, of Conn. July, 1886; 5 Atl. Rep. 868.

2. **COMMERCIAL LAW—Promissory Note.**—Where promissory notes are made in Kentucky, and mailed to the payees doing business in Boston, and made payable at the Kentucky National Bank, they are contracts of that State, and are governed by its statute law. The statute of a State which gives the maker the right to set up in defence any discount or offset that the defendant has, and might have used against the original obligee, or any intermediate assignor, before notice of the assignment, is constitutional and valid, although it changes absolutely the operations of "the law merchant." *Shoe, etc. Bank v. Wood*, Supreme J. C. Mass. Oct. 23, 1886; Boston Law Record, Oct. 29, 1886.

3. **CORPORATION—Dividends on Preferred Stock—Impaired Capital—Railroad—Statute.**—Where an act of the legislature allowed a railroad corporation, whose finances were embarrassed by a large floating debt which it could not meet, either to pay the debt with the proceeds of second mortgage bonds to be thereafter issued, or to issue preferred stock for the purpose, by consent of a majority of the stockholders, and provided that the holders of such preferred stock should receive "out of the net earnings" of the company, annually, a certain per cent. on said stock, arrearages for any year to be paid out of net earnings of subsequent years before paying anything on the common stock, and the company adopted the latter method, and is-

sued preferred stock, held, that dividends on the preferred stock were payable from the net earnings of any year notwithstanding an existing deficiency of nearly a quarter of a million dollars, and notwithstanding the provision of the general statute forbidding any corporation to declare a dividend while its capital is impaired, said deficiency having existed prior to the act of the legislature. *Cutting v. New York, etc. Co.*, Supreme Court of Errors, of Conn., July 20, 1886; 5 Atl. Rep. 857.

4. **Municipal Corporations—Assessments for Improvements.**—Taxes assessed not according to the true value of the property cannot be sustained, and improvement assessments are invalid when not imposed for and within the limits of special benefits derived from the improvement. *State v. Mayor of the City of Patterson*, Supreme Court of New Jersey, Oct. 6, 1886; 5 Atl. Rep. 896.

5. **Supervisors—Repair of Bridge—Purchase of Abutments—Unauthorized Contract of Town Supervisors—Ratification.**—A resolution passed at an annual town meeting authorizing the supervisors to use their own judgment in repairing the abutments of a certain bridge, or moving it to another place, confers on the supervisors no authority to purchase the abutments. Where the contract for the purchase of certain bridge abutments by the supervisors of a town is void, and the town builds a bridge upon said abutments, it does not thereby ratify the void contract. *Hubbard v. Town of Williamston*, Supreme Court of Wisconsin, Oct. 12, 1886; 29 N. W. Rep. 393.

6. **Public or Private—Charitable Corporations—Character of Corporations Cannot be Determined Solely by Charter—Negligence—Non-Suit.**—Whether the "Insurance Patrol of the City of Philadelphia" is a public agent of the municipality, or a charitable corporation, or a private corporation for profit, cannot be determined solely by the language of the special act by which it was incorporated. Hence, in an action against said corporation to recover damages for negligence of its servant, in which the court granted a non-suit on the ground that it was a public charity, there being no evidence as to its character other than the charter, the Supreme Court, on writ of error, reversed the judgment, and awarded a procedendo, in order to show in what manner the affairs of the corporation had been conducted. A, and B., servants of a corporation, went in a wagon to remove certain tarpaulins, belonging to the corporation, from the upper floor of a house. A. went up stairs and threw the rolls of tarpaulin out of the front window to the street below. B. stood in the street by the horse's head, and gave warning to the passers-by; but in one case he failed to give warning in time, and a pedestrian was struck and killed by a bundle thrown out of the window. In an action against A. and B., the court granted a non-suit as to B. Held, under the circumstances of the case, not to be error, as although A. and B. may have together determined to throw the bundles out of the window upon the pavement, B. had no reason to suppose that A. would recklessly throw the bundles upon the passers-by. *Boyd v. Insurance, etc. of Phila.*, S. C. Pa. Oct. 4, 1886; 18 W. Notes. Cas. 209.

7. **CRIMINAL LAW—Appeal—Evidence—New Trial—Newly-Discovered Evidence—Assault and Battery.**—Where the testimony offered by the State, when taken alone, is competent and sufficient to

sustain the prosecution, a verdict which has been approved by the district court will not be set aside in the supreme court for insufficiency of the evidence. As a general rule, newly-discovered evidence, the purpose of which is to discredit a witness in the original trial, does not afford adequate ground for the granting of a new trial. The declarations of a party other than the defendant which formed no part of the *res gestæ*, although they may amount to an admission that he committed the offense charged against the defendant, are not admissible in evidence in behalf of the defendant, and an application for a new trial based upon such evidence was properly refused. Evidence examined, and held to be sufficient to sustain a charge of assault. *State v. Smith*, S. C. Kans. Oct. 7, 1886; 11 Pac. Rep. 908.

8. CRIMINAL LAW.—*Appeal—Rules of Court—Homicide—Manslaughter—Self-Defense.*—The right to an appeal in criminal cases is not a constitutional right; and an accused, having had his trial below, must conform to the rules prescribed by law for bringing his case to the appellate court, and to the practice adopted there. When the evidence shows that the accused lay in wait and slew his adversary without or with warning, there will be no ground for an instruction for manslaughter or self-defense, even though it appear that the accused had been previously threatened and assaulted with a deadly weapon by the deceased. *Turner v. Commonwealth*, Court of Appeals Ky., Sept. 30, 1886; 1 S. W. Rep. 476.

9. ———. *False Pretenses—Indictment—Theft—Former Acquittal—Motion for Continuance.*—The fact that an indictment for swindling contains allegations of acts on the part of accused that constitute theft does not make the indictment bad for swindling. A plea of former acquittal to an indictment for obtaining property under false pretenses, by trading cattle to which the accused had no title, for a horse, is not borne out by the fact that the defendant had been tried for stealing the cattle, and acquitted. Where it is developed, at the trial, that the evidence upon which the accused based his motion for a continuance, which motion was overruled, was material and important, a new trial will be granted. *Sims v. State*, Ct. of App. of Texas, June 25, 1886; 1 S. W. Rep. 468.

10. DEED.—*Acknowledgment—Act of Kentucky of 1792—Effect of Certificate.*—Under the act of the legislature of 1792 the certificate of acknowledgment to a deed which is made before two justices of the peace must state that "the deed was so acknowledged, and also subscribed or signed, in their presence." A certificate by the justices to the effect that, in their presence, the parties acknowledged the indenture by them subscribed to be their act and deed, certifies simply to an acknowledgment in their presence, and not also to a subscription. *Brown v. Swift*, Ct. of App. Ky., Sept. 28, 1886; 1 S. W. Rep. 474.

11. ———. *Conditions—Forfeiture—Waiver—Lapse of Time—Action or Suit—Parties—Rights of Strangers.*—Where a party has been granted property on certain conditions, and seeks to avoid forfeiture, after a breach of the conditions, on the ground that his grantor has acquiesced and waived his rights, it is incumbent on him to allege and prove such lapse of time, since the breach, as would authorize a court to presume an acquiescence and waiver. The rights of persons to prop-

erty cannot be considered in a suit to which they are not parties. *Kinney v. Trustees of Shelbyville*, Ct. of App. Ky., Sept. 28, 1886; 1 N. W. Rep. 472.

12. ———. *Description—"East Half of Tract, Containing Fifty Acres"—Estoppel—Ejectment—Title Recognized in Former Foreclosure Suit—Boundary—Taking Case from Jury.*—Where the description in a deed transferring a portion of a tract of land having an irregular southern boundary, was the "east half of the east half of the north-west quarter, and the east half of the east half of south-west fractional quarter, all in section thirty-six, containing fifty acres of land, being the east half of one hundred acres," etc., held, that the deed conveyed one-half of the quantity of the land, and not the land lying east of a line drawn through the middle of the tract. In an action of ejectment, a party who was a defendant in a previous action to foreclose a mortgage by reason of his having levied upon and sold the mortgaged property as judgment creditor of the mortgagor, and who had in the former action asked for an accounting of the rents and profits of the premises, the levy having been set aside in the decree of foreclosure, is not estopped in the action of ejectment from denying the title recognized by him in the former action. In an action involving a dispute as to the location of a boundary line between adjoining tracts of land, where there was testimony introduced to show the actual location of the boundary line, it was error to withhold the case from the jury. *Jones v. Pashby*, S. C. of Mich., Oct. 7, 1886; 29 N. W. Rep. 874.

13. EQUITY.—*Action to Quiet Title—Service of Process upon Infants—Parties—Husband of Deceased Devisee.*—In an action to quiet title to real estate it should be made to appear that the minor children of a deceased devisee are under fourteen years of age, or they should be served with process. In an action to quiet title to real estate, the husband of a deceased devisee is interested, and therefore, under the Kentucky Code, should be made a party, and served with process. *Shuchart v. Clark*, Ct. of App. Ky., Oct. 2, 1886; 1 S. W. Rep. 279.

14. ———. *Jurisdiction—Bills Quia Timet to Remove Cloud on Title to Real Estate—Relief Afforded.*—Courts of equity in Pennsylvania have jurisdiction of a bill filed by the owner of real estate, in peaceable possession thereof, to remove a cloud from his title by decreeing the cancellation of an outstanding deed held by the defendant, valid upon its face, but averred to be invalid by reason of matter resting in parol. This jurisdiction is independent of any relation of trust or of fraud, accident, mistake, account, or other head of equitable jurisdiction. "Whenever a deed or other instrument exists which may be vexatiously or injuriously used against a party after the evidence to impeach or invalidate it is lost, or which may throw a cloud or suspicion over his title or interest, and he cannot immediately maintain his right by any course of proceeding at law, a court of equity will afford relief by directing the instrument to be delivered up or cancelled, or by making any other decree which justice or the rights of the parties may require." The foregoing expression of the rule, by Merrick, J., in *Martin v. Graves* (5 Allen, 661), approved. In this case the court, at the suit of the owner in possession, decreed the cancellation of a recorded treasurer's deed valid on its

face, but which, it was shown by parol evidence, was made under an invalid sale, and which deed was therefore a cloud upon the complainant's title, though the grantee under the deed had not asserted an adverse title to the land in question, otherwise than by his answer in this case. *Dull's Appeal*, S. C. Pa., Oct. 4, 1888; 18 W. Notes of Cas. 216.

15. EVIDENCE.—*Handwriting—Signature—Genuineness—Witness—Competency—Interest*.—Without personal knowledge of a person's handwriting, testimony that witness sent receipts in blank to such person, which were returned by another, was insufficient proof of the genuineness of the signatures. The husband of an heir at law who has assigned her interest in a mortgage which was part of a decedent's estate, is a competent witness in an action of ejectment by decedent's administrators. *Brant v. Dennison*, S. C. of Pa., Oct. 5, 1885; 5 Atl. Rep. 869.

16. ——. *Judicial Records—Issue of Nul Tiel Record—Record in Same Court—Inspection of Record—Insolvency—Discharge—Record—Docket Entries*.—Upon the trial of an issue of nul tiel record in the same court where the alleged record is kept, it is not necessary to produce a formal record of the alleged proceedings, and it is sufficient to have the docket entries and original entries laid before the court for its inspection. Where the following entries were made in the docket of a court in insolvency proceedings: "June 21, 1879. Certif. pub. notice filed. Same day petitioner finally discharged." Held, that the presumption is that the court itself while in session ordered the discharge, and that the clerk made the entry thereof in open court. Held, further, that the docket entries and papers in the insolvent proceedings showed a valid and complete discharge of the insolvent debtor from all debts and contracts made before filing the application in insolvency. *Lerian v. Bohr*, Ct. of App. of Md., October Term, 1886; 5 Atl. Rep. 867.

17. ——. *Similar Transactions with Third Parties*.—Evidence of transactions of a similar nature between plaintiff and third parties, not shown to be his regular course of office or business, is not admissible to show the terms of the contract in issue between plaintiff and defendant. *Aiken v. Kennison*, S. C. Vt., Aug. 31, 1886; 5 Atl. Rep. 757.

18. EXECUTION.—*Levy—Officer's Return—Amendment—Appraisal—Undivided Interest—Metes and Bounds*.—If the return of an officer making a levy contains sufficient matter to indicate that in making the extent all the requirements of the statute have been complied with, an amendment of a mere clerical error may be made notwithstanding any intervening interest of a subsequent bona fide purchaser. An appraisal of the interest of a tenant in common is not invalidated because reference is made therein to the lot boundaries as the metes and bounds of the extent. *Peaks v. Gifford*, S. Jud. Ct. Me. Sept. 24, 1886; 5 Atl. Rep. 879.

19. GUARDIAN AND WARD.—*Investment—Worthless Securities*.—A guardian, although acting in good faith, in not obtaining the sanction of the court to investments of the ward, will be held liable for all losses occurring through such investments proving worthless. *Osborne v. Munroe*, Ot. Chan. N. J. Oct. 9, 1886; 5 Atl. Rep. 886.

20. HEALTH.—*Putting Dead Animals Into Stream—Complaint*.—A complaint filed under § 319, of

chapter 81, Comp. Laws, 1879, which charges the defendant with putting "the part of a carcass of any dead animal into any river, creek, pond, road, street, alley, lane, lot, field, meadow, or common," but which does not allege that the act of the defendant complained of resulted to the injury of the health or to the annoyance of the citizens of the State, or any of them, is insufficient, and a motion to quash such complaint should be sustained. *State v. Wail*, S. C. Kans. Oct. 7, 1886; 11 Pac. R. 911.

21. INSURANCE.—*Policy of—Implied Waiver of Conditions—Premium—Principal and Agent*.—An insurance company issued through an agent a policy of insurance, which contained, *inter alia*, the condition that if the assured "shall have neglected to pay the premium," the policy should be null and void. A clause stamped upon the face of the policy further provided that the person procuring the insurance should be deemed the agent of the assured and not of the company. The agent had been in the habit of remitting to the company the amount of the premiums due by the assured, charging the amount upon his books against the latter, and receiving the premium from them sometime during the month after it came due. A premium became due on April 24, but was not paid. A loss by fire occurred on May 2, and on May 3, the assured sent notice of the loss to the company, and remitted the amount of the premium to the agent. The latter then sent a check for the premium to the company, which they refused to receive. Held, that the company were liable for the amount of the policy. *Lebanon, etc. Co. v. Hoover*, S. C. Pa. Oct. 4, 1886; 18 W. Notes, 223.

22. JUDGMENT.—*Setting Aside—Errors in Judgment—Schools—Lands—State Agricultural College Lands—Sections 3533 and 3534, Pol. Code Cal.—Construction of—Power of Land Agent—Conflicting Claims of Individuals—Rights of Actual Settlers*.—A judgment based on a finding against an admission made in the pleadings cannot be sustained, unless it is apparent that the judgment would have been the same if the objectionable finding had not been made. Under the statutes (§§ 3533 and 3534 of the Political Code) relating to the disposition of the agricultural college lands, the land agent of the university had no power to sell land to an applicant who was not a qualified purchaser, or whose application was not in the prescribed form. A person who has never settled upon university land, never occupied or improved it, acquires no right to purchase it which can be maintained against an application to purchase by an actual settler upon the same land. *White v. Douglass*, S. C. Cal. Sept. 27, 1886; 11 Pac. Rep. 860.

23. LANDLORD AND TENANT.—*Lease on Shares—Assignment—Attachment—Crops not Grown*.—A contract under which one of the parties is to "occupy, cultivate, and carry on" a farm of the other at the halves, vests in the tenant an interest in the land, and an assignment by him of his rights under the contract vests in the assignee a good title to the tenant's share of crops to be grown in the future, as against the tenant's attaching creditors, notwithstanding the fact that the tenant remained in possession after the assignment and was in occupation when the attachment was levied. *Wahworth v. Jenness*, S. C. Vt. 1886; 5 Atl. Rep. 887.

24. MASTER AND SERVANT.—Assumption of Risks—Defective Railroad Switch—Evidence—Similar Accident—Trial—Instructions—Exceptions—Negligence—Action for Death—Damages.—Where an accident, caused by a broken switch-rail, resulted in the derailment of an engine, and the death of the engineer in charge thereof, and the evidence tended to show that the rail was too weak and light to support the engine and rolling stock used on the road, *held*, that the risks of such defects was not to be deemed to have been assumed by the deceased unless it appeared that he had notice that the rail was unsafe. Proof of similar accidents at the same switch under the same conditions, *held* admissible; following *Morse v. Railroad Co.*, 30 Minn. 471; s. c., 16 N. W. Rep. 358. That the charge of the court is indefinite, or omits material instructions, is not ground of exception, where the attention of the court is not specifically invited to the matter or special instructions asked. In an action, for the benefit of the widow and next of kin, for damages for injuries causing death, and as having reference to the question of the reasonable expectation of pecuniary benefit to them if the deceased had survived, it was not error for the court to instruct the jury that they might consider his age, health, capacity to earn money, and the injury to his business, as disclosed by the evidence. *Clapp v. Minneapolis etc. R. R. Co.* S. C. Minn., Oct. 6, 1886; 29 N. W. Rep. 338.

25.—MECHANIC'S LIEN—Material for Building—Title to Lot—Filing Verified Account.—The plaintiff furnished materials for a building, erected by defendants on a designated village lot, in pursuance of a contract by them jointly entered into with him. The title of the lot was in the mean time in a third party, and, shortly, prior to the completion of the building, one of the defendants transferred his interest to the others, and the title of the lot was thereupon conveyed to the latter. *Held*, that plaintiff was entitled to enforce a lien for the amount of his claim against the building and lot, and that the defendants were estopped to deny title and ownership therein. In order to perfect his lien, the material-man must file a duly-verified account thereof within the statutory time; and where such account purported to be sworn to before the register of deeds, but was not properly attested by his seal, so as to entitle it to be recorded within the time limited, *held*, that it was insufficient to preserve and continue the lien. *Colman v. Goodnow*, S. Ct., Minnesota, Oct. 6, 1889; 29 N. W. 338.

26. MORTGAGE.—Mistake in Description of Note—Foreclosure—Set-Off and Counter-Claim—Breach of Contract—Good-Will.—Where a note was correctly described in a mortgage except as to its date and no question was made that the note produced was the one referred to and intended to be secured, the mistake as to date was held immaterial, and therefore it was not necessary that the mortgage be reformed before foreclosure. Where the defendant purchased from the plaintiff, with certain tangible property, the good-will of a business, and gave a promissory note for a part of the purchase money, and the plaintiff afterwards willfully proceeded to draw off the defendant's customers, and to deprive him, to a large extent, of the good-will so purchased, and thereby damaged him in a sum greater than the amount remaining due on the note, *held*, that the defendant

was entitled to have the damages sustained by him offset against the purchase money which the plaintiff was seeking to recover. *Snow v. Holmes*, S. C. of California, Sept. 28, 1886; 11 Pac. Rep. 856.

27. NEGLIGENCE.—Collision—Instruction as to Particular Facts—Trial—Instructions—Claims of Both Sides—Negligence—Same Rule for Plaintiff and Defendant.—In an action to recover damages for an injury caused by the collision of plaintiff's and defendant's teams, it is not the duty of the court to state particular facts as constituting negligence if proved, but to leave it to the jury to decide whether, under all the circumstances, the conduct of the parties was that of ordinarily careful and prudent persons. The court may properly state to the jury the claims of both parties upon all questions of fact in the case. In determining the question of negligence, the same rule should be applied to plaintiff as to defendant. *Dexter v. McCready*, S. Ct. of Errors of Conn., July 20, 1886; 5 Atl. Rep. 855.

28. —.—Contributory Negligence—Common Carrier and a Voluntary Carrier Without Compensation—Difference in Degree of Care and Diligence Required from Each—Contributory Negligence of the Latter Does Not Debar Passenger from Recovering from the Party Who was the Direct Cause of the Injury.—A., who was a visitor in the borough of Carlisle, took a sleigh ride upon invitation of B., the owner and driver of the sleigh, and on their return in the evening the sleigh was upset and A.'s leg was broken. The accident was caused by an excavation in the middle of the street, which was not designated in a way to arrest the attention of a traveler after dark; said excavation was caused by the borough in making repairs on the road. In a suit by A. against the borough to recover damages: *Held*, that the offer to prove that B., the driver, was acquainted with the character of the street was properly rejected, as B.'s knowledge could not be imputed to A. The rule in *Lockhart v. Lichtenshaler* (10 Wr. 151), discussed and distinguished. *Borough of Carlisle v. Brisbane*, S. C. of Penn., Oct. 4, 1886; 18 Weekly Note of Cases 220.

29. —.—False Apprehension of Danger—New Trial—Verdict—Excessive Damages—Damages—Injuries to Person—Special Damages.—When a person, acting with reasonable prudence, jumps from a moving car to escape a danger which is apparently impending, and is thereby injured, he is not guilty of that contributory negligence which bars recovery, even though had he in fact remained upon the car he would have escaped injury. The verdict of the jury is not to be set aside for excessive damages awarded, unless it appears that such damages were flagrantly excessive. In an action for damages for injuries to the person, where the petition does not aver any special damages, but only proceeds for the injury, the plaintiff cannot recover any many expended or debt created on account of it. *South Covington etc. Co., v. Hare*, Ct. of App. of Ky., Sept. 25, 1886; 1 S. W. Rep. 493.

30. PARTITION.—Considering Benefit to Husband of Heir.—It is no ground of objection to a partition of realty, made between heirs, that the husband of one of the heirs owns a parcel of land adjoining their's, and near a spring of water thereon, which spring the husband has walled up and used constantly for several years in connection with his

land, and which is almost indispensable to the proper enjoyment thereof, and that, notwithstanding these facts, the spring is allotted to another of the heirs, when to allot the spring to said first-named heir would make the lots unshapely and without uniformity, making it almost impossible for one of the heirs to fence his portion, and would leave one of the full shares without any water. *Mackbee and Wife v. Fields*, Ct. App. Ky., Oct. 5, 1886; 1 S. W. Rep. 485.

31. **PARTNERSHIP DEBT.—Claim against Estate of Deceased Partner—Claim against Surviving Partner—Res Judicata—Claim against Estate of Deceased Person—Uncorroborated Evidence of Claimant.**—There is no rule of law that a claimant against the estate of a deceased person cannot recover unless his evidence is corroborated; the only question being whether the evidence of the living man alone brings conviction to the mind of the court. A father and son, being in partnership, became indebted to the plaintiffs. The son having died, the father commenced an action for the administration of his estate, and the plaintiffs, not being then able to prove that a partnership had existed, carried in a claim for the debt against the separate estate of the son, and were declared to be entitled to a dividend. The father died, and the plaintiffs afterwards became able to prove that the partnership had existed, and commenced an action for the administration of his estate, which they claimed to make liable for the debt. *Held*, that the proceedings taken by the plaintiffs in the previous action did not constitute the matter *res judicata*, so as to prevent them proving in this action for their debt; but that they must undertake to postpone their dividend out of the son's separate estate to the claims of his separate creditors. *Beckett v. Ramsdale*, Eng. Ct. App.; 54 L. T. Rep. 222.

32. —. **Dissolution by Consent—Notice of—London Gazette—Action to Enforce Signature of Notice of Dissolution—Jurisdiction—Costs.**—After the dissolution by consent of a partnership between the plaintiff and the defendant, an action was brought to compel the defendant to sign a proper notice of dissolution for insertion in the *London Gazette*. No other relief was sought. It was contended that the court had no jurisdiction to entertain such an action; and that an order directing a partner to sign a notice of dissolution could only be made as incidental to and part of a regular judgment for the winding up of the partnership. *Held*, that the court had full jurisdiction to entertain the action. *Hendry v. Turner*, Eng. Ct. App.; 54 London L. T. Rep. 292.

33. **PRACTICE.—Action for False Imprisonment and Libel—Particulars—Reasonable and Probable Cause.**—The plaintiff sued the defendant for having wrongfully made and signed an order, stating that the plaintiff was a person of unsound mind, in consequence of which the plaintiff had been assaulted and removed to a lunatic asylum and kept there against his will; and he also claimed damages for the libel contained in such order. The defendant, in his defense, pleaded (*inter alia*) reasonable and probable cause for believing the plaintiff to have been a person of unsound mind, and fit to be detained under care and treatment. *Held*, that the allegation of reasonable and probable cause was an immaterial allegation; and that the

defendant could not be ordered to give particulars thereof. *Cave v. Torre*, Eng. Ct. of App.; 54 L. T. Rep. 87, 515.

34. —. **Reference—Account Stated—Report of Referee—Evidence—Mortgage—Payment—Delivery of Mortgage to Mortgagee—Presumption—Mortgage not Satisfied.**—Where the uncontroverted testimony before a referee disclosed that there was an account stated between the parties on a certain date, and it also appears by the referee's own report without holding that the parties were not bound by said stated account: *Held*, that this was error, and that the report of the referee should not have been confirmed. The amount due upon a certain mortgage was claimed by the mortgagee to be about \$3,000, and by the mortgagor to be about \$4,000. The mortgagee agreed to accept \$4,000 in cash, and to join the mortgagor in a note for \$1,000, which was discounted, and the proceeds paid to the mortgagee, and the note was subsequently paid by the mortgagee. It was also agreed between them that the final accounting should be postponed for a short time. The notes and mortgage were delivered to the mortgagor, but the mortgage was not satisfied. *Held*, that the mortgagee might hold the unsatisfied mortgage as security for the balance found due him upon the final accounting, and that there was no presumption that the mortgage debt had been paid by the delivery to the mortgagor. *Killops v. Stevens*, S. C. Wis., Oct. 12, 1886; 29 N. W. Rep. 390.

35. **SALE.—Agricultural Machine Taken on Trial—Evidence—Agent.**—In an action for the price of an agricultural machine, where the point in issue is whether the machine was sold or taken on trial, and the machine has been shown to be in the defendant's possession, it is not error to admit testimony of the plaintiff's agent to the effect that he had requested the defendant, after he refused to keep the machine, to place it under cover on his place until he could see his principal. *Lyon v. Hayden*, S. C. Vt., Sept. 6, 1886; 5 Atl. Rep. 892.

36. **SALE—Bill of Sale—Power to Sell Under—Appeal—Conflict of Evidence—Conclusions of Court Below—Principal and Agent—Duty and Liability of Agent to Principal.**—Where a bill of sale of goods and chattels is made to a person with full power to sell and apply the proceeds to the payment of certain specified debts, and such goods and chattels are left in the possession of the owner with the understanding that he may sell what portion of them he can and appropriate the proceeds to the same purpose, if such owner violates his agreement, and fails to apply the whole of the proceeds, as he has agreed to do, although the bill of sale was intended as a mortgage, the person holding the same has a right to sell the property without the judgment of a court, in the exercise of a reasonable judgment, where he may deem it for the interest of all the parties concerned so to do, and to apply the money as directed by the instrument. Where, in the trial of an action, there is a conflict of evidence between the parties, the court, on appeal, will not disturb the conclusion of the lower court. The principle that an agent cannot deal with his principal's property for his own benefit, inconsistent with the interest of his principal, applies only to agents who are relied upon for counsel and direction, and where employment is rather a trust than a service, or both, and not to those who are employed merely as instruments in

the performance of an appointed service. *Spalding v. Mattingly*, Ct. App. Ky. Oct. 9, 1886; 1 S. W. Rep. 488.

37. TROVER AND CONVERSION—*Mortgaged Property—Damages—Instruction to Jury*.—In an action against an officer for damages for the conversion of personal property on a part of which the plaintiff held a bill of sale, and had a chattel mortgage on the remainder, an instruction to the jury that, if they found that the plaintiff was the owner or bailee of the property, his damages would be the value of the property at the time of the conversion, with interest and a fair compensation for the time and money properly expended in the pursuit of the property, and, if they found that the plaintiff held a chattel mortgage on the property, the amount of the mortgage debt, with interest, *held*, a proper instruction. *Sherman v. Finch*, S. C. Cal. Sept. 22, 1886; 11 Pac. Rep. 847.

38. TRUSTS—*Administrator Involuntary Trustee for Heir—Fraud—Section 2224, Civil Code Cal. Executors and Administrators—Sale of Land to Pay Claims—Delay Amounting to Laches—Claims Barred*.—An administrator who procures the heir of his intestate to convey to him all the heir's interest in the estate, by representations which are actually untrue, though not made with a fraudulent intent, is an involuntary trustee of the property conveyed, for the benefit of the heir, under section 2224, Civil Code Cal. Where there is a failure of personal property to pay a claim which the administrator holds against an estate, the administrator must institute proceedings for sale of real estate belonging to the estate; and a delay of 18 years to institute such proceedings will bar the claim, although it has previously been allowed by the probate court. *Wingter v. Wingter*, S. C. Cal. Sept. 25, 1886; 11 Pac. Rep. 853.

39. ——. *Children Selling Lands for Support of Father—Father as Trustee—Violation of Trust by Trustee—Equity—Party not Joined in Bill—Consenting to Proceeding Before Decree—Statute of Frauds—Parol Agreement Creating Trust—Lands Sold—Proceeds in Trust*.—Where the evidence shows that children sold lands to a third person, but the transfer was made to their father, and from him to the purchaser, and it was agreed by parol that the father was to have charge of the proceeds of the sale during his life, and use the income therefrom for his support, and that at his death the principal was to revert to his children, this created a trust in the father. Where a father who holds property in trust for his children, uses a portion of the trust property to purchase a woman's consent to marry him, he violates his trust. Where a party in interest in a proceeding in equity is not made a party in the bill, but before decree files a paper in the court stating, under oath, that he approves of the action of the complainants, and that he desires the relief demanded, and his interests are in no way prejudiced, the decree will be sustained. Where children agreed by parol with their father that he should take the proceeds of the sale of certain lands owned by them, the income to go to his support during his life, the principal to be returned to them at his death, and they then deeded the land to him, and he at the same time transferred it to a third party, *held*, that the contract was not void as being pa-

rol, and relating to realty, but created a valid trust in the father. *Edinger v. Heiser*, S. C. Mich. Oct. 7, 1886; 29 N. W. Rep. 367.

40. ——. *Conveyance as Security—Purchase Under Mortgages, Judgments and Bankruptcy, Proceedings—Bankruptcy—Interest of Bankrupt After Assignment—Land—Nature of Estate—Assignee's Sale—Purchase by Trustee—Jurisdiction of State Court—Partnership—Contract to Manage and Sell Lands*.—K. owned a large quantity of real estate, and was largely indebted beyond his ability to pay at once without sacrificing the real estate. His wife also owned a large amount of real estate. June 15, 1875, the two conveyed the greater part of their real estate to R. by deeds absolute in terms. At the same time K. and R. executed an agreement in writing, acknowledging the conveyances to have been made as security for advances to K., made and to be made by R. and containing provisions in respect to future advances of money and credit, which R. covenanted to make, from which the purpose of the transaction appears to have been to enable K., by means of the advances so to be made, to pay off his debts, and save as much of his property as might remain after disposing of enough to reimburse R. for all advances made and to be made, and interest and expenses. The contract gave to R. peculiar powers with respect to the holding and disposition of the lands conveyed. *Held*, that this created such a relation of trust and confidence between the parties as disabled R. to purchase under judgments or mortgages, or bankruptcy proceedings, and hold against K., and for his own benefit, property of K. whether included in the deeds executed as security or not. A bankrupt's interest in this estate is not extinguished by the assignment in the bankruptcy proceedings to the assignee in bankruptcy. In respect to real estate, the interest remaining in the bankrupt after such assignment, is under our statute, in the nature of a reversion, subject to be defeated by a sale by the assignee. The state courts have jurisdiction to determine that a purchaser at a sale by an assignee in bankruptcy stands in such relation to the bankrupt and the property that he will be charged as trustee for the latter in making the purchase. A certain contract construed, and *held* to create a partnership to manage and dispose of certain lands, and a purchase of the lands in the name of one of the partners, made simultaneously with the forming of the partnership, *held* to be a partnership transaction, so that notice of the rights of others in the lands had by one partner was notice to the other. *King v. Remington*, Supreme Court of Minnesota, October 9, 1886; 29. N. W. Rep. 352.

QUERIES AND ANSWERS.*

[Correspondents are requested to draw up their answers in the form in which we print them, and not in the form of letters to the editor. They are also admonished to make their answers as brief as may be.—Ed.]

QUERIES.

29. "I give and devise the house and lot on Ninth Street, in the City of N., to John Thompson, in trust for the sole and separate use of my daughter Kate, and the said trustee, or any successor, in the lifetime

of said Kate, with her consent, or afterwards, may sell the said house and lot at public or private sale, and on such terms of payment as the person selling may deem best, and hold and dispose of the proceeds of sale on the same trusts as the property was held before sale." What interest does the daughter Kate take in the house and lot by virtue of the above provision of a will? If she takes but a life estate, would the property at her death go to her children, or to her brothers and sisters?

QUERIES ANSWERED.

Query 27. [28 Cent. L. J. 408.]-A. contracts to build a house for B., and in the contract there is a clause that A. "will deliver the building free of mechanics or other liens." What effect would such a clause have on material men, sub-contractors and day laborers. If B. paid A. in full, according to contract, and it turns out that A. has not paid for all the material, and still owes sub-contractors and day laborers, could they, under the above claim, file a lien on said building?

Answer.-The contract binds none but the privies. Mechanic's lien could not be filed. The Mechanic's Lien Law usually provides for two classes of persons. First, those employed by the owner, whom the statute gives a lien. Second, those employed by the contractor, who only can have a lien on the unpaid funds of the contractor in the hands of the owner, by serving notice on the owner as provided by statute. See *McCollum v. Richards*, 2 Handy, Cincinnati; *Copeland v. Manton*, 22 Ohio St. 398. M. A. H.

Another Answer.-Under the law of Indiana, they could file a lien if done within sixty days from the time of the completion of the building. Ind. Stat., § 5298; 45 Ind. 96; 51 Ind. 397; 55 Ind. 220; 83 Ind. 17. O. S. HADLEY.

RECENT PUBLICATIONS.

CASES SUMMARILY DISPOSED OF on motion in the United States Supreme Court. By C. H. Armes, Attorney at Law, Washington, D. C. Philadelphia: T. & J. Johnson, & Co. 535 Chestnut Street. 1886.

This is a neatly printed and bound volume of 262 pages, and the reason of its existence is so well and tersely stated in the preface that we find it most convenient to express the object of the work in the author's own words: He says:

"The many cases summarily disposed of on motion by the United States Supreme Court from term to term, for years past, upon jurisdictional questions, rules of practice, or trivial questions, induced a belief that a book which would enable the practitioner to review the decisions upon these oft-recurring questions, without having to examine all the volumes containing the decisions would be of service to the profession. This volume is therefore designed to present in a convenient form, decisions embracing every principle adjudicated upon motion down to the beginning of October Term 1885. It is not intended to reproduce cases of exact similarity, but to produce those which, though similar, differ in some respect—probably material."

It is manifest from this statement that the work addresses itself to a very small segment of the profession including only those lawyers who practice habitually in the Supreme Court, those who occasionally appear there, and those who, appearing regularly in the circuit and district courts of the United States might be presumed to feel a special interest in the practice of the Supreme Court.

The book is faulty in one very material respect. The cases are not arranged according to their subjects; the reader must turn to the index, which seems to be the only guide vouchsafed him. The paucity or total absence of cited authorities is another grave error, into which, according to his preface, the author was led by his anxiety to make the book "as brief and compact as possible." A minor error is the omission of the names of the justices who respectively delivered the opinions; the omission of the names of the attorneys in the several cases, for which he thinks it necessary to apologize, is no error at all.

Notwithstanding the defect in arrangement, we think the book may prove useful to the limited circle of the profession for whose service it is designed.

JETSAM AND FLOTSAM.

It is a beautiful story that in one of the old cities of Italy the king caused a bell to be hung in a tower in one of the public squares, and called it "The bell of justice," and commanded that any one who had been wronged should go and ring the bell, and so call the magistrate of the city, and ask and receive justice. And when in the course of time the lower end of the bell rope rotted away, a wild vine was tied to it to lengthen it; and one day an old and starving horse that had been abandoned by its owner and turned out to die, wandered into the tower, and in trying to eat the vine, rang the bell. And the magistrate of the city, coming to see who rang the bell, found this old and starving horse; and he caused the owner of that horse, in whose service he had toiled and been worn out, to be summoned before him, and decreed that as his poor horse had rung the bell of justice, he should have justice, and that during the horse's life his owner should provide for him proper food and drink and stable.

The shortest and yet the most pointed charge to a jury that has come under our notice is that reported by the *Law Journal*, to have been delivered by Mr. Commissioner Kerr, famous for the terseness of his charges, while sitting as sitting as assistant judge at Middlesex Sessions. The prisoner concluded his defense by saying, "After all, gentlemen, you have only the prosecutor's word for it that I took his watch." "That is true, gentlemen," said the judge; "but if you believe his word, you will find the prisoner guilty; if you don't believe it, or are in doubt, acquit him. Consider your verdict."

The Central Law Journal.

ST. LOUIS, NOVEMBER 12, 1886.

CURRENT EVENTS.

PRISONERS AS WITNESSES—AGAIN.—We will not place ourselves in a false position. We are not *laudators temporis acti*; on the contrary we are champions of progress, devoted to reform, and our dearest ambition is to "keep up with the procession." It would seem otherwise from our strictures upon the so-called reform in the matter of the testimony of person accused of crime. The explanation is simple. That reform is no reform at all, but reaction. In England, and in those of the American States in which it has been adopted, it is regarded as a concession to the prisoner, "opening his mouth," that he might defend himself by telling his own story under oath. Upon its face this would seem fair and liberal, in effect, as we think we have shown, and as Mr. Justice Stephen substantially admits, its operation is adverse, not favorable to the prisoner, whether he is innocent or guilty. The nett result is usually to say to the average defendant: "If you do not testify, we will believe you guilty; if you do testify we will strongly suspect you of perjury." Besides this the average prisoner who is, in Mr. Justice Stephen's language, "an ignorant, uneducated man, dreadfully frightened, very much confused," having told his tale as best he could, is forthwith subjected to a cross examination by a skillful and experienced prosecuting attorney who is not a bit frightened, and utterly incapable of being confused. All this tends no doubt to increase the chances of conviction, but whether it is as Mr. Justice Stephen says, "favorable in the highest degree to the due administration of justice," is another and altogether different question.

To place a prisoner under duress physical or moral, and thus compel him to testify against his will is certainly a step backward. Mr. Justice Stephen however goes further in his article in the *Nineteenth Century* for October, upon which we commented in our last number¹, and proposes that persons ac-

cused of crime should be not merely "competent but compellable witnesses at every stage of the inquiry." This is certainly not as mediæval as the rack and the thumbscrew, but it is of the same character, for the catechism may well assume the nature of moral torture. We have read of persons, who, under the persistent importunity of their persecutors "at every stage of the inquiry," but without physical torture, confessed themselves guilty of impossible crimes, such for instance as witchcraft. Of course this is an extreme illustration, but we can easily conceive that a prisoner suddenly arrested, perhaps dragged from his bed, hurried before a magistrate, persistently interrogated in a hostile spirit, might, although absolutely innocent, involve himself in such inconsistencies, as would at least tend very strongly to establish his guilt. Especially would this be the case if he were without counsel and "an ignorant, uneducated man dreadfully frightened, very much confused."

Mr. Justice Stephen in advocating this change in the procedure in criminal cases not only proposes to return to the worst methods of the middle ages, short of physical torture, but, in doing so, to abrogate the primeval legal maxim that no man shall be required to accuse himself; and the equally venerable doctrine that the law presumes every man innocent until he shall be proved guilty. Under his theory the law presumes the prisoner to be guilty and requires him, upon what is equivalent to a cross-examination to prove his innocence if he can, and his guilt if he cannot. And thus Mr. Justice Stephen, and those who favor his views, contrive to combine the opposite characters of innovator and reactionary.

In his character of innovator Mr. Justice Stephen proposes to remove another landmark of the law. He says: "If the change in question should be made, it would, I think be necessary to modify the old doctrine about proving beyond all reasonable doubt the guilt of an accused person, for it would be a matter of moral certainty that whenever a plausible story consistent with innocence can be devised, the prisoner would swear to it and find others to help him."

It is not very apparent why the time-honored safeguard of "a reasonable doubt"

¹ 23 Cent. Law Journal, 433.

should be extinguished, because prisoners who can devise a plausible story consistent with innocence, may find others to swear to it. Prisoners, in any state of the law, can often find persons to swear to plausible stories, and as Mr. Justice Stephen has himself demonstrated that in most instances the testimony of a prisoner is of little value to himself, it cannot add much appreciable weight to that of his friends.

As we said in the beginning of this article, we are in favor of legal reform. We are fully aware that the law needs careful and judicious pruning. The process, however, is critical, and should be conducted with special caution and discretion. Anachronisms should be abolished, excrescences removed, and abuses remedied, but every principle of the law as it stands should receive that, which Mr. Justice Stephen seems disposed to deny to prisoners on trial for their lives, "the benefit of all reasonable doubt."

NOTES OF RECENT DECISIONS.

MALICIOUS PROSECUTION—PROBABLE CAUSE—BURDEN OF PROOF—CORPORATIONS.—In a recent English case,¹ the House of Lords held that a party suing a corporation for a malicious prosecution was bound to prove a negative, to-wit, that the prosecution was instituted without probable cause. The court held that, although it was a rule of logic that he who asserts a particular proposition must be held to prove it, yet the law required that a plaintiff must establish his own case, and cannot be permitted to rely upon the weakness of his adversary. This settled the case, of course, but underlying this question was one much more discussed in the opinions, but not necessary to the decision of the cause, and that was whether a corporation could be sued at all for a tort of this description. Lord Bramwell's opinion was, that malice could not be predicated of a corporation, and therefore it could not be sued for any cause of action of which malice was an essential component part. He says a corporation may be

held responsible for a trespass committed by its servants, because trespass is an action into which neither motive nor malice enters. So a printing company may be held liable for a libel, because a libel may be published without malice or other improper motive.

Lord Bramwell's view that malice cannot be predicated of a corporation, is in some sort affected by his opinion of juries. He says, that "in an action for malicious prosecution if the plaintiff proves himself innocent, you may tell the jury over and over again that that is not the question, but they never, or very rarely, can be got to understand it. They think it is not right that a man should be prosecuted when he is innocent, and in the end they pay him for it." And in so doing, they are, in our opinion, in full accord, not only with natural justice, but with the spirit of the law.

A corporation, being an artificial body made in the likeness of a man, endowed with human powers should, by analogy, be subject to all the liabilities of a man. It can institute a prosecution upon unfounded charges and the flimsiest pretexts, without the shadow of probable cause, and employ all the artillery of the law to secure a conviction. If a natural person did so and failed, he would assuredly be liable to an action. Why should not a corporation. Its liability should surely be commensurate with its powers. In this same case Lord Fitzgerald says:

"I shall only say of corporations, and of trading corporations especially, that I have often heard it observed that they certainly are very frequently without conscience, and sometimes very malicious."

EMINENT DOMAIN—CONSTITUTIONAL LAW—REMEDY—ACTION.—In the Supreme Judicial Court of Massachusetts was recently decided a case² of some interest, involving the remedy of a land owner whose property has been injured by the action of a corporation exercising the right of eminent domain under authority of a statute of the State. The defendant, an aqueduct company, under authority of a statute enacted in 1867, built a dam across the outlet of Kenoza lake, by which

¹ *Abrath v. North Eastern etc Co.*, 55 L. J. Rep. 457.

² *Brackett v. Haverhill etc Co.* 7 East. Rep. 124.

the flow of the water through the plaintiff's land was impeded and diminished. He thereupon brought a common law action of tort. The court held that he was in some form entitled to a remedy for any damage he had sustained.³ The Constitution provides that, whenever the public exigencies shall require that the property of a private citizen shall be taken for public purposes he shall be compensated therefor; and in view of that provision, the court held that any statute which authorized the exercise of the right of eminent domain by a corporation, and failed to make *adequate* compensation to citizens who suffered loss thereby, was unconstitutional and void.⁴

In the case under consideration, however, the provision for compensation made by the statute, was held to be adequate; and, further, that such being the case, the plaintiff was restricted to the remedy provided by the statute, and was not at liberty to seek redress otherwise, as in this case, by a common law action. Nevertheless, it was held that a common law action would lie against the defendant company, if it had exceeded the powers granted in the statute, as by raising its dam too high, or by drawing off the water, reducing its level below the mark prescribed in the statute. In such case, and for damages caused thereby, the plaintiff was entitled to a common law remedy. For injuries suffered by reason of the exercise of the statutory power, he was limited to the statutory remedy.

Watuppa etc Co. v. Fall River, 184 Mass. 267.

⁴ Conn. River etc Co. v. County Commrs., 127 Mass., 50.

THE DOCTRINE OF IMPUTED NEGLIGENCE, AS APPLIED TO CHILDREN.

In the evolution, which the law is, in these times, rapidly undergoing, only the fittest principles can survive.

One of the unsound doctrines that is destined to fall, is that still adhered to by several States, where in actions for injuries to children of tender years, or to their estates, caused by the negligence of the defendant, the child is held responsible for the contributory negligence of its parent, guardian, or person in charge of it, at the time of the injury.

It is believed that the weight of authority already concurs with the strong reasons against this ruling; as it is certain that there is a growing tendency of decision adverse to it.

It encounters the objection, at the very threshold, that it requires one person to answer for the wrong or error of another.

Imputing Negligence of Driver.—This unjust identification of parent, guardian or custodian, with the child, is fast going the way of the other identification of passenger and driver. The old doctrine of *Thorogood v. Bryan*,¹ holding the passenger in an omnibus, or public conveyance, responsible for the carelessness of its driver, decided merely upon an order to show cause, has been criticised in *Tuff v. Warman*,² *Waite v. N. E. R. Co.*,³ and "*The Milan*."⁴ This rule, though followed in some American cases,⁵ has been rejected by a larger number.⁶ And now the Supreme Court of the United States, in a recent case, decided in January last, takes the negative, and exonerates the passenger in such a case, holding that this doctrine "was not applying any general rule of law, but was framing a new exception, based on fiction, and inconsistent with justice." (CEN-

¹ 8 Man. Gr. & Scott, 116.

² 2 C. B. (N. S.), 750.

³ El. B. & El. 728.

⁴ 1 Lushn. 888.

⁵ *Lockhart v. Lichtenthaler*, 46 Pa. St. 151; *Phila. R. Co. v. Boyer*, 97 Pa. St. 91.

⁶ *Colgrove v. R. Co.* 20 N. Y. 492; *Barrett v. R. Co.*, 45 N. Y. 628; *Turnpike Co. v. Stewart*, 2 Met. (Ky.) 119; *Louisville R. Co. v. Case*, 9 Bush. 728; *Cuddy v. Horn*, 48 Mich. 596; See note, 24 Am. L. Reg. 710.

TRAL LAW JOURNAL.⁷) That the negligence of a street car driver is not imputable to the passenger, is held in *Bennett v. N. J. R. Co.*⁸ *Chapman v. N. H. R. Co.*,⁹ decides that a passenger on a train is not accountable for the negligence of the proprietors of the train.

When Parent Sues for Damages.—It will be observed that the immediate question it is proposed to consider in this article, is not the application of this doctrine where the action is brought by the parent to recover for damages sustained by him from loss of the child's service, medical or other expenses, etc., it is properly agreed that in such actions the general rule of contributory negligence governs; and that no recovery can be had if the plaintiff has been guilty of negligence directly contributing to cause the injury to the child.¹⁰ This is but the ordinary case of contributory negligence of the party seeking damages for the negligence of another.

Imputed Negligence of Parent, etc. to Child.—But the issue raised in the cases we wish to refer to, is as to the effect upon the rights of the child, injured by a third person's carelessness, of the negligence of its parent or custodian.

In such cases, but three persons are involved, viz.: The defendant, or party charged with having caused the injury; the child plaintiff, who has sustained the injury; and the parent, or temporary keeper of the child. Of course, the argument assumes that the defendant has been negligent in the premises, in such a manner as to cause loss and damage to the child; otherwise, of course, there could be no recovery whatever. Now, as to the child, the question supposes it to be *non sui juris*, of tender years, and therefore incapable of negligence. It is common knowledge that a child of one, two, or more years, on up to different ages, in different instances, depending on the capacity of the infant, cannot justly be charged with carelessness, for the reason that it cannot justly be holden to

the exercise of any care or diligence. It is as irresponsible as a lamb or kitten. Such a person can no more be said to be careless, while sitting in the highway, or on the track of a railway than in its mother's lap. It has no faculties sufficiently developed to perceive the peril of such a situation. Hence, the law, which is founded on a thorough experience of human nature, declares that the child so situated shall not be accountable for any conduct of its own. To hold otherwise would be as absurd as to hold the bird culpable for flying within range of the rifle, or the moth for dashing into the flame. In each case, each follows its own instincts and impulses. The child loves to roam, and to its innocent mind all places are innocent. Upon this view the courts have acted, and in various instances have fixed certain ages, within which there was entire legal irresponsibility for negligence. Thus in *Schmidt v. M. & St. P. R. Co.*,¹¹ the age fixed was eighteen months. In *Walters v. C. R. I. P. R. Co.*,¹² the age was two years. In *N. & P. R. Co. v. Ormsby*,¹³ the child was two years and ten months. In *Chicago v. Hessing and Fish v. Missouri Furniture Co.*,¹⁴ the child was four. In *Chicago, etc. R. Co. v. Gregory*, and *Louisville, etc. Canal Co. v. Murphy*,¹⁵ the age was five. And in *Bay Shore R. Co. v. Harris*,¹⁶ the child was six. While in *Ewen v. C. & N. W. R. Co.*,¹⁷ it was held that a child of eight had passed beyond the period of absolute unaccountability. But after that period it is held that the degree of diligence required of the minor is proportionate to the age, maturity and capacity of the child. This is a transition state in the progress from infancy to maturity, which partakes of the irresponsibility of the one, and the full accountability of the other; when half child and half man, the plaintiff seeking damages is held to a degree of diligence suited to his ability to exercise it. More than this would be obvious injustice. Accountability should be exactly adjusted to ability. In the parable, those

⁷ 22 Cent. L. J. 243.

⁸ 36 N. J. 7 Vroom, 225; s. c. 13 Am. Rep. 435.

⁹ 19 N. Y. 341.

¹⁰ *St. L. I. M. & S. R. Co. v. Freeman*, 36 Ark. 41; *Albertson v. Keokuk, etc. R. Co.* 48 Iowa, 292; *Evansville, etc. R. Co. v. Wolf*, 59 Ind. 89; *Jeffersonville, etc. R. Co. v. Bowen*, 49 Ind. 154; *Smith v. O'Conner*, 48 Pa. St. 220.

¹¹ 23 Wis. 188.

¹² 41 Iowa, 71.

¹³ 27 Grattan, 455.

¹⁴ 83 Ill. 204; 10 Mo. App. 62.

¹⁵ 58 Ill. 226; 9 Bush. 522.

¹⁶ 67 Ala. 6.

¹⁷ 38 Wis. 614.

who had received but five talents were not expected to account for the use of ten.

And so are the cases, *Lynch v. Nurdin*,¹⁸ *R. Co. v. Gladman*,¹⁹ *R. Co. v. Stout*,²⁰ *Robinson v. Cone*,²¹ and *Schmidt v. M. & St. P. R. Co.*²² While it is proper, because reasonable and just, to hold the minor responsible for the kind and degree of care which he is able to practice, the question whether he should be made to answer for the carelessness of his father, mother, guardian or custodian, becomes a very different one. When viewed closely it seems strange that such a question was ever raised. We think that in those States where the doctrine of imputed negligence in such cases has been established or followed, it has resulted largely from *dicta*, resting on an artificial or superficial view of the subject. Reasoning from the usual and general pecuniary responsibility of parents for the support and education of their offspring, and recognizing the injustice of inculping the child found and injured in an exposed position, and looking no further, and overlooking the other relations of parent and child, such as the irresponsibility of the former for the torts and unnecessary debts of the latter, and the fact that the child is never liable for the wrongs or debts of the father, they appear to have reached their conclusion through some vague sense of a just identification of the two under all the circumstances. In *Hartfield v. Roper*,²³ the leading case in support of the doctrine, the idea is expressed by Cowen, J., that this is the only way in which to punish the negligence of the parent. After stating that the infant, a boy of two years, run over in the street by a sleigh, is not above the law, and is liable for torts, that learned judge declares that he should not be allowed to be the heedless instrument of his own injury, and cannot profit by his own wrong, and that it is more fit that he should look to his guardian or keeper, applying "*volenti non fit injuria*." But in what legal, or other sense, pray, can a thoughtless child of two years be deemed "*volens*," consenting to be run over, or injured in any way? That was the very

last thing on earth that that child contemplated, when it sat playing in the snow, in the highway, if, indeed, it could be said to contemplate anything. Again, how could such a child be said to commit a wrong by such an act? or, in truth, by any act? As we have seen above, the courts unanimously hold such a child unable to use care, and therefore to do wrong; *ergo*, it cannot be said to profit by its own wrong. To hold a child of tender years, whether totally or partially incapable of diligence, answerable for the negligence of its parent or keeper, seems strictly analogous to the case of charging one person with the negligence of another, for whose conduct he is not responsible. The injustice of so doing seems at first blush most manifest and glaring, and a more careful scrutiny fails to alter the first impression.

The child, though often inevitably visited with the imperfections of the father and remote ancestor, through a physical and moral connection, should not, in law or justice, be bound by the conduct and actions of his parent, over which he has no sort of control. That, as was well said in *Whirley v. Whitman*,²⁴ would be "literally to visit the transgressions of the parent upon the children." The essence of justice is best expressed by the wise poet: "Where the offense is, let the great axe fall." The child is not negligent at all, or, if at all, only in proportion to his capacity. Let him be held accountable to that degree, and that only. If, measured by that standard, his negligence has contributed directly to produce the injury of which he complains, under that established rule he must fall, and the negligent defendant go acquit. Thus far let him be holden, but no farther. Has the negligence of his parent or guardian also directly assisted in causing the injury? What consequences should follow from that? He ought to have his action against them for the injury, as he might have against either or both of two persons whose joint or several acts of negligence had injured him. Then he should not be made responsible for such parent's or guardian's negligence. Much less should the guilty defendant be permitted to take advantage of such co-operating wrong on the part of the parent

¹⁸ 1 A. & E. (N. S.) 28, 41, E. & L. 422.

¹⁹ 15 Wall. 408.

²⁰ 17 Wall. 657.

²¹ 22 Vt. 225.

²² 23 Wis. 190.

²³ 21 Wend. 615.

²⁴ 1 Head, Tenn. 610.

or guardian, to his own immunity and exoneration. This is literally justice with a vengeance. This is a turning of tables that upsets all our preconceived notions of equity. Here two wrongs do make a right. The innocent child plaintiff might have obtained satisfaction from the erring defendant. But there was an erring third person, and the union of the two errors neutralizes the wrong. The defendant who should make compensation for his own wrong is enabled to profit by the wrong of this third person, while the innocent sufferer is left unrequited. Here, then, we have a new application of an old paradox, and the greater the negligence the greater the impunity. This is not killing a thousand men, as in the familiar ballad, to transform the murder of one man into glory. But it is a case where the injury caused by the negligence of one is transmuted into innocence by the legal alchemy of a concurring negligence. There never was a more complete case of offering a premium on negligence. A driver seeing a young child sporting in the highway is relieved of all responsibility of careful driving, for the child's parents have negligently permitted their charge to stray from home, and it is everybody's prey. He can be run down by horse or engine. The child is a castaway. The same may be said of an insane person escaping from its guardian or committee. Placed without his fault in a perfectly defenseless situation, the law also withdraws its protecting shield. With only one negligent assailant the law would valiantly cope; but let two approach from opposite directions, and the law, like a poltroon, throws away its arms, and abandons the field. The little prattling child, left by its heedless parent to wanton in the snow or dust, alone of all human creatures, is beyond the pale of our laws, which the great lawyer styled "the perfection of the reason of all men." Hooker's definition of the law, that "the very least feels its care, and the greatest are not exempted from its power; all things, both in heaven and on earth do it homage, and the creatures of whatsoever form or order acknowledge it as the mother of their peace," must be abandoned, and an exception made of little children. This is a new and unrivalled slaughter of the innocents. But we will dwell no longer on the reason of

the rule by which one offends and another suffers.

Weight of Authority Against the Doctrine.—But we proceed to show that this unsound rule has not the support of the weight of authority.

We note, in passing, that certain prominent text writers oppose the doctrine: such as Field,²⁵ and Wharton, with great force.²⁶

An investigation of the cases shows that while in England the doctrine has received only an equivocal endorsement, of the States which have ruled on the question the following recognize it, viz: New York, Massachusetts, Illinois, Missouri, Indiana, Maine, Kentucky and Maryland. While the following States reject it, viz: Pennsylvania, Ohio, Iowa, Connecticut, Vermont, Virginia, Tennessee and Nebraska, and Texas accepts the English view.

England.—*Lynch v. Nurdin*,²⁷ decided in 1841, is the first leading case in England. There a boy of seven years got into, and was injured in, a cart, which, with horse attached had been carelessly left standing in the street by defendant's carman. Denman, C. J. and the Queen's Bench sustained a recovery. Although holding that the plaintiff was the co-operating cause of his own misfortunes, by doing an unlawful act. It will be observed that here there was no intimation that there was any carelessness on the part of the parent or custodian in permitting a child to go upon the streets of crowded London. The inferences are all against the imputation of such negligence to the child, while the principle of the irresponsibility of the child, even for his own contributory negligence, in unlawfully trespassing upon the defendant's property, is distinctly recognized.

The last leading English case on the subject is *Waite v. N. E. R. Co.*²⁸ Here the court, in 1858, accepts the doctrine in a modified form. The plaintiff, a child of five, was injured by the carelessness of the railroad company while traveling with, and under the control of, her grandmother, whom the jury had found guilty of contributory negligence. The court, while applying the rule of imputed

²⁵ Field on Corp., § 512; Field on Damages, § 126.

²⁶ Whart. on Negl., § 810.

²⁷ 1 Ad. & El. (N. S.) 29.

²⁸ El. B. & El., 96 E. C. L. 719.

negligence, placed it on the ground that the identification of the relative in charge with the child was as complete as if it had been a babe of a few days old, carried in her arms, as it is impossible, upon principle, to distinguish such a case from that of an absent negligent parent, it is evident the court hesitated to fully adopt the rule. For what difference can there be, when a parent has carried and placed his child upon a railroad track, or suffered him to wander there, whether the parent is personally present, when the child is run over, or is a mile away? The negligence of the parent, and the innocence of the child are alike in both cases.

Texas is the only State which approves *Waite v. N. E. R. W. Co.*, and in doing so in *G. H. & H. Ry. Co. v. Moore*,²⁹ where a child of six was run over by the cars, the court repudiates *Hartfield v. Roper*, saying, the *Waite* case is the "utmost limit to which the rule should be extended." There is a manifest inconsistency in this young and great State's thus repelling the one case and approving the other.

Cases Maintaining the Doctrine—New York.—*Hartfield v. Roper*,³⁰ decided in 1839, is the leading case, upon which most, if not all, the courts adopting the doctrine have relied. Judge Cowen's reasoning in support of the decision seems fallacious. He says, "To allow small children to resort to the highway alone, is criminal negligence." And that there is no other way, in a case where the party injured is a small child, to apply the rule that the injured party, drawing the mischief on himself, cannot recover, than to require due care at the hands of those to whom the law and the necessity of the case have delegated the exercise of discretion. The obvious answer is, that the rule should not be applied at all in such a case, for the plaintiff is too young to draw the mischief on itself. And when not too young to be responsible in part, let it suffer according to its responsibility. To be sure the child requires due care from those charged with the exercise of discretion in its behalf. But what if that care is not exerted? Should the child suffer for that? is the question. Demonstrably, no. The learned judge then supposes, by way of argument, a luna-

tic to be allowed by its committees to lie like a log in the road, or a child to suddenly throw itself in front of a vehicle, and asks, as a sort of test question, whether the traveler who unfortunately strikes him, should respond in damages. The answer is obvious: No; if not negligent. The inquiry is not to the purpose. But that State has followed *Hartfield v. Roper* 45 years, with a disposition at times, on the part of some of its courts, to modify the rigid rule, as the cases named below show.³¹

In *Ihl v. 42d St. R. Co.*,³² where a child of three, sent on an errand by its mother across a track, in charge of a child nine and one-half, was run over and killed, *Rapello, J.* held: That if the conduct of the child would not have been negligent in an adult, and the injury was caused wholly by defendant's negligence, the negligence of the mother was too remote. This seems a departure from the doctrine. A child of that age is never considered negligent; but it was clearly negligence that contributed directly to the injury, to allow so young a child, so attended, to be in such a position of danger. The child was not as safe, and could not take the same care of itself there as an adult. If the mother had brought suit for loss of service of the child would not her own negligence have defeated a recovery? So the court really refused to follow *Hartfield v. Roper*, and to impute the mother's negligence to the child.

In *Morrison v. Erie R. Co.*,³³ where a girl of 12 was injured as her father, with her in his arms, was stepping off a moving car, *Folger, J.*, as was done in *Waite v. N. E. R. W. Co.*, emphasises the fact that her father was present, controlling plaintiff's motions, though, as we have endeavored to show, this is an immaterial circumstance.

In *Thurston v. Haarlem, etc. R. Co.*,³⁴ the court decline to apply *Hartfield v. Roper* to the case of a boy of nine, on the ground that it had no application to a child of his age and capacity, but if not, why not? And if not to one minor not *sui juris*, why to any? What is the essential difference in this respect between

²⁹ 59 Tex. 64.

³⁰ 21 Wend., 615.

³¹ *Flynn v. Hatton*, 43 How. Pr. 356; *Lehman v. Brooklyn*, 29 Barb. 237; *Mangam v. Brooklyn R. Co.*, 38 N. Y. 457; *Thurber v. Haarlem R. Co.*, 60 N. Y. 338.

³² 47 N. Y., 317.

³³ 56 N. Y., 305.

³⁴ 60 N. Y., 333.

a smart boy of nine and an infant of two? The former is holden only to a degree of care suited to his capacity. And if his parent's negligence is not fairly imputable to him, it seems difficult to perceive why it should be in any case. Observe, the ground taken by the court is not that the capacity of the plaintiff is such that the parents are free from negligence. If they had not been negligent that would have been the end of the question. Their negligence, on the contrary, is virtually conceded. We maintain that no good reason can be shown why a youth, or indeed an adult, should not be held responsible for a parent's negligence that would not logically apply to a very young child. In the case of the adult, no one pretends to assert such a doctrine. To yield it as to a capable boy of nine is, we submit, to abandon the principle. It inverts the natural order to treat increased capacity as involving diminished responsibility for one's own, or another's actions.

In *McGarry v. Loomis*,³⁶ decided in 1875, and the last case in which the question has come before the Court of Appeals, where the plaintiff, a child of four, was injured while on the sidewalk by a pool of hot water exuding from defendant's steam pipe, a recovery was sustained. The court, through *Church, C. J.*, taking the position that, as the child had done nothing that would have been negligent in an adult, and was not a trespasser, but was in a lawful place, the alleged negligence of the parents in allowing it to be there could not defeat a verdict. This, we think, for reasons stated, a practical abandonment of the rule of imputability. For such a child must necessarily be legally faultless, and the parents were clearly negligent in suffering their child to be in so dangerous a situation as that was, although it was where it had a legal right to be. *Church* and *Rapello* and the court in both cases, unconsciously perhaps, thus attest their dissatisfaction with the doctrine.

Massachusetts.—In *Holly v. Boston, etc. Gas Cor.*,³⁷ the leading case in that State, the doctrine is recognized without discussion. It is applied in other cases.³⁷ In *Lynch v.*

Smith,³⁸ the latest case in that State, the doctrine is shuffled off, as in the New York cases cited; the court holding that, even if the parents were negligent in permitting a child four and one-half years old run over by a hack, to go upon the street, yet, if he neither did what was imprudent, nor omitted what was prudent, the negligence of the parents was too remote. But when could a child of that age be considered imprudent? And why impute negligence in any case of parent and child if not in that?

Illinois.—In a number of cases, the Supreme Court of that State has followed or recognized the doctrine,³⁹ in association with the rule of comparative negligence, peculiar to that State. In *Chicago v. Starr*,⁴⁰ where a child of six was killed in the street, it was held: "That it was carelessness of no slight degree to permit this child of six years thus to wander over the streets of a crowded city is a proposition that admits neither of debate nor doubt. We are of opinion that the negligence on the part of the city was not only not more, but was even less than that fairly attributed to the parents of the child." The latest case is *Toledo, etc. Co. v. Grable*.⁴¹ There a child 28 months old wandered on the track and was run over; and the mother was killed in trying to save the child. Say the court, by *Scott, J.*: "Where there is negligence on the part of the injured party, or, as in this case, on the part of those charged with the care of the injured party contributing directly to produce the result, there can be no recovery unless such negligence is slight and that of the defendant gross in the comparison." We do not find the underlying reason of the rule anywhere discussed in these cases.

Missouri.—That State has followed *Hartfield v. Roper*.⁴² Yet the Supreme Court in *Boland v. Mo. Pac. R. Co.*,⁴³ dissent from

³⁶ 104 Mass., 56.

³⁷ *Chicago v. Major*, 18 Ill. 356; *Chicago v. Starr*, 42 Ill. 174; *Chicago & Alton R. Co. v. McLaughlin*, 47 Ill. 265; *Chicago & Alton R. Co. v. Gregory*, 58 Ill. 236; *Ohio & Mississippi R. Co. v. Stratton*, 78 Ill. 88; *Chicago v. Hessing*, 83 Ill. 205; *Chicago & Alton R. Co. v. Becker*, 84 Ill. 488; *Toledo, etc. R. Co. v. Grable*, 88 Ill. 442.

⁴⁰ 42 Ill., 174.

⁴¹ 88 Ill., 442.

⁴² *Isabel v. Hannibal & St. Jo R. Co.*, 60 Mo. 478; *Stillson v. Hannibal & St. Jo R. Co.*, 67 Mo. 671.

⁴³ 36 Mo., 484.

³⁸ 68 N. Y., 104.

³⁹ 8 Gray, 128.

³⁷ *Wright v. Malden*, 4 Allen, 283; *Munn v. Reed*, 4 Allen, 431; *Callehan v. Bean*, 9 Allen, 401; *Mulligan v. Curtis*, 100 Mass. 513.

the views of Cowan, J., in *Hartfield v. Roper*, in confounding all distinctions between the responsibility for negligence of children and adults. In *Isabel v. Han. & St. Joe R. Co.*,⁴⁴ the doctrine is indistinctly recognized. It is only in *Stillson v. Han. & St. Joe R. Co.*,⁴⁵ decided in 1877, that the rule, though without reasoning, is applied.

Indiana.—The rule is obediently followed in that State.⁴⁶ The court in *Pitts., Ft. W. etc. R. Co. v. Vining*,⁴⁷ where the child was seven, saying: "It seems to us that the unnecessary exposure to known danger of a child incapable of exercising the care and judgment of mature years is in itself an act of negligence on the part of the parents sufficient to defeat a recovery, unless the injury is wilful"

Maine, completes the list of affirmatives.⁴⁸ The court in *Brown v. E. & N. A. R. Co.*,⁴⁹ where a child of nine was injured by a draw, holding that the child was careless, if negligence could be imputed to one so young; and, if not, the parents were careless in allowing it to run at large, that the plaintiff, the child, in either case was responsible.

*Kentucky*⁵⁰ and *Maryland*⁵¹ also acquiesce in this rule.

A careful examination of all these cases will not disclose, that, aside from the bare authority of the courts deciding them, they add any strength to the foundations of this doctrine, beyond what has been already herein considered. Indeed, but a very few of them are reasoned at all.

Cases Repudiating this Doctrine of Imputed Negligence.—*Vermont*, seems entitled to first consideration, as this court supplies the leading case.⁵² In *Robinson v. Cone*, decided in 1850, 11 years after *Hartfield v. Roper*, a boy three years nine months of age was run over on the highway by a sleigh. The facts, it will be seen, being very much like those in

the latter case. Says Redfield J. for the court: "We are satisfied that, although a child or idiot or lunatic may to some extent have crept into the highway through the fault or negligence of his keeper, and so be improperly there, yet, if he is hurt by the negligence of the defendant he is not precluded from his redress. If one knows that such a person is in the highway he is bound to a proportionate degree of watchfulness. And what would be but ordinary neglect in regard to one, whom the defendant supposed a person of full age and capacity would be gross neglect as to a child, or one known to be incapable of escaping danger. * * * *

The case of *Hartfield v. Roper*, is, so far as it has any application to the present case, altogether at variance with that of *Lynch v. Nurdin*⁵³, and far less sound in its principles, and infinitely less satisfactory to the instinctive sense of reason and justice."

Pennsylvania.—The cases⁵⁴ in that state speak no uncertain sound. In *Pennsylvania R. Co. v. Kelly*⁵⁵ Woodward J. delivering the opinion, quotes the language given above of Redfield J. in *Robinson v. Cone*, "dismisses" *Hartfield v. Roper*, adding that "Lord Denman's opinion in *Lynch v. Nurdin* was subsequent to that of Mr. Justice Cowen and much worthier it seems to be followed." In *Smith v. O'Conner*⁵⁶ a girl of seven was run over by a wagon on the street. The court again rejects the principle of *Hartfield v. Roper*. Says Strong J.: "This is compelling the child to the exercise not of *its own*, but of *its parents'* discretion. It is holding it responsible for the *ordinary care of adults*. In maintaining it, the New York courts stand supported only by the supreme court of Massachusetts in *Holly v. the Boston Gas Co.*⁵⁷" In *North Pennsylvania R. Co. v. Mahony*⁵⁸, a child of 4, while in the arms of her aunt, not placed in charge of her, was run over. It was held that the child was not liable for the aunt's negligence.

Ohio.—In *Bellefontaine & I. R. Co. v.*

⁴⁴ 60 Mo., 473.

⁴⁵ 67 Mo., 671.

⁴⁶ *Pittsburg, etc. R. Co. v. Vining*, 27 Ind. 518; *Lafayette & Ind. R. Co. v. Huffman*, 28 Ind. 287; *Hathaway v. Toledo, etc. R. Co.*, 46 Ind. 25.

⁴⁷ 27 Ind., 518.

⁴⁸ 58 Me. 384; 62 Me. 468.

⁴⁹ 58 Me. 384.

⁵⁰ *Louisville & Canal Co. v. Murphy* 9 Bush 522.

⁵¹ *McMahon v. North, &c. R. Co.* 39 Md. 438 *Balt. &c. R. Co. v. McDonald* 43; Md., 584.

⁵² *Robinson v. Cone* 22 Vt. 218.

⁵³ 1 Ad. & El., N. S., 29.

⁵⁴ *Penn. R. Co., v. Kelly* 81 Pa., St. 377; *Smith v. O'Conner* 48; Pa., 220; *Nor. Pa., R. Co. v. Mahony* 87 Pa. 187.

⁵⁵ 81 Pa. St. 377.

⁵⁶ 48 Pa. St. 220.

⁵⁷ 8 Gray 123.

⁵⁸ 57 Pa. St. 187.

Snyder⁶⁰, a leading case, a girl of six was run over by a gravel train. The Supreme Court, Welch J. delivering the opinion, made a thorough examination of this question, which was the sole question in the case, carefully classifying and discussing the authorities. Say the court, "the weight of authority in our judgment, as well as the reasoning, is against the adoption of the doctrine in any form, or under any circumstances." The court adds, "we have examined most of the authorities on which the doctrine rests, with some care, and the result is a conviction that in most of the cases the assertion of the doctrine amounts to little more than mere dicta.

* * * The cases warrant the declaration of no such general rule. * * * The utmost that can fairly be claimed in these cases is that the rule is applicable to some cases, depending on the nature of the defendant's negligence. * * * In *Hartfield v. Roper* the doctrine is a mere dictum." In *C. C. C. & I. R. Co. v. Manson*⁶¹, where the plaintiff was a girl of nine, that court follows Snyder's case, and declares that the doctrine of imputed negligence does not prevail in Ohio. In *St. Clair R. Co. v. Eadie*⁶². A female of sixteen, held *sui juris*, was injured by the collision with a street car of a wagon in which she was riding with her father, he driving, through the mutual and concurring negligence of the father and the driver of the street car. The same court holds the plaintiff not responsible for her father's negligence.

Iowa.—In *Walters v. C. R. I. & P. R. Co.*,⁶³ a child two years old was run over in Davenport by a freight train. The person in charge of the child was claimed to have been negligent in permitting the child to get upon the track. Day, J. speaking for the Supreme Court, and holding that a child of two cannot be deemed guilty of negligence, says, "when therefore the parents, who are primarily entrusted with the protection and care of their infant children, exercise reasonable and ordinary care, there is no good reason why the negligence of the person in charge of the child should be imputed to the parent, or through the parent to the child itself." The reason

upon which this rule is founded, leads inevitably to the overthrow of the whole doctrine, and doubtless that court, will, in a case where the question squarely arises, so hold. It logically results that if the negligence of the person placed in charge by the parent, and who, for that purpose, is the parent's agent, is immaterial to the case, that of the principal, the parent, is equally immaterial.

Connecticut.—*Daley v. Norwich & C. R. Co.*⁶⁴ declares the law for that State. A child three years old, was run over in the city of Norwich by a freight train drawn by powerful engines, and making from five to fifteen miles per hour, around a curve, where the engineer could not see forty paces ahead. Says the court below: "In an action brought by the father his negligence might be a defence, but in an action by a child for an injury inflicted on her through the defendant's negligence, they are not relieved from the consequences of their own fault because the natural protectors of the plaintiff, may also have been wanting in their duty towards her. Says the Supreme Court, on Appeal, W. W. Ellsworth J. "We entertain no doubt that the view expressed by the judge is entirely correct * * *

* * * It is obvious that the negligence of the parents, if there was any, is not the want of ordinary care in a child less than three years of age, however, much such negligence might be a defence to an action by the father, had he sued the company for expenses incurred, or for loss of service." That Court has thus touched the quick of the underlying principle involved, viz. the entire irresponsibility of the child for its father's misconduct.

Virginia.—The court of that State has assumed no equivocal position on this subject. *N. & P. R. Co. v. Ormsby*,⁶⁵ was a case where a child of two years and ten months was run over on a railroad track. The court "concurs in *Lynch v. Nurdin* and others of that class which decide that the neglect of parents and guardians is not imputable to infants in such cases; and does not concur in the principle of the case of *Hartfield v. Roper* and others of that class which decide the contrary."

Tennessee.—In *Whirley v. Whitman*⁶⁶ the

⁶⁰ 18 Ohio St. 399.

⁶¹ 30 Ohio St. 472.

⁶² 24 Am. L. Reg. 706.

⁶³ 41 Iowa 71.

⁶⁴ 26 Conn. 591.

⁶⁵ 27 Gratt 455.

⁶⁶ 1 Head 610.

case of a child of three, injured while playing around machinery, that court expressly refuses to follow *Hartfield v. Roper*, and cites approvingly *Lynch v. Nurdin*.

Minnesota.—In *Fitzgerald v. St. P. R. Co.*,⁶⁶ the court below held the weight of authority and reason to be against the doctrine, but applied the doctrine to that case, because opposing counsel agreed to it, and the Supreme Court affirmed.

Nebraska.—*Huff v. Ames*⁶⁷ arrays this young and vigorous state in the line of the sound states as to this doctrine. A boy of eleven was hurt in defendant's cane mill. That court thinks the weight of authority and better rule to be, that in an action by the infant for damages resulting from an injury to himself, by the negligence or want of care of a third party, the negligence of the parent or guardian is not to be considered, or imputed to the infant.

We supplement these holdings by State Courts of last resort, with the only case, it is believed, in which the question has come before a court of the United States.

In *Stout v. R. Co.*⁶⁸, tried in the U. S. C. C. for the district of Nebraska, a boy of six was injured on defendant's turn table. Dundy J. charged the jury against the doctrine of imputed negligence of father to child. The jury failing to agree, on a second trial,⁶⁹ Dillon, J., charged the jury, stating to them that the counsel for the defendant "disclaim resting their defence on the ground that the plaintiff's parents were negligent, or that the plaintiff, considering his tender age, was negligent." So the question went no further; though the jury found a verdict for the plaintiff, and the case was appealed to the Supreme Court of the United States⁷⁰.

Conclusion.—Having filled so much more space than was intended, we claim finally that those courts are sound which conclude that this doctrine is against reason and authority. Originating chiefly in *dicta*, it has had for the most part, it is presumed, but a reluctant following. Judge Cowen lays down a dictum. Massachusetts compliantly endorses it, other States yield their assent, and so the rule has

obtained an extensive sway over too many States. Latterly the New York courts have wavered, and against this offspring of dictum, we marshal the emphatic expressions of Redfield, Strong, Woodward, Ellsworth, Welch, and Dundy; and are content to leave the discussion, with the hope that this New York rule will go no further. WM. G. WHIPPLE.

Little Rock, Ark.

BILL IN EQUITY FOR PERPETUAL INJUNCTION TO PRESENT INTERFERENCE WITH EXCLUSIVE RIGHT OF OPERATING STREET RAILWAY.

THE BIRMINGHAM & PRATT MINES STREET RAILWAY CO. v. THE BIRMINGHAM STREET RAILWAY CO.

Supreme Court of Alabama.

1 *Corporations, Constitutional Law—Grant of Exclusive Privilege by Municipal Corporation Void*.—There is no clause in the charter of the City of Birmingham, nor any public statute, which authorizes the municipal authorities of said city to grant to any person or private corporation the exclusive privilege of running street cars through certain designated streets and avenues of said city in perpetuity; and such grant, if authorized by any statute or charter, would be in violation of the constitutional inhibition of laws "making any irrevocable grant of special privileges or immunities."

Appeal from the Chancery Court of Jefferson. Heard before Hon. Thomas Cobbs, Chancellor. Messrs. James M. Van Hoose, and Hewitt, Walker & Porter, counsel for appellant. Messrs. R. H. Pearson, and Webb & Tullman, contra.

SOMERVILLE, J., delivered the opinion of the court:

The equity of the complainant's bill in this case depends in our judgment, upon a single inquiry, and that is, whether the municipal authorities of the city of Birmingham were invested by law with the power to make to the appellee—the Birmingham Street Railway Company—an irrevocable grant of the exclusive privilege to construct and operate a street railway over and through certain streets and avenues of that city. If the power to grant such a franchise resided in this municipality and if the franchise has been lawfully granted upon a valuable consideration by an ordinance in the nature of a contract, there can be no doubt either of the jurisdiction, or of the duty of a court of equity to protect the invasion of the right by issuing the injunction to prevent contiguous com-

⁶⁶ 29 Minn. 336.

⁶⁷ 19 N. W. Rep. 623.

⁶⁸ 11 Am. L. Reg. 226.

⁶⁹ 2 Dillon 296.

⁷⁰ 17 Wall. 667.

petition on the part of the appellants, in their efforts to establish an opposition railway company over any of the same streets or avenues previously included in the grant to the appellee. 1 High on Inj. (2nd Ed.) § 902. If, however, the power in question did not exist, then the grant would be void so far as it purports to be exclusive in its nature, the bill in such contingency, is without equity, and the court must be pronounced to have erred in refusing to dismiss the bill for want of equity, and in refusing to dissolve the injunction granted at the instance of the complainant.

Before we proceed to discuss the power of the Mayor and Aldermen of the City of Birmingham to grant such a franchise, we propose to first consider the nature of the thing granted, or the character and terms of the franchise itself.

It bears date on the nineteenth day of May, 1882, was duly enacted by ordinance, and purports to be in the form of a regular contract between the subscribing parties. The privilege granted was the exclusive right to construct and operate a street railway, with the necessary side tracks and turn-outs, over and upon fifteen designated streets and avenues of the city. The only limitation of this grant, in point of time, is the proviso that it shall not apply to such of said streets and avenues as shall not have been occupied by the grantee within ten years from the date of the contract. The franchise, it will thus be seen, is one not only exclusive in its nature, but in perpetuity, being without limit of duration, except as to an option to exercise it, which was to continue for ten years. When once put in exercise it purports to last forever. The main consideration on the part of the grantee was the agreement to construct at least one mile of such railway, and to transport passengers at a fare not exceeding five cents from one end of the line to the other. Certain powers of police and regulation are retained to be exercised by the city, not necessary to be mentioned. For all the purposes of this discussion we shall consider this franchise as a contract between the Mayor and Aldermen of Birmingham, and the appellee, such as, if valid and binding, would be fully protected from violation by both the constitution of the United States and of this State, each of which instruments prohibits the passage of any laws by State or municipality impairing the obligations of contracts. So we shall consider the contention of the appellee as well taken, that if the grant of this exclusive right be obnoxious to no objection, either on constitutional grounds or for want of the charter power to make it, the obligation of the contract would be impaired by the subsequent grant of a similar franchise to the appellant company to build their competing road over and along the streets and avenues included in the appellees franchise, and embraced in this controversy. *New Orleans Gas Co. v. Louisiana Light Co.* 115 U. S. 650. *The Birmingham Bridge* 3 Wall. 31.

The contention of the appellants in this case is

that the contract in question, so far as it purports to grant to the appellee the exclusive right to railway privileges over the streets designated, is void for two reasons. First: on the ground that there is no clause either in the charter of the city, nor any other law of the General Assembly, which authorizes the making of such a contract; and Secondly, because the contract itself is in violation of section twenty-three of Article 1 of the Constitution of Alabama, which provides that no law shall be passed by the general assembly "making any irrevocable grants of special privileges or immunities." If either of these positions can be successfully maintained, the exclusive feature of the franchise is without warrant of law, and must of its own weight fall to the ground.

The power to make this exclusive grant, which, though not strictly a monopoly, is certainly in the nature of one, must be derived either from some clause in the charter of the city, from the laws of the State, under which the appellee railway company was organized, or from the constitution of Alabama, which is the organic law of the State.

The only section of the present constitution, of 1875, bearing on the subject of street railways, is in section 34 article 14, which provides that "no street passenger railway shall be constructed within the limits of any city or town, without the consent of its local authorities." This is prohibitory and not permissive in its nature, and confers no franchise or right of any kind on any person or corporation, much less one of an exclusive character. This is not denied and is too obvious for argument.

The present charter of the city, enacted March 1, 1881, and the one in force at the time of the alleged grant, is silent on the subject of street railways. There is a power conferred in sub-division 18, of § 30, authorizing the city authorities "to regulate and control the running of cars or locomotives upon or across the streets, avenues or alleys of said city, and to regulate and control the speed of such cars, engines, or trains, within the corporate limits of the city." Acts, 1880-81, p. 481. The better opinion would seem to be that this clause has reference only to cars propelled by steam, and not to ordinary passenger street railways unless drawn by locomotives. *Peoples' Railroad v. Memphis Railroad*, 10 Wall. 38, 51. But assuming the opposite to be the correct view, or assuming that the power to regulate and control the running of such cars exists as an incidental police power under other clauses of the city charter, which is probable, it is unquestionably true that such a power confers no right on the city authorities to grant to any person or corporation a privilege exclusive in its character and without limit as to duration. The authorities in support of this proposition are so numerous and uniform that we will not stop to argue it at any length. *Cooley's Const. Lim.* (5th ed.) 252 (*207); 1 *Dillon on Mun. Corp.* (3d ed.) § 114, § 362; *Logan v. Pyne*, 45 Iowa, 524; s. c. 22 Amer. Rep.

261; *City of Chicago v. Rumbf*, 46 Ill. 20; *Milhan v. Sharp*, 27 N. Y. 611; *Davis v. The Mayor*, etc. of New York, 14 N. Y. 506.

This conclusion is but the logical result of the rule, now so well established, that municipal corporations can exercise only such powers as are expressly granted in their charter, or such as may be necessary and proper to carry such express powers into effect, including such as are indispensably necessary to the declared objects and governmental purposes for which such corporations are created. And any reasonable doubt as to the existence of a power claimed to be conferred by the charter will be resolved by the courts against the corporation and in favor of the public. *City of Eufaula v. McHab*, 67 Ala. 589; 1 *Dillon on Mun. Corp.* (3rd Ed.) § 89; *Logan v. Pyne*, 23 Amer. Rep. 261, *supra*.

The only remaining source from which it is or can be claimed that this exclusive right can be derived is from the general law of the State having reference to the incorporation of street railway companies. The appellee corporation, the Birmingham Street Railway Company was organized under this law, as found embraced in sections 1917 to 1929 of the present Code (1876). It can have no other rights therefore than such as are conferred by or authorized to be contracted for under this statute. The section relied on by the appellee's counsel is section 1921 of the Code, which reads as follows:

"Such corporation shall have power to construct, maintain and use a street railroad upon the streets and upon the line and between the termini named in the certificate, upon such terms and in such manner as may be authorized by an ordinance or other lawful act of the proper corporate authorities of the city or town in which it is proposed to build and use the street railroad. And such railroad company may contract with the city or town therefor, and the contract may be altered when both parties agree to the change." Code of 1876, § 1921.

The City of Birmingham, as we have shown, has no distinct power in its charter, express or implied, to grant this exclusive franchise. Is there anything in this section of the Code to authorize it? Conceding that the city is invested with authority to contract with the company for the construction and running of a street railway, as a necessary correlative of the company's power to contract with the city, does this, by necessary implication, confer the power to contract for a monopoly of privilege and one in perpetuity? We are forced to the conviction that it does not. The inquiry, in fact, is answered by one clearly settled principle of law, which is now thoroughly imbedded in our American jurisprudence, and is deemed to be of vast importance in the economy of our system of free government, especially in view of what may now be considered as the baleful result of the celebrated Dartmouth College

case, in the perpetuity of special privileges conferred by franchises from governments. This principle is that the charter of corporations are to be strictly construed against the corporators, and that no franchise which is granted by the State is ever construed to be exclusive, whether it be in the nature of a contract or not, unless it be so declared in clear terms, or be necessarily implied; or, as expressed by a learned author, "unless the element of exclusiveness appears in the grant itself," and by another, unless the "terms of the grant render such construction imperative." 1 *High on Injunc.* (2nd Ed.) § 902; *Cooley's Const. Lim.* (5th Ed.) 490 (*396). There has been no departure in this country from this doctrine since the decision of the Charles River Bridge case by the United States Supreme Court, as far back as the year 1837. *Charles River Bridge v. Warren Bridge*, 11 Pet. 490. It was there said by Chief-Justice Taney that "in charters of this description, no rights are taken away from the public, or given to the corporation, beyond those which the words of the charter by their natural and proper constitution purport to convey." Upon precisely the same principle it has been held, and must logically follow, that no municipal corporation, which is but the creature of the State, can make a grant of exclusive rights, whether by ordinance in the nature of a contract, or otherwise, unless the power to do so is expressly granted by the law-making power, or unless it be so far necessary to the proper execution of other powers expressly granted as to make its existence free from doubt. *The State v. The Cincinnati Gas Light Co.* 18 Ohio St. 263. As said by Mr. Dillon, "such a corporation has not an exclusive power over the subject, unless, by express words, or necessary inference, it be plainly given to it by the legislature." 1 *Dillon on Mun. Corp.* (3d ed.), § 114. Judge Cooley adopts the view that a municipal corporation cannot, "without explicit legislative consent," permit the construction of a street railway in its streets, and confer on the projectors "privileges exclusive in their character and designed to be perpetual in duration." *Cooley's Const. Lim.* (5th ed.), 252 (*207). No reason is perceived why this principle is not entirely sound and in strict conformity to every rule pertaining to the true functions of municipal corporations. Whatever power they may have over the public streets within their limits is in the nature of a trust. This they can exercise only for the benefit of the public, and not of particular individuals or corporations. They have no implied power to barter away today, as a monopoly, to one that which the public necessities of a growing city may require to be reserved in order that they may be exercised for the public benefit on to-morrow. And such seems to be the sounder and better doctrine, although some adjudged cases may be found which seem to sustain a different view. 2 *Dillon Mun. Corp.* (3d ed.) §§ 715-716.

We nowhere find where the city authorities of Birmingham had any power to invest the appellee corporation with the exclusive right which it here claimed.

We might stop here with this case, without extending this opinion further. But the principle involved is of such great public importance as to justify, if not require, a consideration of the constitutional objection which is urged to the existence of this right. The argument is further made that the General Assembly is prohibited by the organic law from making such an irrevocable grant, and, therefore, under no circumstances, can it be done by a municipal corporation, which is the mere agency of the State exercising only derivative powers. The power of the agent, it is said, cannot exceed that of the principal.

Art. I, § 23, of the present Constitution of Alabama, provides that no law shall be passed by the General Assembly "making any irrevocable grants of special privilege or immunities."

Section 3, of article 14, reads as follows: "All existing charters or grants of special or exclusive privileges under which a *bona fide* organization shall not have taken place, and business been commenced in good faith at the time of the ratification of this Constitution, shall thereafter have no validity."

These provisions occur for the first time in the Constitution of 1875, and have not before been the subject of construction by this court.

What, it may be asked, is the nature of these special or exclusive privileges which are thus prohibited to be granted by the legislature? It seems plain from the very terms used, that the evil intended to be specially prevented was the granting of exclusive privileges in the nature of a monopoly by the legislative creation of corporate franchises. Monopolies were void at the common law, are not commonly conferred by legislative grant, and need no special prohibition in the organic law of a free republic. They may now be regarded as relics of governmental folly, rendered odious by royal prerogative in the most extravagant periods of the European monarchies. In the strict sense a monopoly is an exclusive right granted to one person, or a class of persons of something which was before of common right. A franchise is a special privilege conferred by the State or government upon individuals, and which does not belong to citizens of the country by common right. It has been a common legislative practice to make grants of this kind, and they have led to much and protracted litigation in all of the American courts. Examples of this kind are found in numerous cases where the exclusive privilege has been conferred on favored individuals and corporations to manufacture and sell gas in a city; or to supply the inhabitants with water; or to construct a bridge or run a ferry across a river between two given points, free from competition within certain limits; or to construct a canal, turn-pike, or railroad between certain

designated termini; or to construct and rent a market-house in a city; or to own and control the only premises which can be lawfully used for the slaughter of livestock within municipal limits, or, in fine, as has been done many times in this and other States, to confer on favored corporations an irrevocable exemption from the common burdens of equal taxation, either by exacting from them an inconsiderable *bonus* in commutation of all future taxation, or else exacting from them no taxes at all. The following cases illustrate monopolies of this kind, so often conferred by legislative franchises: New Orleans Gas Co. v. Louisiana Light Co., 115 U. S., 650; New Orleans Water Works Co. v. Rivers, *Id.*, 674; The Binghampton Bridge, 3 Wall., 51; City of Chicago v. Rumpff, 45 Ill., 90; Slaughterhouse Cases, 16 Wall., 36; Gale v. Kalamazoo, 23 Mich., 344, S. C. 9 Amer. Rep., 80; Atlantic City Water Works v. Atlantic, 39 N. J. Eq., S. C., 10 Amer. & Eng. Corp. Cases, 59; Norwich Gas Light Co. v. Norwich City Gas Co., 25 Conn., 19; Mobile, Etc. R. R. Co. v. Kennerly, 74 Ala., 566; Doughdrill v. Alabama Life Ins. Co., 31 Ala., 91; Home of the Friendless v. House, 3 Wall., 430.

The very fact that the Legislature could, according to the better view, make irrevocable grants of this nature was the very reason, no doubt, why the organic law was made so as to prohibit such grants in the future. In the struggling infancy of States and communities, the temptation has been very great to offer them as a reward to the investment of capital. The injustice and inequality of their operation have only been illustrated in the light of the said increase of our population, the steady growth of our wealth, and the wonderful discoveries of modern science. It now more fully becomes manifest that they prove iron bands to fetter the growth of public industry, enterprise and commerce. Free competition in all departments of commercial traffic is justly deemed to be the life of a people's prosperity. The policy of the law, as now declared by our Constitution, is as clear in the condemnation of the grant of irrevocable exclusive privileges conferred by franchise, as that of the common law was in the reprobation of pure monopolies which were always deemed odious, not only as being in contravention of common right, but as founded in the destruction of trade by the extinguishment of a free and healthy competition. The case of Monopolies, 11 Rep., 84.

The exclusive right of the appellee to the privilege claimed, in our opinion, can not be sustained. The General Assembly would itself have no power under the Constitution to make such a grant. *A fortiori* a mere municipality would have no such power. Nor can we find, upon any proper principle of construction, that it has anywhere been attempted to confer such a power upon the municipal authorities of Birmingham. They had as much right, therefore, in the exercise of their lawful governmental agency, to give their consent

to the appellants to construct and maintain a street railway in the streets and avenues of the city, as they had to grant the same right to the appellee corporation.

These views result in the reversal of the Chancellor's decree. He erred in not sustaining the demurrer, and in refusing to dismiss the bill for want of equity. The injunction should have also been dissolved. We will accordingly enter a judgment here, ordering the dissolution of the injunction, and will reverse and remand the cause, so that the complainants may have an opportunity to amend the bill, if practicable, so as to give it equity. We will not say this is impossible.

Reversed and remanded.

NOTE ON THE CONSTITUTIONALITY OF GRANTS OF EXCLUSIVE PRIVILEGES.—Although the power of the Legislature of a State to invest the corporation which it creates with exclusive and irrevocable privileges or immunities, when not forbidden by the organic law, is too well established upon the authorities to be open to question at this day, yet the principal case is practically the first to define with exactness the limits of municipal power in this respect. Its position, however, is but the natural resultant of the settled principles that govern the law of municipal corporations and the construction of their powers. The two premises (1) That they can exercise only such powers as are expressly granted in their charter, or such as may be necessary and proper to carry the grant into effect; and (2) That the same rule of construction which denies the alienation of any portion of the sovereign power, unless upon a manifest intention and by explicit terms, is to be applied in considering the organic law of a municipality—lead us inevitably to the conclusion that it is not within the province of the City Council to fetter the hands of its successor by the grant of an exclusive and irrevocable franchise, unless the authority to do so specifically proceeds from the law-making power of the State. In giving the support of a well reasoned judicial opinion to this doctrine, the principal case makes a considerable addition to our fund of constitutional learning.

Exclusive Privileges.—The Constitution of Alabama is not alone in forbidding the grant of monopolies. A similar provision is found in the Constitutions of Arkansas, California, Colorado, Illinois, Iowa, Maryland, Missouri, Nebraska, Pennsylvania and Tennessee. But where no such inhibition exists, it is well settled, as we have said, that the State may grant to a corporation an exclusive and irrevocable franchise to erect and maintain public works, or to pursue its avocations, whatever they may be, and that such franchise constitutes a contract which is protected from impairment by the Supreme law of the land;¹ but such a grant is to be construed most strictly the grantee and in favor of the State; nothing passes by implication, especially where it would be in derogation of the sovereign power; and if the grant does, not, in clear and explicit language, make the franchise

exclusive, it will not be so understood.² Consequently, if the rights and privileges granted to a company are not made exclusive by the terms of the grant, the Legislature is not debarred from granting a similar franchise to a rival corporation, although the effect of the latter grant may be to injure the business and diminish the profits of the first company.³ For example, the grant to a corporation of the right to erect a toll-bridge across a river, without any restriction as to the right of the Legislature to grant a similar privilege to others, does not deprive a future Legislature of the power to authorize the erection of another toll-bridge across the same river, so near to the first as to divert a part of the travel which would have crossed the river on the first bridge, if the last had not been erected.⁴

Exemption from Taxation, is the most frequent example of the matter under consideration—the grant to a corporation of special privileges or immunities. It was at one time seriously doubted whether the power of taxation, being inherent in the people under a republican government, and an essential attribute of sovereignty, was not so far inalienable that the Legislature could not make a valid contract whereby it should be surrendered, without express authority for that purpose, either in the Constitution itself or in some other way directly from the people.⁵ But a long line of cases in the United States Supreme Court, and elsewhere, has definitely established the proposition that the Legislature of a State may, upon consideration, relinquish and surrender the right of taxing the property or franchises of a corporation, either absolutely or beyond a specified amount, and either for a limited period or in perpetuity; and that this agreement will be binding upon future Legislatures and protected from invasion by the Federal Constitution.⁶ Yet here, also, the strict rule of construction is to be adopted, and the surrender of the right of taxation will never be presumed; nor, indeed, will it be held to have been relinquished, in any particular case, unless the deliberate intention of the Legislature so to do is clearly manifested in the grant itself.⁷ And it is also necessary that there should be a consideration for the exemption. For if the grant is merely spontaneous, and no service or duty or obligation or other remunerative consideration is imposed upon the grantee, it belongs to that class of laws denominated *privilegia favorabilia*, and is not properly a contract but

¹ Charles River Bridge v. Warren Bridge, 11 Pet. 420; Gaines v. Coates, 51 Miss. 385; DeLancy v. Ins. Co. 52 N. H. 581; Lehigh Water Co.'s Appeal, 102 Pa. St. 515.

² Turnpike Co. v. Railroad Co., 10 Gill & J. 392; Tuckahoe Canal Co. v. Tuckahoe R. R., 11 Leigh, 42; Thompson v. Railroad, 3 Sandf. Ch. 679; Shorter v. Smith, 9 Ga., 517; Matter of Hamilton Ave., 14 Barb. 405; Collins v. Sherman, 31 Miss. 679.

³ Mohawk Bridge Co. v. Railroad, 6 Paige Ch. 554.

⁴ Brewster v. Hough, 10 N. H. 138, 143; Skelly v. Jefferson Bank, 9 Ohio St. 606; Mott v. Railroad, 30 Pa. St. 9.

⁵ State of New Jersey v. Wilson, 7 Cranch, 164; Gordon v. Appeal Tax Court, 3 How. 183; Piqua Branch Bank v. Knoop, 16 How. 269; Home of the Friendless v. Rouse, 8 Wall. 430; Humphrey v. Pegnes, 16 Wall. 244; Delaware R. R. Tax, 18 Wall. 206; Erie R. R. v. Pennsylvania, 2 Wall. 493; St. Anna's Asylum v. New Orleans, 105 U. S. 263; Given v. Wright, 117 U. S. 648; Comm. v. Pottsville Water Co., 94 Pa. St. 516; Memphis & C. R. R. v. Berry, 41 Ark. 436.

⁷ Delaware Railroad Tax, 18 Wall. 206; Wilmington & C. R. R. v. Reid, 13 Wall. 264; Providence Bank v. Billings, 4 Pet. 514; Jones Mfg. Co. v. Comm., 69 Pa. St. 187; State v. Newark, 26 N. J. L. 519; People v. Roper, 35 N. Y. 629.

¹ Piscataqua Bridge v. N. H. Bridge, 7 N. H. 35; Bridge Co. v. Hoboken Land Co., 13 N. J. Eq. 81; The Binghamton Bridge, 3 Wall. 51; Bridge Proprietors v. Hoboken Land Co., 1 Wall. 116; Chenango Bridge Co. v. Binghamton Bridge Co., 37 N. Y. 87.

may be revoked at the will of the Legislature.⁸ If the charter of a corporation specifies a certain sum to be annually paid into the State treasury and declares that the same "shall be in lieu of all other taxes," this constitutes a contract not to impose any tax beyond the amount named.⁹ But if the charter requires the payment of an annual duty, without stating whether or not it is to be in lieu of all taxation, the Legislature is not estopped to impose other and further taxes.¹⁰

Police Power of the State.—But in considering grants of exclusive privileges, and the limitations upon them, it is important to remember that the police power of the State is never parted with. That is to say, it is not within the power of any Legislature, antecedently of constitutional prohibition, to grant rights of so exclusive a character as to place them beyond the reach of subsequent statutes enacted with reference to the public police. This power never can be sold or bargained away; it lies back of all grants; all rights and franchises are taken subject to it. The established doctrine is thus stated by Mr. Justice Miller: "While we are not prepared to say that the Legislature can make valid contracts on no subject embraced in the largest definition of the police power, we think that in regard to two subjects so embraced, it can not by any contract, limit the exercise of these powers to the prejudice of the public welfare. These are the public health and public morals. The preservation of these is so necessary to the best interests of social organization, that a wise policy forbids the legislative body to divest itself of the power to enact laws for the preservation of health and the repression of crime."¹¹ To the same effect:¹²

But this power is restricted to the two subjects mentioned, and can not extend to a mere matter of public convenience.¹³ As an example of the exercise of this process: a law which prohibits manufacturers and others, from selling, or keeping for sale within the State, intoxicating liquors which may have been manufactured or bought by them previous to its passage, is not, because it lessens the value of liquors owned in the State at the time of its passage, a law impairing the obligation of contracts; since the right to sell, or keep for sale, intoxicating liquors, and to prescribe the places and mode of their sale, is within the police power of the State, subject to which such property is holden.¹⁴

Eminent Domain.—It is also to be noted that the power of eminent domain is never relinquished. The franchise itself is only a species of property, and not more sacred than any other kind, and hence may be taken or destroyed by the State in the exercise of its sovereign powers, as well as any other property of the

citizen; and when compensation is provided for its infringement, its obligation is not impaired, but recognized.¹⁵ "Thus a Legislature may authorize a bridge to be erected so as to occupy and destroy a ferry, or a railroad company or a city to appropriate the bridge property of a company, and thereby destroy its franchise; or even may authorize one railroad company to destroy the franchise of another in constructing its own road, in the exercise of this power of eminent domain, provided compensation is at the same time secured to the party thus deprived of its prior franchise.¹⁶ And Judge Cooley says, that where the grant was exclusive and guaranteed against impairment, "the exclusiveness of the grant, and the agreement against interference with it, if valid, constitute elements in its value to be taken into account in assessing compensation; but appropriating the franchise in such a case no more violates the obligation of the contract than does the appropriation of land which the State has granted under an express or implied agreement for quiet enjoyment by the grantee, but which nevertheless may be taken when the public need requires."¹⁷

H. CAMPBELL BLACK.

HUSBAND AND WIFE—MARRIAGE—PRE-SUMPTION—EVIDENCE—COHABITATION AND REPUTATION.

APPEAL OF READING FIRE INS. & TRUST CO. GUARDIAN.*

Supreme Court of Pennsylvania, October 4, 1886.

Cohabitation and reputation alone are not marriage. They are merely circumstances from which a marriage may sometimes be presumed. It is a presumption that may be rebutted by other facts and circumstances. When the relation between a man and a woman living together is illicit in its commencement, it is presumed to so continue until a changed relation is proved. Without proof of subsequent actual marriage, it will be presumed from continued cohabitation and reputation of a relation between them which was of illicit origin.

Appeal of the Reading Fire Insurance & Trust Company, guardian of Charles B. Riegel, a minor child of Jacob R. Riegel, deceased, from the decree of the orphans' court of Berks county dismissing the exceptions filed by the said appellant to the \$300 exemption appraisal of Ellen Riegel, who claims to be the widow of Jacob R.

⁸ *Christ Church v. Philadelphia Co.*, 24 How. 300; 8 C. 24 Pa. St. 229; *Washington University v. Rowse*, 42 Mo. 306; *People v. Comm'rs of Taxes*, 47 N. Y. 501.

⁹ *Farrington v. Tennessee*, 35 U. S. 679.

¹⁰ *Delaware Railroad Tax*, 18 Wall. 206; *Union Passenger R. R. v. Philadelphia*, 101 U. S. 528.

¹¹ *Butchers' Union Co. v. Crescent City Co.*, 111 U. S. 746.

¹² *New Orleans Gas-Light Co. v. Louisiana Light and Heat Co.*, 115 U. S. 650; *Boyd v. Alabama*, 94 U. S. 645; *Stone v. Mississippi*, 101 U. S. 814; *Lake Hill v. Cemetery Co.*, 70 Ill. 191; *Pittsburg & Co. R. R. v. Southwest R. R.*, 77 Pa. St. 173; *Thorpe v. Railroad*, 37 Vt. 149.

¹³ *State v. Noyes*, 47 Me. 189, 212.

¹⁴ *State v. Paul*, 5 R. T. 185; *Cooley*, Const. Lim. 533. *People v. Hawley*, 3 Mich. 330; *Reynolds v. Geary*, 28 Conn. 179; *Gutzwiller v. People*, 14 Ill. 142; *Rowland v. State*, 12 Tex. App. 418; *Metropolitan Board of Excise v. Barrie*, 34 N. Y. 657; *Santo v. State*, 2 Iowa, 165; *Beer Co. Massachusetts*, 97 U. S. 25.

¹⁵ *New Orleans Gas Light Co. v. Louisiana Light and Heat Co.*, 115 U. S. 650, 673; *Richmond & Co. R. R. v. Louisiana R. R.*, 18 How. 71; *West River Bridge v. Dix*, 6 How. 507; *In re Citizens Passenger R. R.*, 2 Pittsburg, 10; *Shorter v. Smith*, 9 Ga. 517; *Benson v. New York*, 10 Barb. 223; *Backus v. Lebanon*, 11 N. H. 19.

¹⁶ 2 Washburn, Real Prop. p. 235; *In re Towanda Bridge*, 91 Pa. St. 213; *New Orleans & Co. R. R. v. Southern Tel. Co.*, 53 Ala. 211; *Piscataqua Bridge v. N. H. Bridge*, 7 N. H. 85.

¹⁷ Const. Lim. 281.

* S. C. 6 Atlantic Reporter, 60.

Riegel, deceased, and confirming absolutely said appraisement.

The facts of the case are fully set forth in the opinion of the supreme court.

MERCUR, C. J., delivered the opinion of the court:

This is an appeal from a decree setting off \$300 worth of property to the alleged widow of Jacob R. Riegel, deceased. Whether the appellee was ever his lawful wife is the question in the case. It is clearly proved that they lived and cohabited together for several years. She gave birth to a child, which he claimed and recognized to be his. There is evidence that at times he declared she was his wife, and introduced her as such. On one occasion when he conveyed some real estate, she joined in the deed as his wife. At other times, when asked whether he was married to her, he would give evasive answers, neither admitting nor denying that he was or was not. At the time the child was born, Rebecca Forney swears they were not married. That witness asked each of them about that time. "He said he was not married; that he would take her for a housekeeper." "He said he would never marry her." "She said she was long ago married." At other times the appellee spoke of him as her husband. Mrs. Dr. Rhoads, however, testifies, after Riegel and the appellee had lived together for some time, that the latter "complained to her that he would not marry her." "She blamed his sister for being opposed to his marrying her." "She said whenever she would ask him to marry her, he would say, 'I cannot; my sisters don't want you in the family.'" Witness further testified the appellee said "she told Jacob Riegel to get himself another housekeeper if he would not marry her."

The whole evidence discloses quite a difference of opinion in the minds of their neighbors as to whether they were married. It was so uncertain that there appears to have been much talk questioning it while they were living together. The evidence does not show any actual marriage, nor any well-recognized general reputation that they were married. Soon after the death of Riegel, and before his funeral, Ressler swears he at the house, and said to her, "You know there are rumors on the streets that you and Jacob Riegel were not married;" and she answered, "If we ain't married, I was true to him all the time we lived together." She was afterwards called, and testified in her own behalf. She denied generally that she had such a conversation with Mrs. Rhoads, and swore that she did not tell her that she said to Jacob, "If you don't want to marry me, then get yourself another housekeeper." She did not specifically deny other portions of Mrs. Rhoads' evidence, equally as strong and expressive, that no marriage existed; nor did she deny having used the language testified to by Ressler. She did not swear that she was ever married to Riegel, or that there was any agreement between them under which they lived together as husband

and wife. On the argument of the case in the court below it appears, by the opinion of the court, that the appellant asked why she was not examined with reference to her marriage with the decedent. The answer was that she called and testified only in rebuttal. The learned judge says: "The question why she was not called and did not testify in chief still remains unanswered, and I submit that I am not able to answer it." We think the easy and correct solution of this question is to infer she was not called in chief to testify to an alleged marriage with Riegel, by reason of her known inability to testify to any fact sufficient to prove a marriage.

Undoubtedly they lived together for a long time under circumstances to prove intimate sexual relations; but cohabitation and reputation alone are not marriage. They are merely circumstances from which a marriage may sometimes be presumed. It is a presumption, however, that may be rebutted by other facts and circumstances. *Hunt's Appeal*, 86 Pa. St. 294. When the relation between a man and a woman living together is illicit in its commencement, it is presumed to so continue until a changed relation is proved. Without proof of subsequent actual marriage, it will not be presumed from continued cohabitation and reputation of a relation between them which was of illicit origin. *Id.* Here the evidence establishes with sufficient certainty that, in its inception, the relation between the appellee and Riegel was illicit, and there is no sufficient evidence to create a legal presumption of any subsequent marriage. In arriving at this conclusion we do not doubt the correctness of the law, as declared in *Richard v. Brehm*, 73 Pa. St. 140, and numerous kindred cases. Many times marriage may be proved by acts of recognition, continued matrimonial cohabitation, and general reputation.

Here, however, the evidence falls far short of satisfying the mind that there was ever any actual agreement to form the relation of husband and wife.

There is another feature in the case which, if proved, would establish that she is the wife of another man who is still living. The appellant gave evidence tending to prove that, before the appellee formed any relations with Riegel, she lived and cohabited with one Jeremiah Ribble, and was reputed to be his wife, and he is still living. Some eight witnesses testify that Ribble and she were living together, keeping house, and reputed to be husband and wife. Four of these witnesses were neighbors, living on the same street with them. One was a cousin of the appellee, and three of them were brothers of Ribble. Two of the brothers testify that he told them he and she were married, and were living together or keeping house. The evidence of cohabitation and reputed marriage with Ribble, during the time she lived with him is of the same general character as that given to prove the subsequent relation between her and Riegel; but that time was of

much shorter duration. She swears that she never lived with Ribble as his wife. If in fact she lived and cohabited with him as his mistress, the reputation proved and his declarations would not make her his wife. They would not be sufficient to establish the existence of a valid marriage with him. They do, however, tend to strengthen the probability that she may have formed the same kind of meretricious relation with Riegel. The evidence of any marriage with him is too weak and uncertain to establish that relation, and the learned judge erred in holding otherwise.

Decree reversed, at the costs of the appellee, the confirmation of the appraisal to her is taken off, the exceptions thereto are sustained, and the appraisal is set aside.

WEEKLY DIGEST OF RECENT CASES.

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1. AGENCY.—*Principal and Agent—Action on Account—Evidence—Instruction.*—A., a harvester company, entered into a contract in writing with B., appointing him its agent for the sale of its machines. One of the provisions of the contract was that A. should use its best efforts to complete and ship all machines therein and thereafter ordered, but should not be responsible to B. for failure to furnish machines where the demand exceeded the supply; and another provision was that the sales made by B. upon credit should be to such persons only as were known to be responsible, and of good reputation for the payment of their debts. *Held*, in an action brought by A. against B. upon an account, to which B. filed a counter-claim for damages, that the evidence of B. that he had sold five machines, and that A. had failed to furnish the same was inadmissible, as there was neither averment nor evidence that B. ordered five machines, nor that A. did not use its best efforts to furnish such machines, if any, as were ordered. *Held* further, that as there was no evidence as to the character of persons to whom B. sold, that an instruction to the jury that he could not recover for sales made, unless made within the terms of the contract, was correct. *Williams Harvester Co., v. Pope*, S. C. Iowa, Oct., 13, 1886; 29 N. W. Rep. 438.

2. ——— *Principal and Agent—Power of Attorney—*

Deed—Rights Conveyed—Taxes—Redemption.—The power of attorney copied at length in the opinion, *held* to be sufficient authority for the execution of the deed, also copied in the opinion. The above-mentioned deed was sufficient to vest in the grantee therein named, all the rights of the grantor to the money paid for the real estate therein described at tax sale, and the several amounts paid by such purchaser for taxes subsequently assessed thereon, and the right to reclaim the same from such real estate upon the failure of the tax title thereto. *Alexander v. Goodwin*, S. C. Neb., Oct. 13, 1886; 29 N. W. Rep. 468.

3. CONTRACT.—*Performance—Completion of Building—Fire—Acceptance—Fire Insurance—Right to Proceeds—Mechanic's Lien—Mortgagee—Assignment.*—If, by a building contract, the builder is to furnish all materials, and the building is to be completed before it is paid for, but, when nearly but not quite done, the owner accepts it, as by moving in by himself or another, the owner thereby becomes responsible for the price agreed to be paid, and if, thereafter, and before entire completion, the building is destroyed by fire, he, and not the contractor, must bear the loss. The holder of a mechanic's lien upon certain property has no claim upon insurance effected by the owner, and assigned after loss, but before the filing of the lienor's bill, to a mortgagee of the property. *Galyon v. Ketchen*, S. C. Tenn., Sep. 25, 1886; 1 S. W. Rep. 508.

4. CORPORATION.—*Municipal Corporations—Torts—How Far Bound by Acts of Agents and Officers—Negligence—Evidence—Presumptions—Negligent Construction of Cistern—Instruction—Objections to Testimony—Master and Servant—Appeal—Questions not Seasonably Raised—Who are Fellow-Servants—Damages—Death—Injuries to Person.*—A municipality is liable for the torts of its agents in the performance of a public duty, if they are especially employed to superintend the particular work of the city, and are not acting generally in the capacity of public officers. When a thing is shown to be under the management of a party or his servants, and an accident occurs in connection therewith which, in the ordinary course of things, does not happen, if those who have the management use the proper care, it affords reasonable evidence, in the absence of explanation, that the accident arose from want of care. Where the evidence was overwhelming that a public work was not properly constructed, and an accident resulted therefrom, *held*, that it was not error for the court to charge that it was the city's duty to construct a work "suitable and for the purpose intended." The point at issue being whether a particular cistern wall was properly constructed, *held*, that the question whether it was customary to put braces on the inside of cistern walls was properly excluded. The legal presumption is that an accident which results from the improper construction of a piece of masonry is the fault of the principal, and not of his subordinates. An exception to the argument of counsel in his address to the jury, which was not ruled on by the trial court, cannot be considered on appeal. When an accident results from the fall of a certain piece of masonry, evidence tending to show how such a work should be constructed is material. A workman engaged in one branch of a business cannot be presumed to have assumed the risk arising from other connected branches of the

immaterial that the boarder does not know of such agreement. *Riley v. Mitchell*, S. C. Minn., Oct. 6, 1886; 29 N. W. Rep., 588.

13.—INSURANCE.—*Fire Insurance—Ownership of Property—Evidence—Trial—Production of Written Instrument—Parol Evidence of Contents of Written Document.*—Where the defense to an action upon a fire insurance policy is that the insured was not the owner of the premises in question, it is competent to show that the deed under which the insured claimed had been delivered in escrow only. Where the defendant gives the plaintiff notice to produce a certain instrument known to be in his possession, and the plaintiff fails so to do, it is competent to inquire on cross-examination as to the contents of said instrument. *Pangborn v. Continental Ins. Co.*, S. C. Mich., Oct. 7, 1886; 29 N. W. Rep., 475.

14. JUDGEMENT.—*Arrest of—Motion for Judgment Non Obstante Verdicto.*—Where, in the trial of an action on a lease to recover damages for a failure to perform the conditions of the lease, a verdict is rendered in favor of the plaintiff, and the defendant submits a motion in arrest of judgment, and the court thereupon renders a judgment in favor of the defendant notwithstanding the verdict, if the petition shows that the plaintiff is entitled to any relief, such judgment of the court will be reversed. *Carl v. Granger Coal Co.*, S. C. Iowa, Oct., 13, 1886; 29 N. W. Rep. 437.

15. —. — *Fraud—Mistake—Res Adjudicata.*—A judgment in an action of tort to recover money alleged to have been obtained by fraud, is not a bar to a subsequent action to recover the same money, on the ground that it had been paid under a mistake of fact. Facts offered in evidence to prove an issue are not themselves in issue, and the judgment is no evidence in regard to them. When a creditor has received more than was due him from his debtor, the excess is deemed so much money of the debtor in the hands of the creditor for the use of the debtor; and if, on a subsequent transaction between the parties, the debtor becomes again indebted, such excess will be presumed to have been applied by the creditor upon the subsequent indebtedness when it accrued, and the debtor will not be deprived of the benefit of such application by force of the Statute of Limitations, in an action by the creditor for the entire indebtedness. *Belden v. New York*, N. Y. Ct. Appls., Oct. 5, 1886; 4 Cent Rep. 180.

16. MECHANIC'S LIEN.—*Possession of Land—Right of Owner.*—When one who has put in the possession of land by the agent of the owner, with the verbal understanding that he was to purchase the land, contracted for materials and labor for the erecting of improvements upon the land, held, that the contract was a personal one with the person in possession, and that no lien attached to the improvements as the property of the owner of the land. *Wilkins v. Litchfield* S. C. Iowa, Oct. 9, 1886; 29 N. W. Rep. 447.

17. MORTGAGE.—*Deed Absolute—Rights of Transferee—Evidence.*—Whenever property is transferred, no matter in what form or by what conveyance, as the mere security for a debt, the transferee takes

merely as a mortgagee, and has no other rights or remedies than the law accords to mortgagees. The want of a personal agreement by the borrower to repay the money is not conclusive that the conveyance was not intended as a mortgage, but merely a circumstance to be considered with the other evidence in the case. *Scheiber v. LeClatre*, S. C. Wis. Oct. 12, 1886; 29 N. W. Rep. 570.

18. LEGACY.—*Will.*—The law conclusively presumes that a legacy is to be paid only out of the personality; and if that is insufficient, the legacy is lost unless a contrary intention is shown on the face of the will. Where a will directs a legacy to be paid out of testator's estate by the executor, and no reality is devised to the executor, payment of the legacy will be confined to the personality; no inference to change the reality can be drawn from a subsequent residuary clause devising all the remainder of testator's estate, "real, personal and mixed," to a third person. *White v. Kaufman*, Md. Ct. App. Oct. 9, 1886; 4 Cent. Rep. 159.

19. NEGLIGENCE.—In an action for personal injuries alleged to have been sustained by a servant, through the negligence of the defendant employer to provide safe and suitable machinery and tools, and to give suitable and proper instructions, a request by the defendant for a ruling "that unless the jury find that the plaintiff was a man of manifest imbecility, the verdict must be for the defendant" is rightfully refused. *Allen v. Merrick, etc. Co.*, S. J. C. Mass. Oct. 12, 1886; 5 Boston Law Record, No. 10.

20. PARTNERSHIP.—*Accounting—How and When the Right to, Arises—Action or Suit—Partnership—Trove—Accounting.*—One partner cannot, by wrongfully terminating the contract of partnership, and tortiously seizing and appropriating the joint property, create a right to compel an accounting in equity with reference to the operation, after possession taken, or as to the avails of property wrongfully converted. An action in trover by one partner against another, for tortiously seizing and converting the joint property, should not be consolidated with proceedings in equity for an account brought by the defendant in the trover case. *McGrav v. Dale*, S. C. Mich. Oct. 7, 1886; 29 N. W. Rep. 477.

21. PLEADING.—*Section 101, Civil Code Ky.—Meaning of "Subsequent" as There Used—Trusts—Resulting Trusts—Purchase of Land with Another's Means—Statute of Frauds—Agreement to Redeem Land of Another from Execution Sale.*—The word "subsequent," as used in section 101 of the Civil Code, as to departures from defenses or grounds of action pleaded, refers to a pleading subsequent in its character to a reply, and not to the time when one may be filed. The statutory provision in Kentucky that when a deed is made to one person, and the consideration shall be paid by another, that no trust shall result in favor of the latter, does not apply where the grantee takes the deed without the consent of the one paying the consideration, or where the grantee, in violation of a trust, purchases the lands with the means of another. An agreement whereby one party was to redeem the other's land from an execution sale, and occupy the land so redeemed as the latter's lessee for a time following, in consideration for his act, is not a contract for the sale of land, and hence not within the statute of frauds. *Bedford v.*

Graves, Ky. Ct. App., Sep. 23, 1886; 1 S. W. Rep. 584.

22. — *Power of Appointment—Exercise of—General Residuary Bequest—Intestacy.*—By a will made in exercise of a testamentary power of appointment among children, contained in a marriage settlement, a testatrix appointed certain shares in the settled funds to her children, and one share, in an event which happened, to her grandson. The will also contained a general residuary bequest to her two sons of "all the rest, residue of, and remainder of my personal estate and effects whatsoever and wheresoever, and of what nature or kind soever, * * * and over which I have any power of disposal by this my will." Held, that the share improperly appointed to the grandson was not undisposed of, but passed to the two sons under the terms of the general residuary bequest. *Re Hunt's Trusts, Eng. Ct. Apps., 1886; 54 Law Times Rep. 6.*

23. PRACTICE—*Error, Writ of—Final Decree—Consent to Jurisdiction.*—In proceedings to enforce a vendor's lien a decree in favor of plaintiff for a certain sum, and ordering a sale if the same be not paid within a certain time, cannot be taken up on writ of error, even by consent of parties, as it is not a final decree. *Gibson v. Widener, S. C. Tenn., Sep. 17, 1886; 1 S. W. Rep. 497.*

24. QUO WARRANTO—*Voter—Check-List—Revised Laws, §§ 71, 2644, 2656—Parol Evidence—Naturalization—Revised Laws, Chap. 74—Civil Authority.*—While the vote of a person whose name is on the check-list, and who is a resident, cannot lawfully be rejected, yet the list is not conclusive that he is a legal voter. In making a check-list of voters, the annual assessment-list, which is completed, and the last one preceding the time of making the check-list, governs; thus, in making a voting list in April, 1886, the assessment-list of 1885 should be used. Parol evidence is not admissible to prove that a foreigner has been naturalized, the question being whether he was a voter; a certified copy of the record is required. The statute requiring check-lists did not change the power of the board of civil authority. *State, ex rel. v. O'Hearn, S. C. Vt., Sep. 8, 1886; 7 East. Rep. 87.*

25. RAILROAD COMPANIES. — *Fencing—"Crazy" Horses—Code Iowa § 1289—Evidence Improperly Rejected—Error Cured—Special Findings—Failure to Deliver Interrogatories to Jury—Immaterial Matters—Fences—Double Damages—Service of Affidavit Upon Company's Agent—Correcting Return of Constable.*—Under section 1289 of the Code of Iowa, a railroad company is required to fence its track for the protection of "crazy" horses as well as for the protection of animals possessing good "horse sense." In an action against a railroad company for damages for the killing of a horse by defendant's train, at a point where defendant had a right to build a fence, but had failed to do so, the fact that the train did not strike the horse, and that the horse was injured by running in front of the train into a bridge, does not relieve the railroad company of liability. Where evidence offered by defendant was rejected by the court, and, after all the evidence was in, a written admission was filed by the plaintiff, conceding the

facts which defendant offered to prove by such evidence, and a correct instruction was given by the court to the jury applicable to such facts, the error in rejecting the evidence was cured. Interrogatories intended to elicit special findings by the jury were prepared by the court, and the jury's attention was directed to them by an instruction, but, through oversight, the jury did not receive the interrogatories, and no special findings were made. Held, that as the interrogatories were intended to elicit answers upon immaterial matters, the omission to give the question to the jury was not prejudicial error. Upon the trial of an action against a railroad company to recover double the value of a horse killed by a train, the value not having been paid after notice and proof of the injury by affidavit, the statement in the return of the constable who served the affidavit upon the agent of the railroad company, that such service was made by giving a copy of the affidavit to the agent, may be corrected by the constable's evidence showing that he served the original affidavit. *Liston v. Central Iowa Etc. Co., Oct. 14, 1886; 29 N. W. Rep., 445.*

26. — *Right of Way—Contract—Mortgage.*—An agreement made, on the purchase of rights of way by a railway corporation, to pay therefor in bonds of the purchasing corporation, is within the powers of such corporation; and the facts that the line of the purchasing corporation was not formally located on the line proposed to be purchased, and was subsequently located on a different line, do not affect the question of corporate power. A contract made by an individual, in connection with others, with a railroad corporation in which he is a director, binding the corporation to purchase certain property from him and his associates, such director having participated in the action of the corporation in assuming the obligation, is within the rule which invalidates all contracts made by a trustee fiduciary, in which he is personally interested, at the election of the party he represents. Such contract is not rendered valid by the fact that its effect was merely to substitute the corporation for certain of its individual promoters, who had previously contracted for the purchase; nor by the fact that the property consisted of real estate, track, etc., of another railroad corporation which the present vendors had purchased under a mortgage foreclosure; the transaction in question not being an arrangement for the reorganization of an existing railroad within the provisions of Laws 1873, chap. 710. *Munson, v. Syracuse Etc., Co., N. Y. Ct. of Appls., Oct. 5, 1886; 4 Cent. Rep., 191.*

27. TENANCY—*Joint Tenants and Tenants in Common—Title Derived from one Co-Tenant—Equity—Confirming Title—Husband and Wife—Improvements Made upon Land by Co-Tenant—Conveyance—Subrogation—Action or Suit—Joiner or Parties—Requiring Party to Intervene—Demurrer—Trespass—Title—Nuncupative Will—Fixtures—Buildings Constructed upon Lands with Permission—Nuncupative Will.*—Where one claims title to a particular piece of land by warranty deed from a grantor who is a tenant in common of that with other lands, a court of equity will confirm the title in the grantee, if it can be done without prejudice to the rights of the co-tenants of the grantor. Where a husband makes improve-

ments on his wife's lands with community funds, he is entitled to reimbursement to the amount of his share of the funds used; and when by inheritance from his children, he becomes a co-tenant of that with other lands, and makes a warranty deed of the land in question, his grantee is entitled to be subrogated to his right to the money so used. In an action of trespass to try title to land, it was alleged in the answer that a certain person, not a party to the action, claimed some interest in the land, and asked that he be made a party, and required to assert whatever claim he might have. *Held*, that it was error to sustain a general demurrer filed by such third person. In an action of trespass to try title to land, a demurrer to an allegation in the complaint claiming title by a nuncupative will was properly sustained. Building constructed upon land within the right of way of a railway, with its permission, the fee being in some one else, are not chattels, so as to pass by a nuncupative will. *Furrh v. Winston*, S. C. Tex. Oct. 15, 1886; 1 S. W. Rep. 527.

28. **TRESPASS QUARE CLAUSUM.—Possession—Evidence of Title.**—A petition in an action for trespass to land, and for carrying away timber therefrom, which alleges that defendant "entered the close of plaintiff,—that is to say, a certain tract of land, and the lines and boundaries thereof," and cut down and carried away a lot of timber therefrom, without otherwise alleging possession or seizin of the land or ownership of the wood by plaintiff, is demurrable. The act of March 10, 1854, allowing an owner of land, although not in actual possession, to maintain trespass *quare clausum*, is not in force, and possession must be shown. A deed of special warranty from a person who does not appear to have had any title himself is not sufficient evidence of ownership or possession to enable the plaintiff in an action of trespass *quare clausum fregit* to maintain his action. *Dusan v. Ferguson*, Ky. Ct. Appls. Oct. 5, 1886; 1 S. W. Rep. 539.

29. **TROVER—Evidence—Presumption.**—In general it will not be presumed that A. made a certain contract with B. from the fact that he had made similar contracts with other parties. Defendant was authorized to and did purchase a horse on the plaintiff's credit; the defendant retained possession, and the plaintiff claimed to have a lien; the defendant exchanged this horse for another; that the plaintiff claimed that it was by his consent, and that the first lien was discharged in consideration of his having a lien on the second horse, *held*, that the bill of sale, executed by the first vendor to the defendant at the time of purchase, although the plaintiff was not present, was admissible in behalf of the defendant, to prove that he was the sole owner. *Aiken v. Kennison*, S. C. Vt. Sept. 10, 1886; 7 East. Rep. 90.

30. **TRUSTS—Power of Trustee to Sell Land—"Natural Guardian" of Cestuis Que Trust.**—Where land owned by a woman was conveyed to a trustee in trust for her children, her husband joining in the deed, which gave the trustee power to sell the land during the minority of the *cestuis que trust*, upon a request from their "legal and natural guardian," *held*, that a request to sell made by their father was sufficient to authorize

the trustee to sell. *Harris v. Petty*, S. C. Tex. Oct. 15, 1886; 1 S. W. Rep. 525.

31. **USURY.—Usurious Contract—Validity—Parent and Child—Rights of Parent—Equitable Ownership of Property.**—Where one proposed to advance money to another for the purchase of a house provided the legal title was conveyed directly to himself, and the purchaser would agree to pay rent at a given rate per month, after which the property would be re-conveyed to the purchaser or his wife, and it appeared that this contract was only a cover to obtain a usurious rate of interest, *held*, that the contract was illegal, and that the borrower should pay only what he justly owed, after deducting the usurious interest. A father cannot, by any arrangement entered into with the holder of the legal title, appropriate property belonging to his minor child as equitable owner. *Tiller v. Cleeland*, S. C. Ark. Sept. 29, 1886; 1 S. W. Rep. 516.

32. **VENDOR AND PURCHASER—Action for Price—Defense of Defect of Title.**—In the absence of fraud, a person who has been let into the possession of property under a deed, and never has suffered eviction, either actual or constructive, cannot controvert his vendor's title, nor defend against payment of the purchase money on account of defects therein, real or supposed, but is remitted to the covenants in the deed. *Morris v. Ham*, S. C. Ark., Sep. 25, 1886; 1 S. W. Rep. 519.

33. **VENDOR AND VENDEE—Vendor's Lien—Priority—Purchase by Partners—Dower.**—The proceeds of a sale to satisfy a vendor's lien of land purchased with partnership funds, and for partnership purposes, is assets for the payment of the obligations of the partnership, after the satisfaction of the lien, and such sale is not subject to a right of dower in the wife of one of the partners. *Sherley v. Thomasson*, Ky. Ct. of App., Sep. 25, 1886; 1 S. W. Rep. 530.

34. **WATERS AND WATER-COURSES—Rights of Property in Water—Tenants in Common in the Use of the Flow of a Stream—Evidence—Experts—Testimony as to Capacity of a Ditch to Carry Water—Appeal—Conflicting Evidence.**—A court equity has power to ascertain and determine the extent of the rights of property in water flowing in a natural water-course, acquired by persons who hold and are entitled to them, and to regulate, between or among them, the use in the flow of the water in such a way as to maintain equality of rights in the enjoyment of the common property. The capacity of a ditch to carry water does not require for its proof unusual scientific attainments or peculiar skill. It may be established, like any other fact, by competent testimony; and witnesses who have had long experience in measuring and selling water are as competent to testify to the fact as experts. A finding made upon substantially conflicting evidence is not reviewable. *Frey v. Lowden*, S. C. Cal., Aug. 31, 1886; 11 Pac. Rep. 538.

35. **WILL.—Charge on Land—Legacy.**—A testator directed his executor to satisfy and pay his just debts, etc., out of his "estate," and gave and bequeathed to K. \$200, which he directed his executor to pay out of his "estate." Testator then gave, devised, and bequeathed all the rest, residue, and remainder of his estate, real, personal, and mixed, to his niece, J. C. *Held*, that the real-

tate was given to J. C. unconditionally, and was not charged with payment of the legacy to K. *White v. Kaufman*, Court of Appeals, Maryland Oct. 9, 1886; 5 Atl. Rep. 865.

36. ———. — *Construction*.—"All my property leasehold and freehold."—R. by will, after appointing executors and directing his debts and funeral expenses to be paid, gave his wife "all my property leasehold and freehold which I now possess." *Held*, that all the testator's real and personal estate passed under the gift to his widow, and not only his leaseholds and freeholds. *Re Roberts Kiff v. Roberts*, Eng. Ct. App., 1886; 54 Law Times Rep. 386.

37. ———. ——"All the property settled on my marriage over which I have any disposing power."—P., a married woman, made a will the day after her marriage in the following terms: "In pursuance an exercise of the power of appointment vested in me by the settlement executed previously to my marriage and of every other power enabling me, I hereby appoint, give, and bequeath all the property settled by me on my marriage, and over which I have any disposing power unto my dear husband." After the execution of the will, but in the lifetime of P., O. died, having by will bequeathed 100l. East Indian Railway Annuities, in trust for P. for life, with remainder as she should by will appoint, with remainders over. *Held*, that P.'s will was not confined to the property comprised in her marriage settlement, but operated to exercise the power given her by the will of O. *Re Old's Trusts; Pengelly v. Herbert*, Eng. Ct. App. 1886; London Law Times, Rep. Vol. 54, 677.

38. ———. — *Constructions—Testation—Technical Words*.—A testator's intention may be more clearly indicated by the general tenor of the will than by technical words or phrases, especially when it is apparent that certain words are used in a sense different from their legal and technical meaning. *Wiggin, Trustee v. Perkins*, Supreme Court of New Hampshire July 30, 1886; 5 Atl. Rep. 904.

39. ———. — *Substitutional Gift—Vesting*.—Gift of residue to A. for life, and afterwards equally between the children of testator's brothers and sisters, "the issue of any deceased child to take the parent's share." A testator, who died in 1871, by his will dated in 1870, gave his residuary estate to trustees upon trust to pay the income thereof to his widow for her life, and after death he gave the property unto and equally between all and every the children of his brothers and sisters, share and share alike, "the issue of any deceased child to take the parent's share." The testator's widow died in 1881. Some of the children of the brothers and sisters of the testator survived him, but died in the lifetime of the testator's widow, leaving issue. The question was, whether the issue of the deceased children of the brothers and sisters of the testator were respectively entitled to the shares of their deceased parents. *Held*, that the substitutional gift took effect in the case of any child of a brother or sister of the testator who had died in the lifetime of the testator's widow. *Re Gilbert v. Matthews*, Eng. Ct. Appl. 1886; 54 Law Times Rep. 752.

40. ———. — *Trust—Perpetuities—Contingent Remainders—Devise to Grandchildren—Contingent*

Remainders—Trusts—How Affected by Void Disposition of Fund—Based on Illegal Bequest.—Where a testator, by will, gives his property to trustees, with directions to pay the income in equal portions to his two daughters, and on the death of the surviving daughter to divide the principal among his grandchildren, or their issue then living, one share to each grandchild and one to the issue of each deceased grandchild, the gifts to the grandchildren do not vest until the division after the death of the surviving daughter, and are therefore void by force of the statute against perpetuities. Where, by the provisions of a will, the property is to be divided on the death of testator's daughters, and one share given to each grandchild, the interest of the grandchild is only contingent, until the death of the daughters and the division of the property. If he dies before that time, without issue, his interest is extinguished; if he leave issue, they take, not as his heirs, but as purchasers under the will. Declaring the final disposition of the trust fund void, does not affect trusts whose objects are so independent and severable from the illegal object, that they can be carried into effect with due regard to the legal rights of all parties interested, without annulling any of the legal provisions of the will, and without adding anything thereto. A trust whose foundation is a part of an illegal bequest, of which it is a mere incident or auxiliary, must fall with it. *Andrews v. Rice*, S. C. Conn., May 31, 1886; 5 Atl. Rep. 823.

QUERIES AND ANSWERS.*

[Correspondents are requested to draw up their answers the form in which we print them, and not in the form of letters to the editor. They are also admonished to make their answers as brief as may be.—Ed.]

QUERIES.

30. A. brings replevin against B. for a piano. B. executes a retaining bond and retains the piano. Pending the action, B. sells the piano to C. At the trial, judgment is rendered in favor of A., that he recover the piano or \$200, its value. Execution is issued to sheriff for the piano or its value and he takes the piano from C.'s possession. Is he a trespasser in doing so? Did B.'s retaining bond relieve the piano of A.'s claim of ownership, so as to pass a good title to C. or not?
P.

QUERIES ANSWERED.

Query 24. [23 Cent. L. J., 335.] — A. sells a town lot to B. for \$1,000; before the deed is given, B. sells to C. for \$1,500. By an arrangement between A. and B. to which C. is not a party, the deed runs from A. to C. direct, and names the consideration as \$1,500. C. is not informed of the actual amount received by A. The title fails and C. is ousted. In an action by C. against A. upon the covenants of warranty in A.'s deed, can C. collect the \$1,500 actual sum paid by him, or only the \$1,000, amount received by A.?
H. P. R.

Answer.—A. is responsible upon his covenant of warranty to C. for the full amount \$1,500, which by its terms he has acknowledged that he has received from C. He is estopped by his deed from denying that he received the sum named in it as the consider-

ation of the conveyance. Besides, if he could in equity show, that in point of fact he received no more than \$1,000, he is precluded from that defense because C. was not a party to the agreement between A. and B. by which A. was to make the title direct to him, and he had no notice that A. had received only \$1,000. A. and C. both being innocent parties, the loss, by a well established rule of equity, must fall upon the one whose action rendered the loss possible. M.

CORRESPONDENCE.

MEMPHIS, MO., Oct. 26th, 1886.

TO THE EDITOR OF THE CENTRAL LAW JOURNAL:—

Dear Sir:—I desire to call your attention to the decision of the Supreme Court of Missouri in the case Davidson v. Davis, 86 Mo. 440. It is possible that the doctrine of estoppel by the conduct of the heirs may have justified the court in reaching the conclusion it did, but the facts seem not to justify even that. But the court announces the unqualified doctrine that, "a widow cannot take the devise and bequest under the will and at the same time insist upon her homestead right." It appears to me that, the court overlooked the principle of law laid down by so many of our text books and supported by so many authorities, that "If the terms of the will do not indicate a clear intention that the bequests are made in lieu of homestead, then she will take the bequests in the will and also her estate of homestead under the law." Thompson on Homesteads, section 544, Bryant v. McCune 49 Mo. 546. In Hassenritter v. Hassenritter, 77 Mo. 162, quoting approvingly from Sheldon v. Bliss 8 N. Y. 31. The court says "It is an established principle, that a provision in the will of the husband in favor of the wife will never be construed by implication to be in lieu of dower or any other interest in his estate given by law; the design to constitute one for the other must be unequivocally expressed."

In Davidson v. Davis, the terms of the will are not stated, neither is it affirmed that it contained unequivocal expressions indicating that the bequest in the will was in lieu of homestead. Possibly it did contain such expressions, but the court puts its decision upon the broad ground which I stated in the outset. The decision as it stands, as I think, is misleading and directly in the face of former decision of the same Court.

I call your attention to this case with some diffidence, as I claim to be no law critic, and besides I have a high respect for our Supreme Court.

Respectfully, WM. T. KAYS.

The authorities cited by our correspondent fully sustain his views, and upon principle the same doctrine can be maintained. A testator will always be presumed to devise and bequeath with reference to the law affecting his estate which may be in force when his will takes effect. The homestead right of the widow is the creation of the law, goes into effect at the death of the testator, and withdraws the property, upon which it operates, from the general power of disposition which every testator possesses over his whole estate. He cannot devise the homestead to a stranger, if he devises it to the party entitled to it by the law, he does a work of supererogation; if he devises other property to the widow upon condition that she renounce her homestead right, the condition is a limitation upon her right to the other property, and not upon the homestead. By such a devise, he puts her upon her election between that which he gives her and that which the law gives her. That such an intention must clearly appear, is abundantly supported by

authority. In Missouri and in New York it has been held that such a limitation cannot be established by implication, but must be by express words. Bryant v. McCune, 49 Mo. 546; Hassenritter v. Hassenritter, 77 Mo. 162; Bliss v. Sheldon, 8 N. Y. 31. In Vermont, however, the court does not go quite so far, it says: "The intent to exclude the widow from her legal right must clearly appear; if it be doubtful she is not to be excluded. It is not necessary that this should appear in express words. If the terms of the instrument clearly and plainly imply it, * * * then the court will find the intent to exclude." Meech v. Meech, 37 Vt. 419.

Upon the whole, it seems to us very clear that a widow cannot be put upon her election, between the homestead or dower provided by the law, and the land devised by the will, unless the terms of that instrument clearly and unequivocally show that the land was devised upon condition that the devisee should renounce the homestead.—[EDITOR CENTRAL LAW JOURNAL.]

RECENT PUBLICATIONS.

RAILWAY ACCIDENT LAW—The liability of railways for injuries to the person. By Christopher Stuart Patterson of the Philadelphia Bar. Philadelphia: T. & J. W. Johnson & Co., 535 Chestnut Street 1886.

This is a live book upon a subject, which like the poor, we have always with us, and perhaps more than any other, comes into the current litigation of the day. It is of course a subdivision of the great subject of negligence which from its immense and ever increasing mass will well bear subdivision. Mr. Patterson has acted wisely in confining himself to the liabilities of railroads, and treating that branch of the subject as exhaustively as he has done. In doing so, he has produced a book which cannot fail to be of great use to all practitioners in every State, for wherever the iron horse appears, the ubiquitous "damage suit" follows. Mr. Patterson's arrangement is very good. His work is divided into four books, the first treats of the general nature of the railway's liability; the second, of the persons for whose acts or omissions the Railway is liable; the third, of the persons for injuries to whom the Railway is liable; the fourth, treats of the remedy.

Each book is subdivided into chapters and they into sections, so that in the way of careful and methodical arrangement, nothing is left to be desired, while the very full table of cases cited, attest the diligent and laborious research of the author. The book is handsomely gotten up, the printing being particularly neat and clear. We have no doubt the work will prove very useful to the profession.

JETSAM AND FLOTSAM.

THE DEVIL'S OWN.—The London *Law Times* mentions a painful rumor that the well-known regiment of volunteers raised by the Inns of Court, appropriately named the "Devil's Own," and, presumably, composed of "limbs," is about to "disappear." We are quite confident that there can be no truth in the report, for nothing is better settled than that the devil takes care of his own.

The Central Law Journal.

ST. LOUIS, NOVEMBER 19, 1886.

CURRENT EVENTS.

CRIMINAL LAW REFORM.—In a former number of this JOURNAL¹ we noticed an article in the New York Nation in which a correspondent advocates the formation of a "National Association for Criminal Law Reform," from which should proceed projects of reform of criminal law to be laid before congress and the legislatures of the several States. Upon three of the six points upon which it was urged that reform was necessary, we expressed our views as fully as the limited space at our command would permit, and deferred the consideration of the others to a more convenient season.

These deferred subjects are:

1. The definition of self-defense in cases of homicide.
2. The allowance of new trials, and writs of error or appeals.
3. The pardoning power, its restriction or regulation.

On the first of these points, it is manifest to every one who has observed the usual practice in criminal cases, that the plea of self-defense in cases of homicide is more generally abused than any other line of defense open to the accused, except that of "emotional insanity." Those expert in "single fight and mixed affray" seldom find much difficulty in leading an inexperienced antagonist into such a position of *quasi* aggression, as will probably justify a reasonable doubt as to self-defense, and then killing him. Especially is this the case in those sections of the country cursed with the prevalence of the habit of carrying concealed weapons. And in our judgment the enactment and relentless enforcement of the most stringent laws against that detestable practice would go further, than any other line of legislation, to remedy the evil in question. The plea of self-defense is, in proper cases, and in those only, very meritorious; but the practical difficulty always is, to draw the line

between those cases and those in which the tender regard of the law for the sacred rights of personal security is abused for purposes of deliberate murder. The law as it stands, or more properly, perhaps, its application, is necessarily vague and indefinite. The old rule was that one must "retreat to the wall" before he can excusably kill his adversary. What is the wall?

When the retreat to the wall was first promulgated as the rule of self-defense, brawlers fought with swords and clubs, and the line of forbearance was distinct and appreciable. Now, it is indefinite as possible. How can a man retreat to the wall when he is "covered" by a six-shooter? He must get the "drop" on his antagonist or go under himself. The change in weapons has produced much confusion in the application of the law, but the principle remains that the assailed must abstain as long as he can with safety to himself from killing his assailant. That principle cannot be impaired in any government which professes to protect the lives of its citizens; the trouble is, and always has been, that the lenient caution of courts and mistaken sympathy of juries have allowed it to operate in far too many cases to which it was in no proper sense applicable.

The chief fault of the law in this connection is that it is too indefinite, and we think that some good might be effected by careful and well considered legislation designed to define and limit the plea of self-defense. And, among other things, we think that the plea should not be allowed in cases in which the homicide had been committed with a weapon that had been unlawfully carried concealed by the accused.

As for abuses of the pardoning power, we do not believe that they exist to such a degree in any of the States as to render any legislation on the subject necessary, or any agitation for such legislation judicious or expedient.

Whether miscarriages of justice occur from abuses of the rights of appeal, new trials, and of suing out writs of error, and what may be the best and most appropriate remedies for such abuses, are questions which we will consider in a future number.

¹ 23 Central Law Journal, 290.

NOTES OF RECENT DECISIONS.

EASEMENT — WATER — AQUEDUCT — PRESCRIPTION—UNITY OF TITLE.—The Supreme Court of Maine recently decided a case¹ involving questions of interest relating to easements in flowing streams and in aqueducts, and rights by prescription, as connected therewith.

The facts were that, in 1836 Herrick acquired a lease for 99 years of a certain spring, and the right to conduct its waters through the lands of conterminous proprietors. He constructed an aqueduct a mile long, from which the neighbors drew water for domestic and farm purposes by branch pipes, each paying a water rent for the privilege. Three persons, however, paid no water rent, but contributed in proportion to keep the aqueduct in repair. One of these was the predecessor of the plaintiff, and the defendant had succeeded to the farm and domicile of another. After Herrick's death in 1864, his rights in the aqueduct were sold to the defendant and Patten, who died, and by his will left all his property to his wife and daughter. In 1879, they conveyed the farm to the plaintiff Dority, including in the deed "all the branch water pipes, etc." Afterwards they conveyed to defendant Dunning all their interest in the aqueduct property. Thereafter Dunning excluded Dority from all use of the water, and he brought suit claiming that his water right was an easement appurtenant to his estate, and had passed to him by the deed of Patten's widow and daughter.

Upon this the court held the law to be, that an easement of this character will not pass as an appurtenance to an estate conveyed, unless it has ripened into a legal right and become attached to the estate.² An easement of this description does not pass by virtue of the *habendum* clause of the deed, for that only limits and describes, but never extends the subject-matter of the grant.³

The court says, however: "But when an easement, although not originally belonging to an estate, has become appurtenant to it,

either by express or implied grant, or by prescription which presupposes a grant, a conveyance of that estate will carry with it such easement, whether mentioned in the deed or not, though it may not be necessary to the enjoyment of the estate by the grantee."⁴ And the court adds, that evidence showing an adverse and exclusive use of water for forty-five years will be considered presumptive evidence of a grant.⁵ "And this is as true," says Parker, C. J.,⁶ "in relation to water flowing through an aqueduct for use at a house, by the occupants, as it is in relation to the water of a river used for propelling machinery."

To this may be added the language of Chief Justice Mellen: "The law gives a natural construction to the conduct of the parties, and after a long succession of years presumes that the person enjoying the easement, having no right to enjoy it unless under the grant of the true owner, had such a grant; and that in consequence of it he had never been molested in his enjoyment."

Another point of interest is discussed and settled by the court in this case: That although by the sale of the aqueduct property to defendant and Patten there was a union of title in the latter of both the aqueduct and the easement in it of his own farm, which was subsequently conveyed to the plaintiff, the easement appurtenant to the farm did not merge in Patten's hand with the aqueduct property which he acquired from Herrick's administrator, and was extinguished by it. On this subject the court says:

"That an easement will become extinguished by unity of title and possession of the dominant and servient estates in the same person by the same right, is a principle of law too general and elementary to be questioned. But this principle, like many others, is subject to qualifications. In order that unity of title to the two estates should operate to extinguish an existing easement, the ownership of the two estates should be co-extensive, equal in validity, quality, and all other cir-

⁴ 2 Washb. Real Property, 28; Kent v. Waite, 10 Pick. 138.

⁵ Watkins v. Peck, 13 N. H. 370; Wallace v. Fletcher, 30 N. H. 432; Ashley v. Ashley, 4 Gray, 200; White v. Chapin, 12 Allen, 519; Jewell v. Hussey, 70 Me. 437; Murchie v. Gates, 78 Me. 304; s. c., 4 Atl. Rep. 698.

Watkins v. Peck, *supra*.

¹ Dority v. Dunning, 6 Atl. 6, Sept., 28, 1886.

² Spaulding v. Abbott, 55 N. H. 428; See also Brown v. Manter, 21 N. H. 533; Sumner v. Williams, 8 Mass. 74.

³ Manning v. Smith, 6 Conn. 289.

circumstances of right. If one is held in severalty, and the other only as to a fractional part thereof by the same person, there will be no extinguishment of such easement.⁷ Thus it was held by Abinger, C. B., in the English court of exchequer, in *Thomas v. Thomas*,⁸ in which case one estate was held in fee, and the other for a term of 500 years, that unity of possession did not extinguish the easement, but only suspended it during that unity of possession; and upon parting with the premises to different parties the right revived."

The court applying these principles holds that there could be no extinguishment of the easement by reason of the unity of title in Patten of the easement and the aqueduct itself, because his interest in the latter was fractional, and because, at best, it was a chattel interest, limited to 999 years. This latter reason, however, seems to have little force for the duration of the easement—at the utmost only extended to that precise period. The former reason, that Patten, owning the land owned also the easement, did not own the *whole* of the aqueduct, only half of it; and if the union of title of the easement and the aqueduct would operate to extinguish the former, it does not follow that unity of title of the easement and *half* the aqueduct would have the same effect.⁹

SALE—WARRANTY—AUTHORITY OF AGENT—REPRESENTATIONS OF VENDOR IN PRICE-LIST.—The Supreme Court of New Hampshire decided last summer a case¹⁰ that should be a warning to too enterprising firms and overzealous salesmen. The facts found by the court were as follows: The defendants, by their agent Chesley, sold to plaintiff a steam heating boiler, warranting it to be durable, meaning by that term, as understood by both parties, that, with due care, it would last

twenty or thirty years. The question was whether the evidence showed that a warranty had been given by the defendant. The court held in effect, that if a vendor furnishes to his salesman a price-list or pamphlet containing a description and list of prices of his wares for distribution among his customers, and in that list durability is enumerated among the necessary qualities of a good boiler, by doing so he authorized his salesman to warrant the qualities so specified in the price-list as essential to a good boiler. The presumption is that he intends to sell a good article and not an inferior one. The court says: "The representations of the defendants, contained in their pamphlet and distributed by their authorized agent, are as binding upon them as though orally made by them to a purchaser, or included in a bill of sale."

The court held, further, that the presumption that the vendor was acting in good faith in distributing the pamphlet, might well be the basis of a further presumption of authority in his agent to warrant the goods to be all that in the pamphlet they were represented to be.

A PLEA FOR STRICT CONSTRUCTION.

It is part of the respect and loyalty due the constitution to interpret it faithfully and precisely according to its letter and spirit. We should love it as much for the restraints it imposes as for the powers it delegates.

"This government," says Chief Justice Marshall (4 Wheat. 405), is acknowledged by all to be one of enumerated powers." Just as the grant of an estate is at common law a limitation of the estate granted, so the enumeration of certain powers in the constitution is a limitation of such powers and a prohibition against transcending them. "The government being one of granted powers its authority was limited by them," says Justice Field, and this is the view adopted in numerous instances by the supreme court.

The tenth amendment is virtually a rule and warrant placed in the constitution itself for a strict construction:

"The powers not delegated to the United States by the constitution, nor prohibited by

⁷ *Ritger v. Parker*, 8 Cush. 147; 2 Washb. Real Prop. *85.

⁸ 2 Crompt., M. & R. 34.

⁹ On this subject generally, see, *In re Gay*, 5 Mass. 419; *Chapman v. Gray*, 15 Mass. 445; *Brewster v. Hill*, 1 N. H. 350; *Hollenback v. McDonald*, 112 Mass. 249; *McConnell v. American, etc. Co.*, 5 Atl. Rep. 785, and note; *Cross v. Ketts*, 10 Pac. Rep. 409.

¹⁰ *Smilie v. Hobbs, Gordon & Co.*, 2 New Eng. Rep. 345, July 29, 1886.

it to the States, are reserved to the States respectively or to the people."

The loose constructionist view has always lacked the directness and candor that comes from an entire dependence on the literal truth. It was obviously a loose constructionist who, as a member of a committee on revision in the constitutional convention of 1787, sought to throw the "general welfare" clause of section 8, article III, into a separate paragraph, when the trick was discovered and frustrated. A similar object is attempted in another way, by substituting a semi-colon for the comma of the original in the same passage, making the reading as follows: "The congress shall have power to levy and collect taxes, duties, imports and excises; [,] to pay the debts and provide for the common defense and general welfare of the United States," etc.

The interpolation of a semi-colon after the word excises changes the sense materially, and seems to delegate power without any limit, except congressional discretion. This false punctuation was at one time common and is still found in some school books (Eq. Venable's United States History), and in some of the blue books issued by State legislatures.

There ought to be very little doubt as to the meaning of this passage in its correct version (that of the original MS. of the constitution preserved at Washington). The exposition of Thomas Jefferson during the Bank controversy (1791) was afterwards substantially adopted by the supreme court. It is quoted approvingly by Judge Story in his Commentaries on the Constitution.

That a vast amount of specious reasoning has been ventured by broad constructionists to show that the clause, "to pay the debts and provide for the common defense and general welfare," was a separate and substantive grant of power, and not, as Jefferson contended, a limitation by way of defining the purpose for which congress might "lay and collect taxes, duties, imports and excises."

The last of the enumerated powers delegated to congress has also been made a battle field of hermeneutics. It authorizes the legislative branch "to make all laws which shall be necessary and proper for carrying

into effect the foregoing powers and all other powers vested by this constitution on government of the United States or in any department or officer thereof."

We might well rest content with the interpretation Chief Justice Marshall places upon this clause (*McCullough v. State of Maryland*, 4 Wheat 421). The incidental and implied powers herein provided for must not only be necessary and proper, but they must be "appropriate" and "plainly adapted" to the powers previously enumerated, and they must "consist with the letter and spirit of the constitution."

Unfortunately, the words of the great jurist, himself a Federalist and (for his time) a broad constructionist, are become like the constitution itself, too narrow and literal for the centralizing constructionists of to-day.

Judge Story believes that this power, if it were not expressed, would be implied from the previously enumerated powers. "It neither enlarges any power specifically granted, nor is it a grant of any new power." (Story on the Constitution, sec. 603.)

Loose interpretation endanger the very value and existence of the constitution. If expediency, emergency, popular acclaim and majority absolutism are to strain, evade, and quibble over the limits of Federal sovereignty therein prescribed, the definitions of the compact have ceased to be binding. They have ceased to check the very tendencies for which they were designed.

A strict and literal observance of these provisions is the only sound and honest, as it is the only safe and desirable policy. Construed in a loose and vague manner, the question will ultimately be one of limit or no limit, one of a living, stable charter of freedom, or an obsolete and dead-letter constitution.

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VENDOR AND VENDEE—THE RULE IN REGARD TO FIXTURES.

Bouvier defines a fixture as a personal chattel affixed to real estate, which may be severed and removed by the party who has affixed it, or by his personal representatives, against the will of the owner of the freehold.¹ But, while the definition is perhaps sufficiently lucid to enable every one to form an intelligent idea of what constitutes a fixture, abstractly considered, it sheds but little light upon itself when we come to determine the question as to whether given appendages or annexations to houses or lands are to be considered as part of the realty, and, hence, partaking of its immovable character, or simply as personal property, which follows the person of the owner.

It is a rule of the common law, that whatever is accessory to real estate is a part of it, and passes by alienation. The necessities of trade have caused a modification of this rule, so far as it may affect the relation of landlord and tenant, and courts recognize and enforce the right of removal by tenants of chattels annexed to the freehold for the purposes of manufacture, agriculture, or domestic use and convenience. But between vendor and vendee the rule is still applicable, except so far as it may have been modified by statutory regulation, and where the question is not affected by the terms of the contract, appurtenances and chattels attached to the land or buildings, and contributing to their value and enjoyment, pass by the grant of the freehold, and after conveyance cannot be severed by the vendor or any person other than the owner.²

Just what shall be regarded as a fixture, sufficient to escape the operation of the foregoing rule, is not always an easy matter to decide. Many things pass by the deed of a house, being put there by the vendor, which a tenant who had put them there might have removed; and they will be regarded as perm-

anent annexations which pass to the vendee, although attached for the purposes of trade, manufacture, or even for ornament or domestic use. Thus, utensils and machinery, appertaining to a building for manufacturing purposes;³ gas pipes, fittings, and other apparatus, designed for purposes of illumination,⁴ including even chandeliers, burners, etc., when it is apparent that such was the intention of the parties,⁵ or they are clearly shown to be accessories and not merely furniture;⁶ water pipes and conduits;⁷ ranges, boilers, and tanks, attached in a permanent manner;⁸ stoves, and hot-air furnaces or other appliances for heating, when put in as a permanent annexation,⁹ though upon this point the authorities are not agreed;¹⁰ window and door screens,¹¹ storm doors, or other adjuncts made and fitted to the house,¹² though if never actually used and the house is complete without them they might not pass, even if on the premises;¹³ and, generally, anything the vendor has annexed to a building, for the more convenient use and improvement of the premises, passes by his deed, unless specially reserved. The rule, therefore, would seem to be, that where the annexation is permanent in its character, and essential to the purpose for which the property is used or occupied, it should be regarded as realty, and pass with the grant of the freehold, and this, notwithstanding the connection between them, may

³ As potash kettles in an ash factory, *Miller v. Plumb*, 6 Cow. (N. Y.) 665; a cotton gin permanently fixed, *Bratton v. Clawson*, 2 Strob. (S. C.) 478; a steam engine to drive a bark mill, *Oves v. Oglesby*, 7 Watts (Pa.), 106; kettles set in brick in a print works, *Dispatch Line v. Bellamy Mfg. Co.*, 12 (N. H.) 207; iron stoves fixed to the brick work of chimneys, *Goddard v. Chase*, 7 Mass. 452; fixed tables in a mill, *Sands v. Pfeiffer*, 10 Cal. 257; blower and pipe conveying air to a forge, *Alvord Mfg. Co. v. Gleason*, 36 Conn. 86; a factory bell, *Ibid*; and *Weston v. Weston*, 102 Mass. 514.

⁴ *McKeag v. Ins. Co.*, 81 N. Y. 38; *Hays v. Doane*, 11 N. J. Eq. 96.

⁵ *Pratt v. Whittier*, 58 Cal. 126; *Keller v. Keller*, 81 N. J. Eq. 191; and see *Johnson v. Wiseman*, 4 Met. (Ky.) 357; *Smith v. Commonwealth*, 14 Bush. (Ky.) 81.

⁶ *Keller v. Keller*, 81 N. J. Eq. 191.

⁷ *Philbrick v. Emry*, 97 Mass. 134.

⁸ *Pratt v. Whittier*, 58 Cal. 126.

⁹ *Goddard v. Chase*, 7 Mass. 432; *Blethen v. Towle*, 19 Me. 252; *Stockwell v. Campbell*, 39 Conn. 362.

¹⁰ See *Towne v. Fisk*, 127 Mass. 125.

¹¹ *Petengill v. Evans*, 5 N. H. 54; *Pratt v. Whittier*, 58 Cal. 126.

¹² *Petengill v. Evans*, 5 N. H. 54.

¹³ *Peck v. Batchelder*, 40 Vt. 233.

¹ Bou. Law Dict., 593.

² *Tourtellot v. Phelps*, 4 Gray (Mass.) 378; *Kennard v. Brough*, 64 Ind. 23; *Lapham v. Norton*, 71 Me. 83; *Westgate v. Wixon*, 128 Mass. 804; *Alvord Manf. Co. v. Gleason*, 36 Conn. 86; *VanKuren v. R. R. Co.* 38 N. J. L. 165.

be such that it may be severed without physical or lasting injury to either.¹⁴

The mode of annexation, while of controlling efficacy, as between landlord and tenant, and, possibly, between executor and heir, is of comparatively small moment, as between vendor and vendee, the purposes of the annexation and the intent with which it was made being, in most cases, the important consideration.¹⁵

It is true the mode of annexation, in the absence of other proof of intent, may become controlling, as where it is in itself so inseparable and permanent as to render the article necessarily a part of the realty;¹⁶ and even in case of a less thorough method the manner of attachment may still afford convincing evidence that the intention was to make the article a permanent accession.¹⁷ Still, there is no universal test, and neither the mode of annexation or the manner of use can ever

be said to be entirely conclusive, the express or implied understanding of the parties being usually the pivot on which the question turns.¹⁸

The greatest difficulty in the application of the rules for determining fixtures occurs in the case of what may, under ordinary circumstances, be fairly classed as furniture; contrivances for heating and illumination. Lamps, chandliers, and gas fixtures, generally, are usually regarded as furniture. True, they are often sold with the house, which can hardly be said to be complete without them, but unless there has been a special agreement in regard to them they will not pass under the general clauses of the deed.¹⁹ Mirrors are ordinarily regarded only as furniture, nor will the fact that they are fastened to the walls for safety or convenience deprive them of their character as personal chattels and make them part of the realty;²⁰ but if they are set in the walls, with frames corresponding to the cabinet work, and their removal would leave the walls in an unfinished condition, the rule is otherwise.²¹ Portable hot-air furnaces have been held to come within the same rule,²² and would, doubtless, be governed by the same principles, but in this, as in every case involving the questions just discussed, the intention of permanent annexation must decide the matter, and where it appears that either gas fixtures²³ or furnaces²⁴ were considered as integral parts of the realty, and as such were to pass with the buildings, effect will be given to such intention, notwithstanding no mention has been made in the deed; and, generally, in all cases of doubt the rule for determining what is a fixture should be construed most strongly against the vendor.²⁵

It will, of course, be understood, that parties themselves may, by express agreement, fix upon chattels annexed to realty whatever

¹⁴ *Green v. Phillips*, 28 Gratt. (Va.) 752; *Smith v. Commonwealth*, 14 Bush. (Ky.) 81; *Parsons v. Copeland*, 38 Me. 537; *Keeler v. Keeler*, 81 N. J. Eq. 191; *Bishop v. Bishop*, 11 N. Y. 123; *Pea v. Pea*, 35 Ind. 387; *Phillipson v. Mullanphy*, 1 Mo. 620; *Cohen v. Kyler*, 27 Mo. 122.

¹⁵ *McRea v. Bank*, 66 N. Y. 489; *Wheeler v. Bedell*, 40 Mich. 693; *Richardson v. Borden*, 42 Miss. 71; *Eaves v. Estes*, 10 Kan. 814.

¹⁶ *Lyle v. Palmer*, 42 Mich. 314.

¹⁷ As, for instance, where the building is constructed expressly to receive the debatable articles, machinery, utensils, etc., and they could not be removed without material injury to the building; or, where the article would be of no value, except for use in that particular building, or could not be removed therefrom without being destroyed, or greatly damaged. *McRea v. Bank*, 66 N. Y. 489. A rule for determining whether or not a chattel is so annexed to the realty as to become a part of it is laid down by *Bartly, J.*, in *Teaff v. Hewitt*, 1 Ohio St. 511, as follows: "From the examination I have been enabled to give this subject, and a careful review of the authorities, I have reached the conclusion that the united application of the following requisites will be found the safest criterion of a fixture: 1, actual annexation to the realty, or something appurtenant thereto; 2, appropriation to the use or purpose of that part of the realty with which it is connected; 3, the intention of the party making the annexation to make the article a permanent accession to the freehold, this intention being inferred from the nature of the article affixed, the relation and situation of the party making the annexation, the structure and mode of annexation, and the purpose or use for which the annexation was made. This criterion furnishes a test of general and uniform application—one by which the essential qualities of a fixture can, in most instances, be certainly and easily ascertained, and tends to harmonize the apparent conflict in the authorities relating to the subject. It may be found inconsistent with the reasoning and distinctions in many of the cases, but it is believed to be at variance with the conclusion in but few of the well considered adjudications."

¹⁸ *Wheeler v. Bedell*, 40 Mich. 693; *Funk v. Brigaldi*, 4 Daly (N. Y.), 359.

¹⁹ *Vaughen v. Haldeman*, 33 Pa. St. 522; *Rogers v. Crow*, 40 Mo. 91; *McKeage v. Ins. Co.* 81 N. Y. 8; *Jarechi v. Philharmonic Soc.*, 79 Pa. St. 403.

²⁰ *McKeage v. Ins. Co.*, 81 N. Y. 91.

²¹ *Ward v. Kilpatrick*, 85 N. Y. 413.

²² *Towne v. Flake*, 127 Mass. 125.

²³ *Pratt v. Whittier*, 58 Cal. 126.

²⁴ *Stockwell v. Campbell*, 39 Conn. 362; *Thielman v. Carr*, 75 Ill. 385.

²⁵ *Pratt v. Whittier*, 58 Cal. 385.

character they may see fit.²⁸ Hence, property which the law regards as fixtures may be by them considered as personal chattels, and that which in contemplation of law is regarded as personalty they may regard as a fixture and part of the realty, and whatever may be their agreement courts will enforce it.²⁷

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²⁸ Pratt v. Whittier, 58 Cal. 126; Bartholomew v. Hamilton, 105 Mass. 239.

²⁷ Smith v. Wagoner, 50 Wis. 155.

DRAM-SHOP LICENSES—VALIDITY ON QUO WARRANTO.

In most of the States, as in Missouri,¹ the statutes prohibit the maintenance of a dram-shop without a license from the State through its proper officer, and require certain things to be done before the officer shall issue the license (for example, requiring the presentation of a petition signed by a majority of property owners in the locality). These are jurisdictional facts, and although the officer may in addition be given a discretion which the court will not be at liberty to review,² yet, in respect of the jurisdictional facts, these are essential to the power of the officer to issue the license,³ and will be open to examination by the courts, and the license will not preclude that inquiry.⁴

But whether rightly or not, it is usually held that, in prosecutions for maintaining a dram-shop, the State will not be permitted, upon introduction of the license in defense, to show that it was issued without a compliance with and in violation of the statute, and the law is thus successfully evaded.

It is the purpose of this article to show that such license is a franchise; that an information in the nature of *quo warranto* is the proper remedy to test its validity, and if illegally issued the usurpation will result in a judgment of ouster and a fine.

An information in the nature of *quo warranto* permits inquiry into the very right to

the franchise exercised and is not stopped by mere paper title.⁵ This is elementary.

Unlike the ancient writ of *quo warranto*, now obsolete, the information in the nature of *quo warranto* is in form a criminal proceeding for the common law misdemeanor of usurping any office or franchise derivable from the State,⁶ and is not confined to such franchises as pertain to the royal prerogative.⁷ Upon conviction, a judgment of ouster is entered and a fine imposed upon the defendant.

Is a dram-shopkeeper's license a franchise?

Franchises are mentioned by Blackstone⁸ as the seventh sort of incorporeal hereditaments. He says they are various—almost infinite—and enumerates: markets, fairs, chases, parks,⁹ warrens, ferries,¹⁰ etc. In the great *quo warranto* case against the city of London in the reign of James II, Pollaxfen, the leading counsel for the city, said: "I agree that franchise is a large word, it is of like sense of liberty or privilege. Therefore, in *quo warranto*, franchises, liberties and privileges seem to be of the same sense."¹¹

"Franchises," said Chief Justice Taney, "are special privileges conferred by government upon individuals, and which do not belong to the citizens of the country generally of common right. It is essential to the character of a franchise that it should be a grant from the sovereign authority, and in this country no franchise can be held which is not derived from the law of the State."¹² It matters not whether privilege was one which could have been exercised at common law. The question arose in *People v. Utica*,¹³ where

¹ State ex rel. v. Jones, 16 Flor. 305; State ex rel. v. Woodbury, 14 Cal. 48; State ex rel. v. Vall, 53 Mo. 97-107; State ex rel. v. Coffee, 59 Mo. 59.

² King v. Stanton Cro Jac. 259; Comyn's Dig. tit. *quo warranto* a and e; Darley v. Regina, 12 Cl. & F., p. 532; King v. Nickolson, 1 Stra. 303; State ex rel. v. Mechan, 45 N. J. L. 194; People v. Utica Co., 15 Johns. 358; People v. Ridgley, 21 Ill. 69; Tanc. *quo warranto*, p 5; State ex rel. v. Jones, 16 Flor. 306. As to form of information see Tom. Law Dic. tit. *quo war*.

³ People v. Utica Co., 15 John. 358; People v. Ridgley 21 Ill. 69; State ex rel. v. Jones 16 Flor. 306.

⁴ 2 Blk. Com. 37.

⁵ Applied in Mayor v. Park Com., 44 Mich. 602.

⁶ Chilvers v. People, 11 Mich. 43.

⁷ 8 How. Sta. Tr., p. 1243.

⁸ Bank of Augusta v. Earle, 13 Pet. 585; Cooley Taxation, 406-7; Home Ins. Co. v. Augusta, 50 Ga. 537.

⁹ 15 John. 358; same ruling on injunction proceedings, where Chancellor Kent held that remedy was by

²⁸ 2 R. S. Mo. ch. 96.

²⁷ High Extra. & Leg. Rem., § 42, 46.

³ State & Hudson 18 Mo. App. 61.

⁴ Jolley & Faltz 34 Cal. 326; Clark & Holmes 1 Doug. (Mich.) 393. These apply with greater force to ministerial officers.

an information in *quo warranto* was tried for usurping the franchise of banking, the laws of New York having restrained unincorporated associations from engaging therein. But the court observed: "Formerly the right of banking was a common law right belonging to individuals, and to be exercised at their pleasure. It cannot, however, admit of doubt that the legislature had authority to regulate, modify or restrain this right. This was done by the restraining act of 1804. * * * The right of banking by any company or association has, since the restraining act, become a franchise or privilege derived from the grant of the legislature, and subsisting only in such companies or association as can show such grant." So it is held that a pilot's license is a franchise, for the usurpation of which the information will lie.¹⁴

We, therefore, think it clear that one who assumes to maintain a dram-shop assumes to exercise a right, privilege and liberty which other citizens, by express provision of statute, are denied the right of exercising without special permission of the State. That such special right, which can only be exercised under express grant, is as much a franchise as the business of banking under the New York law, the privileges of pilot, or right to maintain a market, ferry, warren, or park for deer (incidents of the "Forest Laws") at common law.¹⁵

The attorney-general has undoubted common law authority to exhibit the information, *ex officio*, without leave of court first had, and in most of the States the supreme court is given original jurisdiction.¹⁶

From the language employed by Mr. High at one place in his work on Extraordinary Legal Remedies, it would seem that the operation of the modern information in *quo warranto* was confined to usurpations, misuser or non-user of a public office or corporate franchise;¹⁷ but the succeeding pages show that

information in *quo warranto*. Atty-Gen. v. Utica Co., 2 Johns. Ch. 371.

¹⁴ State *ex rel.* v. Jones, 16 Flor. 306; State *ex rel.* v. Woodbury, 14 Cal. 43.

¹⁵ Austin v. State, 10 Mo. 592; State v. Hudson, 78 Mo. 304.

¹⁶ Tancred *Quo War.*, 12-15; State v. Ins. Co., 8 Mo. 331. Under statutory provision in most of the States the circuits' attorney may exercise the like authority: State *ex rel.* v. Lawrence, 38 Mo. 538; State v. Bernondy, 36 Mo. 279.

¹⁷ High Extra. Leg. Rem., § 591.

the observation was limited to proceedings instituted under the statute of 9 Anne, ch. 20. The authorities are numerous and uniform, that corporate franchises are not the only ones cognizable on such informations.¹⁸ For a proper appreciation of the authorities on informations in *quo warranto*, it must be borne in mind that the proceeding was not of statutory but common law origin, and was founded upon the alleged misdemeanor of usurping a privilege which could not be exercised without authority of the crown or parliament.¹⁹ The clerk or master of the crown office, like the attorney-general, had the right to file such information, *ex officio*, upon the suggestion of private persons, but having abused that discretion by the procurement of "malicious and contentious persons," the statute of 4 and 5 W. & M., ch. 18, prohibited him from exhibiting informations of any kind, without leave of court, and required the prosecutor in all instances to enter into a recognizance for costs. The attorney-general's power remained untouched. In the exercise of the discretion then lodged with the court, the rule was adopted that the application for leave would be denied where no public interest was involved;²⁰ but where the usurpation worked injury to private right, it became a proper cases for the exercise of discretion, and leave would be granted.²¹

The statute of 9 Anne, which has been reenacted in the various States, was designed, says the preamble, to render more speedy and effectual the remedies by writs of *mandamus* and informations in *quo warranto*, for the more easy trying and determining the rights of offices and franchises in corporations and boroughs. It provided that informations in such cases might be exhibited by leave of court by the court's officer (not the attorney-general who possessed the power, *ex officio*), at the relation of the person desiring to prosecute the same, and who should be mentioned as relator.²²

¹⁸ See citations in notes 5, 6, 7 and 8.

¹⁹ Tanc. Quo War., 5; Cole Crim. Inf., 112, see also p. 2.

²⁰ Cole Crim. Inf., 117-119; Tanc. Quo War., 6-10, 13.

²¹ Rex v. Mayor of Hartford, 1 Ld. Ray. 426; also reported in 1 Salk. 374; 12 Mad. 226; Buller's Nisi Prius, 208; Tanc. Quo War., 22-50.

²² Cole Crim. Inf., 127.

A clear and distinct remedy was thus afforded private persons for usurpations of the character mentioned in the statute, by information in the nature of *quo warranto*;²² but in other respects the common law limits for the application of such informations continues, and the common law jurisdiction remains.²⁴

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²² Tanc. Quo. War., 10-17; Cole Crim. Inf., 118, 114, 122, *et seq.*

²⁴ Tanc. Quo War., 13, 18, *et seq.*

ASSIGNMENT—OF PART OF A DEMAND— AT LAW—IN EQUITY—INSOLVENT LAWS.

JAMES v. CITY OF NEWTON, AND ROYAL GILKEY, ASSIGNEE, IN INSOLVENCY.*

Supreme Judicial Court of Massachusetts. September 8, 1886.

1. At law, a debtor cannot be compelled to pay an entire debt in parts, either to the creditor or to assignees of the creditor, unless he promises so to do.

2. But it seems that it has not been decided in this State that there cannot be an assignment of a part of a fund or debt which will constitute an equitable lien or charge upon it, and which will be enforced in equity against the debtor or person holding the fund. That the debtor is a municipality makes no difference.

3. In a suit in equity, where the debt remained unpaid, and the debtor in its answer asked the court to determine the rights of different claimants to the fund for its payment, and a part thereof had been assigned by the creditor by an order in writing, such assignment not being in fraud of the insolvent law: *Held*, that the debtor should be decreed to pay to the payee specified in the creditor's order the portion of the money due from it specified therein, and to pay the remainder thereof, after deducting its costs, to the assignee in insolvency of the creditor.

In equity. Reserved for the full court.

Bill in equity by Edward B. James, setting forth that one William H. Stewart, on August 14, 1883, entered into a contract in writing with the city of Newton to build a school house for said city; that Stewart thereupon entered upon the performance of his part of the contract, and had nearly fulfilled the same, when, becoming financially embarrassed, on June 13, 1884, a meeting of his creditors was held, and they voted to accept the offer of Stewart, to-wit: the sum of twenty cents on the dollar, in full settlement of their respective claims; that on June 21, 1884, for the purpose of enabling him to carry out his said contract with said city, and to fulfill his agreement with the said several creditors, the said Stewart applied to the said James for a loan of money; whereupon, the said James, in good faith and for the purpose aforesaid, let him

have a certain sum, to-wit: \$575, and took an assignment, by the terms of which, "in consideration of \$600 to be paid by Edward B. James, of Cambridge," said Stewart did "sell, assign, transfer and make over to the said James the sum of \$600, now due and to become due and payable to me from the city of Newton * * * under and by virtue of a contract between the said city and myself, for building a grammar-school house, dated August 14, 1883. It is agreed that said sum of \$600 shall be paid out of the money reserved as a guaranty by said city, and at the time the same would become payable to me according to the terms of said contract, and that I will finish the said building, and perform my part of said contract, according to its terms." Immediately after the taking of the assignment, the said James notified the city of Newton.

The bill further sets forth that June 26, 1885, the said Stewart, by reason of the refusal of certain creditors, to the amount of about \$3,000, to accept the said twenty cents on a dollar, filed a petition in insolvency in the county of Middlesex, and on July 10, following, said Royal Gilkey was duly elected assignee of said Stewart; that before and after the filing of his said petition, said Stewart expended the greater portion of said \$575 in the further completion of his said contract with said city, and made a proper and legitimate use of all said sum; that at the time of filing said petition there was due said Stewart under said contract the said sum of \$600 or more, though not then payable; that after the said Gilkey was appointed assignee he substantially completed the said contract with the city of Newton, whereby, under said contract, there became due the sum of \$3,338 or thereabouts, the most of which sum had been paid to said Gilkey as assignee, the said city reserving, on account of this assignment, a sum sufficient to pay the same; that the said city has been ready and willing to make a severance of the sum due under said contract, to pay the said James the amount of the assignment, and the said Gilkey the balance, if it could legally do so; but has been forbidden so to do by said Gilkey, who, as assignee aforesaid, claimed the whole amount due under said contract, and had begun a suit at law therefor, which was pending at the time of bringing this bill. The prayer of the bill was, that the suit at law pending between said Gilkey, as said assignee, and said city of Newton, be stayed to await the determination of this suit; that the said city of Newton be enjoined from payment of the said sum of \$600 to the said Gilkey, and that the said sum of \$600 be decreed to be paid to the plaintiff by the said city of Newton.

The defendant city of Newton in its answer stated that it was and always had been ready and willing to pay said balance to such person or persons as should be justly entitled to receive the same, whether said plaintiff or said Gilkey, as such assignee. The defendant also prayed that

* S. C., 2 New England Reporter, 820.

said plaintiff and said Gilkey might interplead, and settle and adjust their demands between themselves.

It was agreed that the plaintiff James, and Wm. H. Stewart, at the time of the execution of the assignment or order, knew that said Stewart was actually insolvent and had called a meeting of his creditors, and that they had voted, or a majority of them, to accept twenty cents on the dollar of their claim; and said Stewart represented to said James that he was obtaining this money to assist him to complete the contract and to effect the composition of twenty cents on the dollar, and assured him that he could do so. No action or vote was ever had or taken upon said assignment by the city of Newton, by the city council, or either branch thereof, by any committee, or by any person authorized to bind the city. The assignee Gilkey, when he was appointed, had substantially no funds of the estate of said Stewart in his possession, and, in order to complete said contract, expended about \$1,200 of his own funds in labor and material in finishing the building, and paid off out of the funds in the hands of the city, eventually paid him, mechanics' liens thereon amounting to about \$500, besides. Said James actually paid and loaned said Stewart the sum of \$575 at the time of the execution of said assignment, which was the sum agreed upon between the two.

The case, after hearing in the superior court before Knowlton J., was reserved for the consideration of the full court.

Mr. C. C. Powers, for complainant; *Mr. W. B. Durant*, for defendant Gilkey, assignee; *Mr. W. Slocum*, for defendant city of Newton.

FIELD, J., delivered the opinion of the court:

The assignment in this case is a formal assignment for value of "the sum of \$600, now due and to become due and payable to me" from the city of Newton, under and by virtue of a contract for building a grammar-school house, and it is agreed that this sum "shall be paid out of the money reserved as a guaranty by said city," and the assignee is empowered "to collect the same."

There is no doubt that it would operate as an assignment, to the extent of \$600, if there can be an assignment, without the consent of the debtor, of a part of a debt to become due under an existing contract; and the cases that hold that an order drawn on a general or a particular fund is not an assignment *pro tanto*, unless it is accepted by the persons on whom it is drawn, need not be noticed. That a court of law could not recognize and enforce such an assignment except against the assignor, if the money came into his hands, is conceded. The assignee could not sue at law in the name of the assignor, because he is not an assignee of the whole of the debt. He could not sue at law in his own name, because the city of Newton has not promised him that it will pay him \$600. The \$600 is expressly made payable "out of the money reserved as a guaranty by said

city," and, by the contract, the balance reserved was payable as one entire sum; and at law a debtor cannot be compelled to pay an entire debt in parts, either to the creditor or to assignees of the creditor, unless he promises to do so. Courts of law originally refused to recognize any assignments of choses in action made without the assent of the debtor, but now, for a long time, they have recognized and enforced assignments of the whole of a debt by permitting the assignee to sue in the name of the assignor, under an implied power, which they held to be irrevocable. Partial assignments such courts have never recognized, because they hold that an entire debt cannot be divided into parts by the creditor without the consent of the debtor. It is not wholly a question of procedure, although in common-law procedure is not adapted to determining the right of different claimants to parts of a fund or debt. The rule has been established, partially at least, on the ground of the entirety of the contract, because it is held that a creditor could not sue his debtor for a part of an entire debt; and if he brought such an action and recovered judgment, the judgment was a bar to an action to recover the remaining part. There must be distinct promises in order to maintain more than one action. *Warren v. Comings*, 6 Cush. 103.

It is said that in equity there may be, without the consent of the debtor, an assignment of a part of an entire debt. It is conceded that as between assignor and assignee there may be such an assignment. The law, that if the debtor assents to the assignment in such a manner as to imply a promise to the assignee to pay to him the sum assigned, then the assignee can maintain an action, rests upon the theory that the assignment has transferred the property in the sum assigned to the assignee, as the consideration of the debtor's promise to pay the assignee; and that by the promise the indebtedness to the assignor is *pro tanto* discharged. It has been held by courts of equity, which have hesitated to enforce partial assignments against the debtor, that if he brings a bill of interpleader against all the persons claiming the debt or fund, or parts of it, the rights of the defendants will be determined and enforced, because the debtor, although he has not expressly promised to pay the assignees, yet asks that the fund be distributed or the debt paid to the different defendants, according to their rights as between themselves and the rule against partial assignments, established for the benefit of the debtor. *Supt. of Public Schools v. Heath*, 15 N. J. Eq. 22; *Fourth Nat. Bank v. Noonan*, 14 Mo. App. 243.

In many jurisdictions courts of equity have gone further, and have held that an assignment of a part of a fund or debt may be enforced in equity by a bill, brought by the assignee against the debtor and assignor, while the debt remains unpaid. The procedure in equity is adapted to determining and enforcing all the rights of the

parties; and the debtor can pay the fund or debt into court, have his costs, if he is entitled to them, and thus be compensated for any expense or trouble to which he may have been put by the assignment. But some courts of equity have gone further, and have held that, after notice of a partial assignment of a debt, the debtor cannot rightfully pay the sum assigned to his creditor, and if he does, this is no defense to a bill by the assignee. The doctrine, carried to this extent, effects a substantial change in the law. Under the old rule, the debtor could with safety settle with his creditor and pay him, unless he had notice or knowledge of an assignment of the whole of the debt; under this rule he cannot, if he had notice or knowledge of an assignment of any part of it. It may be argued that if a bill in equity can be maintained against the debtor by an assignee of a part of the debt, it must be on the ground, not only that the plaintiff has a right of property in the sum assigned, but also that it is the debtor's duty to pay the sum assigned to the assignee; and that if this is so it follows that after notice of the assignment the debtor cannot rightfully pay the sum assigned to the assignor. The facts of this case, however, do not require us to decide whether a bill can be maintained after the debtor has paid the entire debt to his creditor, although after notice of a partial assignment.

The city of Newton in its answer says, that it "is willing to pay said balance to such person or persons as should be justly entitled to receive the same, whether said plaintiff, or said Gilkey, as such assignee;" and prays "that said plaintiff and said Gilkey may interplead, and settle and adjust the demand between themselves; and that the honorable court shall order and decree to whom said sum shall be paid." This is in effect asking the aid of the court in much the same manner as if the city of Newton had brought a bill of interpleader; and the proceedings are not open to the objection that the court is compelling the city of Newton to assent to an assignment against its will.

This is the first bill in equity to enforce a partial assignment of a debt which has been before this court. It has been often declared here that there cannot be an assignment of a part of an entire debt, without the assent of the debtor, but the cases are all actions at law, and in the majority of them the statement was not necessary to the decision.

In *Tripp v. Brownell*, 12 Cush. 376, the action was assumpsit to recover the amount of the plaintiff's lay as a mariner on a whaling voyage. The defense was an assignment of the balance due, made by the plaintiff and accepted by the defendants. This was held a good defense, the court saying: "It is in terms an assignment of the whole lay; it must be so by operation of law. It is not competent for a creditor to assign part of the debt or create any lien upon it. The debtor or holder of the assignable interest cannot, without his own

consent, be held legally or equitably liable to an assignee for part, and to the original creditor or another assignee for another part. *Mandeville v. Welch*, 5 Wheat., 277 (18 U. S. bk. 5, L. ed. 87); *Gibson v. Cooke*, 20 Pick. 45; *Robbins v. Bacon*, 3 Greenl., 346."

Gibson v. Cooke, *ubi supra*, was assumpsit brought in the name of Gibson, for the benefit of Plympton, to whom Gibson had given an order on the defendant to pay Plympton \$175.33, "as my income becomes due." The defendant held property in trust to pay over the "net proceeds once a quarter" to Gibson and others. The court held that it did not appear that, "at the time of the assignment, or at any period since, the whole amount due to Gorham Gibson would correspond with the amount of the draft," and that "a debtor is not to have his responsibilities so far varied from the terms of his original contract as to subject him to distinct demands on the part of the several persons, when his contract was one and entire."

Knowlton v. Cooley, 102 Mass., 233, was trustee process, and the trustee had in his hands \$147, due the defendant as wages, and the claimant held an order, given by the defendant before the wages were earned, for the payment to him of the defendant's wages, "as fast as they became due, to the amount of \$150," which the trustee had accepted. The court held that the order was an assignment of wages, and, not having been recorded, was invalid against trustee process by Stat. 1865, chap. 43, § 2. The court says that "the acceptance of the order by Barton (the trustee) does not change its character. His assent was necessary to give it any validity, even as an assignment. *Gibson v. Cooke*, 20 Pick., 16."

Papineau v. Naumkeag Steam Cotton Co., 126 Mass. 372, was an action of contract, and the court says: "The order of Couillard on the defendant, in favor of the plaintiff, was not an order for the payment of all that should be due the drawer at the several times when the installments were to be paid. It was not, therefore, an assignment of wages to the plaintiff, unless the defendant saw fit to assent to it as such, but a mere order for money." It is settled that an assignment of a part of a debt, if assented to by the debtor in such a manner as to imply a promise to pay it to the assignee, is good against trustee process or against an assignee in insolvency. *Taylor v. Lynch*, 5 Gray, 49; *Lannan v. Smith*, 7 Gray. 150.

In *Bourne v. Cabot*, 3 Met. 305, the court says: "The order of Litchfield on the defendant was a good assignment of the fund *pro tanto* to the plaintiff, and the express promise to the assignee to pay him the balance when the vessel should be sold constituted a legal contract." It is also settled that an equitable assignment of the whole fund in the hands of the trustee is good against trustee process, although the trustee has received no notice of the assignment until after the trustee process was served, and has never assented to it. *Wakefield v. Martin*, 3 Mass. 558; *Kingman v.*

Perkins, 105 Mass. 111; Norton v. Piscataqua F. & M. Ins. Co., 111 Mass. 532; Taft v. Bowker, 132 Mass. 277; Williams v. Ingersoll, 89 N. Y. 508.

Before, as well as since, Stat. 1865, chap. 43, § 1 (Pub. Stat. chap. 183, § 38), if the assignment was for collateral security, and the assignee was bound to pay immediately to the assignor, out of the sum assigned, any balance remaining after payment of his debt, it has been held that the excess above the debt for which the assignment was security was attachable by the trustee process. Warren v. Sullivan, 123 Mass. 283; Giles v. Ash, 123 Mass. 353; Macomber v. Doane, 2 Allen, 541; Darling v. Andrews, 9 Allen, 106. See Lannan v. Smith, 7 Gray, 150.

In Macomber v. Doane, *ubi supra*, the court says that "an order constitutes a good form of assignment, it being for the whole sum due or becoming due to the drawer, and it needs not to be accepted to make it an assignment." The order was for one month's wages, which, as subsequently ascertained, amounted to \$37.50; but it was given as security for groceries furnished and to be furnished, and on the day of the service of the writ, the defendant owed the claimant for groceries \$28.79, and the remaining \$8.71 was held by the trustee process. Some of these cases were noticed in Whitney v. Elliot Bank, 137 Mass. 351, and the court then declined to decide "whether in equity there may not be an assignment of a part of a debt."

Without considering the cases upon the effect of orders or drafts for money as constituting assignments of the debt or a part of it, it seems never to have been actually decided in this commonwealth that an assignment for value, of a part of an entire debt, is not good to the extent of the assignment against trustee process. In trustee process, the trustee of the defendant, if charged, is, by the statute, compelled to pay to the plaintiff so much of what he admits to be due to the defendant as is necessary to satisfy the plaintiff's judgment; and as an entire debt may thus be divided, it seems equitable that assignees of a part of the debt should be admitted as claimants, and this is in effect done when the assignment is as collateral security.

Palmer v. Merrill, 6 Cush. 282, was assumpsit against the administrator of Spaulding, who had caused his life to be insured payable to himself, his executors, administrators or assigns, and he, "by a memorandum in writing, indorsed on the policy, for a valuable consideration, assigned and requested the insurers to pay the plaintiff the sum of \$400, part of the sum insured by the policy, in case of loss on the same, of which assignment and request the insurers on the same day had due notice." "The policy with this indorsement thereon remained in the custody of Spaulding until his decease," and came into the hands of the administrator of his estate, who collected the whole amount of the insurance, and represented the estate insolvent; and the question was

"whether the case shows an assignment which vested any interest in the policy, legal or equitable, in the plaintiff." The court held that it did not. The court say: "According to the modern decisions, courts of law recognize the assignment of a chose in action, so far as to vest an equitable interest in the assignee, and authorize him to bring an action in the name of the assignor, and recover judgment for his own benefit. But in order to constitute such an assignment, two things must first concur: first, the party holding the chose in action must by some significant act express his intention that the assignee shall have the debt or right in question, and, according to the nature and circumstances of the case, deliver to the assignee or to some person for his use, the security, if there be one, bond, deed, note or written agreement upon which the debt or chose in action arises; and, secondly, the transfer shall be of the whole and entire debt or obligation of which the chose in action consists, etc.;" that "it appears to us that the order indorsed on the policy, and retained by the assured, falls of amounting to an assignment in both these particulars," and that an order "for a part only of the fund or debt is a draft or bill of exchange, which does not bind the drawee, or transfer any proprietary or equitable interest in the fund until accepted by the drawee. It, therefore, creates no lien upon the fund. Upon this point the authorities seem decisive. Welch v. Mandeville, 1 Wheat. 233 (14 U. S. bk. 4, L. ed. 79); s. c., 5 Wheat. 277 (18 U. S. bk. 5, L. ed. 87); Robbins v. Bacon, 3 Greenl. 346; Gibson v. Cooke, 20 Pick. 15."

Welch v. Mandeville, *ubi supra*, was an action of covenant broken, brought by Prior, in the name of Welch, against Mandeville, who set up a release by Welch; to which Prior replied that Welch, before the release, had assigned the debt due by reason of the covenant to him, of which the defendant had notice. The court considers the effect of certain bills of exchange, and says: "But where the order is drawn, either on a general or a particular fund, for a part only, it does not amount to an assignment of that part, or give a lien against the drawee, unless he consents to the appropriation, by an acceptance of the draft," etc.; that "a creditor shall not be permitted to split up a single cause of action into many actions without the assent of his debtor," and that "if the plaintiff could show a partial assignment to the extent of the bills, it would not avail him in support of the present suit."

The equitable doctrine now maintained by the Supreme Court of the United States, is shown by Wright v. Ellison, 1 Wall. 16 (66 U. S. bk. 17, L. ed. 555); Christmas v. Russell, 14 Wall. 70 (51 U. S. bk. 20, L. ed. 762); Trist v. Child, 21 Wall. 441 (88 U. S. bk. 22, L. ed. 623); and Peugh v. Porter, 112 U. S. 737 (bk. 28, L. ed. 859).

In Peugh v. Porter, that court ordered that a decree be entered that Peugh, subject to certain rights in the estate of Winder, was entitled to one-

fourth of a fund, by virtue of an assignment of one-fourth of a claim against Mexico, made before the establishment of the claim, from which the fund was derived, and before the fund was in existence, and declared the law to be that "it is indispensable to a lien thus created, that there should be a distinct appropriation of the fund by the debtor, and an agreement that the creditor should be paid out of it."

In *Robbins v. Bacon*, *ubi supra*, the order was for the payment of the whole of a particular fund, and was held good. The existing law of Maine is declared in *National Exchange Bank v. McLoon*, 73 Me. 498, by an elaborate opinion, and the conclusion reached is, that an assignment of a part of a chose in action is good in equity and against trustee process.

In England, it is held that the particular fund or debt out of which the payment is to be made must be specified in the assignment (*Percival v. Dunn*, 29 Ch. Div. 128); but the assignment of a part of a debt or fund is good in equity. The present case is like *Ex parte Moss*, L. R. 14 Q. B. D. 310, and a stronger case for the plaintiff than *Brice v. Bannister*, L. R. 3 Q. B. D. 569, where, although the procedure was under the statute of 36 and 37 Vict., chap. 66, the foundation of the liability was, that the assignment was good in equity, and the case at bar is relieved from the difficulties which induced *Brett, L. J.*, in that case, to dissent, and *Brice v. Bannister* was affirmed in *Ex parte Hall*, L. R. 10 Ch. Div. 615. The present case also resembles *Tooth v. Hallett*, L. R. 4 Ch. App. 243, except that there the sums paid by the trustee for creditors in finishing the house exhausted all that became due under the contract. See also *Addison v. Cox*, L. R. 8 Ch. App. 76.

In *Appeals of the City of Philadelphia*, 86 Pa. St. 179, it is conceded that the rule, that an assignment of a part of a debt is valid, prevails in equity between individuals; but the court refuses to apply it to a debt due from a municipal corporation, on the ground that "the policy of the law is against permitting individuals by their private contracts to embarrass the principal officers of a municipality," (see *Geist's Appeal*, 104 Pa. St. 354); but there is no ground for any such distinction in this commonwealth.

In New York, the assignment of a part of a debt or fund is good in equity (*Field v. Mayor*, etc., 2 Selden, 179; *Risley v. Phoenix Bank of N. Y.* 318); and the same doctrine is maintained in other States. *Daniels v. Meinhard*, 53 Ga. 359; *Etheridge v. Varnoy*, 74 N. C. 809; *Lapping v. Duffy*, 47 Ind. 51; *Fordyce v. Nelson*, 91 Ind. 447; *Bower v. Hadden Blue Stone Co.*, 30 N. J. Eq. 171; *Gardner v. Smith*, 5 Heisk. 256; *Grain v. Aldrich*, 38 Cal. 514; *Des Moines v. Hinkley*, 62 Iowa, 637; *Canty v. Latterner*, 31 Minn. 239; *First Nat. Bank v. Kimberlands*, 16 W. Va. 555.

From the exarigization of our cases it appears not to have been decided that there cannot be an

assignment of a part of a fund or debt which will constitute an equitable lien or charge upon it, and will be enforced in equity against the debtor or person holding the fund. *Palmer v. Merrill*, *ubi supra*, may well rest upon the first reason given for the decision. See *Stearns v. Quincy Ins. Co.* 124 Mass. 63.

The decisions of courts of equity in other jurisdictions are almost unanimous in maintaining such a lien, where the assignment is for value, and distinctly appropriates a part of the fund or debt, and makes the sum assigned specifically payable out of it.

Without undertaking to decide what is not before us, and confining ourselves to the facts in the case, which are that the debt remains unpaid, and the debtor in his answer asks the court to determine the right of the different claimants, we think that there should be a decree that the city of Newton pay to the plaintiff \$600, and that the remainder of the sum due from the city, after deducting its costs, be paid to Gilkey, assignee.

The assignment was not made in fraud of the law relating to insolvency.

So ordered.

NOTE.—The reason why, at law, an assignment of part of a debt or demand is void unless it has been assented to, or ratified by the debtor is very obvious. The law requires of all parties to a contract due performance of their respective engagements, and it likewise excludes any obligation varying from the true intent and meaning of the contract. Mr. Justice Story says:¹ "He has a right to stand on the singleness of his original contract, and to decline any legal or equitable assignment by which it may be broken into fragments. When he undertakes to pay an integral sum to his creditor, it is no part of his contract that he shall be obliged to pay in fractions to any other persons." It is well settled that a creditor cannot split an entire demand into distinct parts and maintain separate actions at law on each. In such a case a recovery in one action bars the others,² and if he cannot do this himself, he cannot, by an assignment, enable others to do it.

If, however, the assignment of part of a demand is made with the knowledge and consent of the debtor, the assignee may sue upon it without making other holders of the demand parties to the suit.³ What constitutes such knowledge and consent may sometimes become a question. In a Massachusetts case,⁴ it was held that a check on a bank for part of the drawer's funds does not become an assignment until it has been presented to, and accepted by the bank, and that the assent by the cashier, when absent from the bank, will not validate the assignment. And if the assent and acceptance of part of a demand is conditional, dependent upon the happening of some future event, the assignment and acceptance were held equally void if the event did not occur.⁵

¹ *Mandeville v. Welch*, 5 Wheat. 286.

² *Smith v. Jones*, 15 Johns. 229; *Willard v. Sperry*, 16 Johns. 121; *Marzlou v. Poache*, 8 Cal. 536; *Herriter v. Porter*, 28 Cal. 385.

³ *Grain v. Aldrich*, 38 Cal. 514.

⁴ *Bullard v. Randall*, 1 Gray, 605.

⁵ *Lindsay v. Price*, 33 Tex. 280.

In Missouri, it has been held that where a claimant or a creditor assigns a portion of his demand without the consent of the debtor, the assignee cannot recover on the portion so assigned. The court goes further and holds, contrary to the usually received doctrine on the subject, that the rule applies as well in equity as at law; and still further, that if the demand is unliquidated, disputed, and in litigation, the assignor may disregard his assignment and compromise the whole claim.⁶ In support of the doctrine that the rule in question applies as well in equity as at law, the court cites and distinguishes several English cases, which are relied upon by Mr. Justice Story to support the precisely opposite doctrine.⁷ These cases, the Supreme Court of Missouri insists, do not sustain the dictum of the learned author. One case,⁸ the court says, was "more in the nature of an appropriation out of a particular fund than the assignment of a portion of a debt," and, further, that in that case the debtor not only received without objection a duplicate of the order, but paid a portion of the money to the assignee. In another case,⁹ the like facts appear. Lord Commissioner Eyre describes the transaction as an appropriation of a fund, and Lord Commissioner Ashurst says: "This is not a debt, but a standing authority to Everett to give the other parties the same remedy."

It is manifest, as the Supreme Court of Missouri insists, that these cases do not give any material support to the doctrine that a creditor may (in equity) divide his claim into as many parts as he pleases, even as many as there are dollars in the demand, assign each to a different person, and then "appeal to a court of conscience to countenance and enforce such oppressive and inequitable transfers."¹⁰ It must, however, be admitted that the authorities so profusely cited in the principal case would seem to establish the rule, unreasonable as it may seem, and that the Missouri ruling is not in accord with the current of authority.¹¹—
ED. CENT. L. J.

⁶ *Burnett v. Crandall*, 68 Mo. 410; See, also, *Love v. Fairfield*, 18 Mo. 301.

⁷ 2 Story Eq. Juris., § 1044.

⁸ *Lett v. Morris*, 4 Simons, 607.

⁹ *Smith v. Everett*, 4 Bro. Ch. 64.

¹⁰ *Burnett v. Crandall*, *supra*.

¹¹ See, also, on this subject, *Kirtland v. Moore* (N. J.), 1 Cent. Rep. 466; *Supt. Schools v. Heath*, 15 N. J. Eq. 22; *Shannon v. Hoboken*, 37 N. J. Eq. 123, 818.

MUNICIPAL CORPORATION—NEGLIGENCE FOR DANGEROUS CONDITION OF SIDEWALK—KNOWLEDGE OF POLICEMAN—EVIDENCE, PRIVILEGED COMMUNICATION, HOW WAIVED.

CARRINGTON V. CITY OF ST. LOUIS ET AL.

Supreme Court of Missouri, June 7, 1886.

1. *Negligence—Dangerous Condition of Sidewalk—Knowledge of City.*—While a city is liable for the negligent use of its property, and the duty and consequent liability to keep its sidewalks in a reasonably safe condition extends to those cases, where the unsafe condition is occasioned by persons other than its agents and officers, yet, before a recovery can be had, it must be shown that the city had notice of the defect, or ought to have known of it, by the exercise of reasonable care and watchfulness.

2. *Knowledge of Defect—Lapse of Time as an Element—When Question for Jury.*—Negligence in not knowing of a defect may be shown by circumstances, including the lapse of time during which the defect existed, and where the injury is occasioned by the plaintiff falling into certain iron trap-doors, covering a cellar-way opening into a building, which are allowed to stand open for four or five hours, and where it appears that the sidewalk in that particular place is much resorted to for travel, it is proper to submit the question of negligence to the jury.

3. *Agents and Officers—Policeman in City of St. Louis are—Their Knowledge, Knowledge of City.*—Under the Act of the general assembly, establishing a board of police commissioners in the city of St. Louis (chap. 6, appendix to vol. 2, R. S. 1879, Mo.), consisting of five members, where four are appointed by the governor of the State, and the mayor of the city is *ex officio* a member of such board, and where the members of the police force are appointed by such board, who are under its exclusive control, and not subject to interference of the municipal assembly of said city, such police force constitutes a department of the city government, and the policemen are agents or officers of the city, and their knowledge is knowledge of the city. *Attwater v. Mayor of St. Louis*, 31 Md. 463, distinguished.

4. *Negligence—Liability of City for Negligence of its Officers.*—A municipal corporation is not liable for the wrongful and negligent acts of its police, or other officers in the execution of the powers conferred upon the corporation or officers for the public good, and not for private corporate advantage, unless made so by statute law, expressly or by implication.

5. *Evidence—Physician and Patient Privileged Communications—How Waived.*—A statute which provides that a physician and surgeon shall be incompetent to testify as to information acquired from the patient in his professional capacity (R. S. Mo., 1879, § 4017), is for the protection of the patient, and may be, and is waived, by the latter by calling the physician to testify as to information thus acquired.

O. G. Hess, for respondent; and Leverett Bell, for the city, appellant.

BLACK, J., delivered the opinion of the court:

The plaintiff, a minor, brought this suit by his next friend to recover damages for injuries sustained by falling against iron-trap-doors in a cellar-way in the city of St. Louis. The doors covered a cellar-way opening into a building used and occupied by the police commissioners as a police station. The defendant Balte, who was a member of the police force, opened the doors, painted them, propped them open with a stick, and left them in that condition to dry. Plaintiff fell upon them and received severe injuries.

It is the duty of the city to keep its streets and sidewalks in a reasonably safe condition for persons traveling thereon with ordinary care and caution. This duty, and a consequent liability, extends to those cases where the obstruction or unsafe condition of the street is brought about by persons other than the agents of the city. *Bassett v. St. Joseph*, 53 Mo. 298; *Russell v. Columbia*, 74 Mo. 490. But in such case it devolves upon the plaintiff to show that the city had notice of the defect, or ought to have had knowledge thereof, by the use of reasonable care and watchfulness.

The court told the jury that Balte was not the agent of the city, and that his negligence was not its negligence, and left it to them to determine "whether the dangerous condition of the sidewalk and cellar-way was known to the city, or by the use of ordinary care might have been known to it in time to have the same safe, and thus prevent the injury."

Assuming that the policeman was not the agent of the city, and there is no evidence that any agent knew of the defect, obviously, then, under the principles of the law before stated, and the instruction which is in conformity therewith, the question is: Was there evidence entitling the case to go to the jury on the ground that the defendant should have known of the defect? Negligence in not knowing of the dangerous condition of the doors may be shown by circumstances, including the lapse of time during which the defect existed. Besides, the undisputed facts before stated, the evidence tends to show that the doors were seen open between one and two o'clock in the afternoon, and continued propped open till the boy got hurt, about half-past five o'clock of the same afternoon; that it was dark when the boy fell upon the doors, though the street lamps at that particular place and the gas jets at the station had not been lighted, and that the sidewalks of that particular place was much resorted to for travel, so much so that scarcely ten seconds of time intervened between the time when persons would pass and re-pass both day and night. The sidewalk was ten feet wide, and the door extended out from the building into the walk four feet eight inches. The evidence, we hold, fully justified the court in submitting the question to the jury. Much depends upon the surroundings in cases of this character, for what might be negligence in not knowing of a dangerous condition of a sidewalk at one locality in a city would not be at another. The walk was much used and resorted to, and that called for increased care on the part of the city.

But was Balte, the policeman, an agent or officer of the city of St. Louis? If he was not, it is by reason of the various special acts of the general assembly establishing a board of police commissioners within and for the city of St. Louis. (Chapter 6, appendix to vol. 2, R. S. 1879.) By these acts four of the commissioners are appointed by the governor. The mayor of the city is *ex-officio* a member of the board. The members of the police force are appointed by the commissioners, removed by them, and under their exclusive control, and not subject to the orders of, or interference by, the municipal assembly. The commissioners and the force under them are charged with such duties as are usually imposed upon public officers, and are commanded, among other things, to "protect the rights of persons and property," and to "prevent and remove nuisances on all streets, highways, waters and other places." The commissioners are required to make an estimate annually of the

amount of money necessary to enable them to discharge their duties and to certify the same to the municipal assembly, and that body is required to make an appropriation therefor, and the disbursing officer of the city is to make payment to the commissioners on their requisition. By a subsequent act, passed in 1865 (sections 20 and 22 of said chap. 6), the municipal assembly has power to increase the police force and to increase or diminish and regulate the pay of police upon the recommendation of the commissioners. By a still subsequent act, passed in 1873 (section 23 of chap. 6), the municipal assembly has "power to fix the salaries of the police force," not to exceed certain designated amounts. Section 33 of the same compiled laws (Vol. 2., p. 1535, R. S. 1879) is as follows: "The members of the police force in the city of St. Louis, organized and appointed by the police commissioners of said city, are hereby declared to be officers of the city of St. Louis, under the charter and ordinances thereby, and also to be officers of the State of Missouri, and shall be so deemed and taken to all courts having jurisdiction of offenses against the laws of the State, or the ordinances of the said city." All private watchmen, detectives, and policemen serving in the city are to obtain a license from the president of the commissioners.

It is plain from the provisions of the law that the police force constitutes a department of the city government. While these officers are State officers for some purposes, they are also city officers. They are none the less city officers because, of reasons deemed best to the legislature, they are under the control of the commissioners, and not the assembly. We see that by express law they are made city officers. No such declarations seem to have been made in the statute with respect to the board of police commissioners of Baltimore, under which the case of *Attwater v. The Mayor of, 31 Md. 463*, was decided. There it was held the city was not liable for a failure to remove a nuisance from a public street, because the power to remove the nuisance was lodged in the police and not in the city, and the police officers were held not to be city officers. The difference between the statute there and here is material. But though we must conclude that Balte was an agent of the city, yet it does not follow that the city is liable for all his negligent acts. The rule of law is well settled, that a municipal corporation is not liable in damages for the wrongful or negligent acts of its police or other officers in the execution of powers conferred upon the corporation or officers for the public good, and not for private corporate advantage, unless made liable by statute law, expressly or by implication. *Armstrong v. Brunswick*, 79 Mo. 319; *Kiley v. City of Kansas*, not yet reported; *Dill. Mun. Corp.* (3rd ed.) § 975; *Nusting v. St. Louis*, 44 Mo. 479. But we do not see how these principles of the law can aid the defendant

here, for it is the unquestionable duty of the city to keep its streets and sidewalks in a reasonably safe condition for persons traveling thereon, and it is liable in damages to one injured by reason of negligence in this behalf. Again, the city is liable for the negligent use of its property, the same as a private corporation. Dill. Mun. Corp. (3rd ed.) § 985.

The bill of exceptions in this case recites that it was shown by the defendant that the police station, the buildings, belonged to and was occupied by the board of police commissioners. We do not understand by this that the title to the property was in them, or that they could hold the title to real estate. The building was evidently furnished by or at the expense of the city of St. Louis. We conclude that as to the act in question Balte was the officer and agent of the city, and that knowledge of the condition of the trap-doors was notice to, and knowledge thereof, on the part of the city.

The statute which says a physician or surgeon shall be incompetent to testify concerning any information, which he may have acquired from any patient while attending him in a professional character (R. S. 1879, § 4017), does not create an absolute disqualification. The secrecy enjoined upon the physician and surgeon is for the protection of the patient, and may be waived. The patient does waive the privilege by calling the physician as a witness to testify as to information thus acquired. *Groll v. Tower* (S. C. Mo. not yet reported). There was therefore no error in allowing the surgeon to testify, should he be within the purview of the statute, a question which is not considered. The judgment is affirmed. All concur.

NOTE:—Municipal corporations are recognized as bodies exercising some of the functions of government, and as to such functions it is but proper that they should enjoy the same immunity from liability that the State enjoys. Since the theories of government differ, the interpretation of governmental functions must differ. At the same time a municipal corporation is endowed with powers whose exercise benefits only its citizens, and which are often very profitable to its treasury. As to such powers the municipality is a private corporation, as distinguished from the public at large, and should be subject to the same liabilities as other private corporations. Courts have endeavored to separate the public functions of a municipality from its private powers. Accordingly, it has been held, that, in the absence of a statute to the contrary, there is no liability in a municipality for its negligence or that of its agents. Where the duty to be performed is to be exercised for the benefit of the public generally, in which the municipality has no particular interest, and from which it derives no special benefit in its corporate capacity;¹ also where the law imposes the same duties on all similar corporations, and from which they derive no compensation or benefit in their corporate capacity;² or where they act in

their political, discretionary and legislative authority;³ or when acting in their governmental functions.⁴ Again, exemption has been asserted, on the ground that liability in such cases would be too onerous.⁵ On the other hand, municipal corporations have been held liable, because they were acting therein for purposes of private advantage and emolument, though the public may have derived a common benefit;⁶ or the duties were imposed by their consent, express or implied, or a special authority conferred at their request;⁷ or the burden was imposed in consideration of the privileges granted in the charter, while the means to perform the duty were placed at their disposal;⁸ or the corporation participated in or ratified, or derived a corporate advantage from the wrongful act.⁹

If the duties exercised are considered to be public, it is immaterial who appoints the officer, since in the discharge of such duties he is exercising the functions of the government, and cannot be considered as the agent of the municipality.¹⁰

Accordingly, they are exempted from all liability for the acts of their health officers and of all the employees thereof, or for any injury accruing from any of its agencies,¹¹ similarly relative to the fire department;¹² also relative to the police department in the preservation of order.¹³ They are also charged with the care and preservation of their streets, but in accordance with the distinctions drawn above, they should be exempt from all liability relative thereto, and some courts consistently so hold,¹⁴ but the authorities have so overwhelmingly adopted the other view that it may be considered to be the rule.¹⁵

Since all corporations must and can act only through agents, they should only be held liable for the negligence of such agents. If any one is injured by an obstruction placed in the streets by an officer of the city, or by one authorized by it to act in the matter, it is liable without notice to it;¹⁶ otherwise the city must have been notified of the existence of the nuisance and have had time to remove it. Actual notice is not necessary, when it is proved that the nuisance has existed so long that the city would have known it, if it

³ *Richmond v. Long*, 17 Grat. 375.

⁴ *Ogg v. City of Lansing*, 35 Iowa, 496.

⁵ *Wilcox v. Chicago*, 107 Ill. 324; *Jewett v. New Haven*, 38 Conn. 368.

⁶ *Bailey v. Mayor of New York*, 3 Hill (N. Y.), 581; *City of Navasota v. Pearce*, 46 Tex. 525; *Pittsburg v. Greer*, 22 Pa. St. 54; *Fennimore v. City of New Orleans*, 30 La. An. 124.

⁷ *Bigelow v. Inhab. of Randolph*, 14 Gray, 541.

⁸ *Weightman v. Corp. of Washington*, 66 U. S. 29; *Eastman v. Meredith*, 36 N. H. 284.

⁹ *Bryant v. City of St. Paul*, 33 Minn. 239.

¹⁰ *Maximilian v. Mayor*, 62 N. Y. 160; *Fisher v. Boston*, 104 Mass. 87; *City of Richmond v. Long*, 17 Grat. 375; *Ogg v. City of Lansing*, *supra*.

¹¹ *Grube v. City of St. Paul*, 33 Minn. 239; *Maximilian v. Mayor*, 62 N. Y. 160; *Condit v. Mayor*, 46 N. J. Law., 137.

¹² *Fisher v. Boston*, *supra*; *Howard v. San Francisco*, 51 Cal. 52; *Welsh v. Village of Rutland*, 56 Vt. 223; *Hafford v. City of New Bedford*, 16 Gray, 297; *Jewett v. New Haven*, 38 Conn. 368.

¹³ *Dill. Mun. Corp.*, § 975; *Elliott v. Philadelphia*, 75 Pa. St. 347; *Campbell v. City*, 53 Ala. 527; *Caldwell v. Boone*, 51 Iowa, 687.

¹⁴ *City of Detroit v. Blackeby*, 21 Mich. 84; *Pray v. Mayor*, 32 N. J. Law., 394; *City of Navasota v. Pearce*, 46 Tex. 525.

¹⁵ *Billings v. Worcester*, 102 Mass. 329; *Barnes v. Dist. of Col.*, 91 U. S. 551; *Kobs v. Minneapolis*, 22 Minn. 159.

¹⁶ *Russell v. Town of Columbia*, 74 Mo. 480.

¹ *Hayes v. Oshkosh*, 33 Wis. 314.

² *Oliver v. Worcester*, 102 Mass. 489.

had exercised reasonable care in the supervision of its streets.¹⁷

There is no rule of law as to the length of time that the nuisance must have existed. It is a matter for the jury.¹⁸ If, however, it has existed long enough to have become notorious, the city is presumed to have received notice thereof.¹⁹

The municipality is exempt from liability for its plan of street improvement, on the ground that its action is somewhat discretionary and judicial,²⁰ unless such plan is most glaringly dangerous and likely to produce injury. In case of doubt, the benefit thereof is given to the municipality.²¹ But for negligence of its agents in executing such plan it is liable. But to hold such corporations liable, the negligent parties must be their agents. 'Since the legislature has full control of such corporations, such agents may be appointed in any way the law provides, either by the municipality or by any other power.'²²

Though these parties may exercise powers usually exercised by the municipality, they are not agents thereof, unless the law makes them so.²³ Such a corporation is not liable for the negligences of one of its officers relative to duties specifically imposed by statute or such officer,²⁴ nor for negligences of its officers relative to duties imposed upon them by law not relating to such municipality.²⁵

It is well settled, that a municipality is liable for the negligent use of its own property, to the same extent as any other corporation or individual.²⁶

Municipal corporations have often been relieved from all liability for acts of their officers, because such acts were beyond their corporate powers, were *ultra vires*, yet, when such acts were fairly within their discretionary powers, or did not antagonize public duties and were expected to be profitable, the municipalities have been held liable therefor.²⁷

The courts do not harmonize on these subjects, and the only logical course seems to be to hold municipalities liable for all misfeasances and malfeasances, but not non-feasances, of all their authorized agents, and as legislation tends constantly more and more to the protection of the individual, rather than to that of the public, it is probable that such will be the result.

S. S. MERRILL.

WEEKLY DIGEST OF RECENT CASES.

ARKANSAS	12, 22, 33, 35
CONNECTICUT	13
ENGLAND	37
IOWA	4, 5, 16, 19, 25, 29
KENTUCKY	11
MAINE	6
MICHIGAN	2, 28, 24
NEBRASKA	10
NEW HAMPSHIRE	20, 21
NEW JERSEY	9, 28, 34
NEW YORK	14, 36
PENNSYLVANIA	7, 8, 17, 21
TEXAS	3, 15, 30
WISCONSIN	1, 18, 26, 27, 32

1. ACTION—*Survival*—*Ejectment*.—The action of ejectment does not survive at common law, or under the Wisconsin statutes, against the heirs of a deceased defendant, and an order reviving such an action cannot be sustained, in whole or in part, on the ground that one of the heirs purchased the land in controversy before the death of the original defendant, or because a claim for mesne profits is made by plaintiff, and one for money paid out for taxes and improvements by defendant. *Farrell v. Shea*, S. C. Wis., Oct. 12, 1886; 29 N. W. Rep. 634.

2. ASSIGNMENT FOR BENEFIT OF CREDITORS—*Sale—Mortgage*.—During the absence of the plaintiff from home, his son, who was a minor, sold a printing-press, and took the mortgage and notes securing the future payments in his own name. The son promised to transfer the notes and mortgage to the plaintiff, but neglected so to do. Subsequently a firm, of which the son was a member, failed, and they made an assignment for creditors' benefit. The assignee seized the printing-press, and foreclosed the mortgage, default having been made in its terms. The plaintiff brought suit to recover the press, and for the reformation of the notes and mortgage. *Held*, that he was entitled to the relief prayed for. *Watt v. Axford*, S. C. Mich., Oct. 21, 1886; 29 N. W. Rep. 693.

3. CARRIERS—*Ejectment of Passenger from Train—Duty of Passenger—Trial—Promise to Charge—Damages—Ejectment from Train—Eight Thousand Dollars not Excessive—Trial—Judge's Remark to Jury—Reference to Former Case—Appeal—Objections, when Raised—Language Used in Argument—Motion for New Trial—Charge—Request for Special Findings Necessary—Assumption Contrary to Testimony*.—A lady passenger who is on a wrong train by the fault of defendant's agent, and who is put off at night at a lonely place, from where she walks back to the next station, being afraid to remain there, is not precluded from recovering damages for injuries received and fright suffered in walking back to the station, by the fact that she was unwilling either to pay fare for being carried further on the train, or to remain at the place where she was put off until the arrival of a return train. A party is not entitled to rely on the promise of the judge to charge a principle of law, instead of framing a special charge himself, and asking the judge to submit it to the jury. A verdict for \$8,000 for damages for personal injuries received, and fright and mental anguish suffered, by a lady passenger, who, with two infant children, was put off from defendant's train on a dark night

¹⁷ *McLaughlin v. City of Corry*, 77 Pa. St. 109; *Dooley v. City of Meriden*, 44 Conn. 117.

¹⁸ *Sheel v. City of Appleton*, 49 Wis. 125; *Colley v. Inhab. of Westbrook*, 37 Me. 181.

¹⁹ *City of Lincoln v. Woodward*, 27 N. W. Rep. 110; *Kelleher v. City of Keokuk*, 60 Iowa, 473; *Goodnough v. City of Oshkosh*, 29 Wis. 548; *Requa v. City of Rochester*, 45 N. Y. 129.

²⁰ *Urquhart v. City of Ogdensburg*, 91 N. Y. 67; *Dill Mun. Corp.*, §§ 494, 1051; *City of Lansing v. Trolan*, 37 Mich. 152; *Child v. City of Boston*, 4 Allen, 41.

²¹ 3 Thomp. Neg., 781, *et seq.*; *Gould v. City of Topeka*, 4 Pac. Rep. 823.

²² *Bryant v. City of St. Paul*, *supra*; *Barnes v. Dist. of Col.*, *supra*.

²³ *County Comms. v. Duckett*, 20 Md. 468.

²⁴ *Martin v. Mayor*, 1 Hill (N. Y.) 545; *Lorillard v. Town of Monroe*, 11 N. Y. 392.

²⁵ *Hickox v. Village of Plattsburgh*, 15 Barb. 427.

²⁶ *Bryant v. City of St. Paul*, *supra*; *Torney v. Mayor*, 13 Hun, 546; *City of Toledo v. Cone*, 41 Ohio St. 149; *Rochester W. L. Co. v. City of Rochester*, 3 N. Y. 463; *Eastman v. Meredith*, 36 N. H. 284.

²⁷ *Toledo v. Cone*, *supra*; *Moulton v. Scarborough*, 71 Me. 307; *City of St. Louis v. Steamboat Maggie P.*, 25 Fed. Rep. 302.

at a lonely place, not a regular station, and, being afraid to seek shelter there among negroes, walked back several miles to a station, through swamps and over a high railroad bridge, and was obliged to engage for a guide a negro, who insulted her, *held*, not excessive. See 64 Tex. 586. Judgment will not be reversed on account of a remark of the judge to the jury, that all questions raised by the demurrer have been settled by the supreme court in a companion case, where the pleadings were substantially the same as in the case on trial, such being the fact. Objections to the language used by opposing counsel in argument, must be presented by motion for a new trial in the trial court, and cannot be availed of for the first time on appeal. A charge which, as far as it goes, gives the law, is not objectionable upon the ground of not setting forth with sufficient fullness the conditions under which the verdict should be for defendant, or upon the ground of not entering sufficiently into the particulars which distinguish remote from proximate causes, if special charges are not asked for upon these matters. A railroad company, defendant in an action for damages for putting plaintiff off a train, is not entitled to have the judge charge that, if plaintiff was a trespasser, and refused to pay fare, she could be put off at any station, if plaintiff's uncontradicted testimony shows that she was on the train by an innocent and natural mistake. *International, etc. Co. v. Smith*, S. C. Tex., Oct. 19, 1886; 1 S. W. Rep. 565.

4. — *Goods Destroyed in Transit—Loss Caused by Owner's Act—Agreement that Owner Should Care for Goods—Code Iowa, § 1808—Constitutional Law—Commerce—Iowa Statute Prohibiting Carriers from Limiting Their Liability.*—A railroad company is not liable for the injury or destruction of property in the course of transportation, when the injury is occasioned by the owner's own act; and whether the act of the owner which caused the injury amounted to negligence or not is immaterial. Where the owner, by agreement with the carrier, undertook to care for the property in the course of transportation, and the property was destroyed through the act of the owner, the carrier is not liable for the loss, although the agreement between the owner and carrier may have been in violation of section 1808, Code Iowa, providing that "no contract, receipt, rule or regulation shall exempt any corporation engaged in transportation of persons or property by railway from liability of common carrier." A statute of Iowa prohibiting corporations engaged in transporting goods or passengers between different States from limiting their liability as common carriers, by contract, is not a regulation of commerce among the States. *Hart v. Chicago, etc. Co.*, S. C. Iowa, Oct. 11, 1886; 29 N. W. Rep. 597.

5. — *Of Passengers—Passenger Thrown from Railroad Car by Other Passengers—Judgment—Non Obstante—General Verdict—Opposed to Special Findings.*—A railway company is not liable for the death of a passenger where he was killed by being thrown from a platform car by other passengers, and there was nothing in the conduct of such passengers at the time the train left the last station from which the company could reasonably anticipate that an assault would be committed on the deceased by reason of furnishing such a car for transportation. A judgment *non obstante veredicto* should be granted where the

general verdict is in conflict with the special findings. *Felton v. Chicago, etc. Co.*, S. C. Iowa, Oct. 14, 1886; 29 N. W. Rep. 618.

6. *COMMERCIAL LAW—Promissory Note—Construction—Estoppel—Prior Suit Against Corporation.*—A promissory note, reciting "we" promise to pay, and signed, "D. P. Livermore, Treas. Hallowell Gas-light Co.," is the note of the individual, and not of the corporation. In an action on a note, the fact that the plaintiff had previously brought suit against a corporation as maker on the same note, and obtained a default, but not a judgment, will not estop him from maintaining the action if the defendant was not induced to change his position thereby, to his injury. *McClure v. Livermore*, S. C. Me., Oct. 1, 1886; 6 Atl. Rep. 11.

7. *CONSTITUTIONAL LAW—Regulation of Commerce—Foreign Corporation—License—Act June 7, 1879—Railroads—Through Transportation—Interstate Commerce.*—A foreign corporation is subject to payment of the license fee imposed in the sixteenth section of the act of June 7, 1879, for the privilege of having an office in this State. Such a license fee is not a tax upon either the business or property of corporations, and is not, as such, regulation of commerce within the prohibition of the federal constitution. Through transportation carried on in this State by virtue of contract with connecting railroad companies is not interstate commerce, in the sense in which the commercial clause of the federal constitution is to be interpreted, when its immunity is invoked by a body or persons so engaged. *Norfolk, etc. Co. v. Commonwealth*, S. C. Penn., Oct. 4, 1886; 6 Atl. Rep. 45.

8. *CONTRACT—Voidable—Incapacity—Intoxication—Voluntary—Public Sale—Real Estate—Bid.*—A contract made by a person so destitute of reason as not to know the consequences of his contract, though his incompetency be produced by intoxication, is voidable, and may be avoided by himself though the intoxication was voluntary, and not procured by the circumvention of the other party. A made a bid at a public sale of a piece of real estate, and shortly thereafter signed a contract, and paid earnest money on account. It was proved that, at the time the contract was signed, he was so intoxicated that he did not know what he was doing. He afterwards brought suit to recover his earnest money. *Held*, that his intoxication made the contract voidable, and that he was entitled to recover. *Bush v. Breinig*, S. C. Penn., Oct. 4, 1886; 6 Atl. Rep. 86.

9. *CORPORATIONS—Municipal Corporations—Contracts—Ultra Vires—City Charters—Power of Common Council to Supply Water.*—A city charter gave its common council power to provide by ordinance "for a supply of water for said city." A contract was made by virtue of an ordinance passed for the purpose. *Held*, to be enforceable, and not *ultra vires*. A provision in a city's charter that "money shall be raised, from year to year, for defraying the supplying the said city with water," does not prevent a contract being made for a term of years. When the legislature confers upon a common council, in an unqualified form, the power to provide the city with a supply of water, the court has no competency to circumscribe such a grant. *Atlantic City Water Works v. Atlantic City*, S. C. N. J., Oct. 20, 1886; 6 Atl. Rep. 24.

10. ———. *Defective Sidewalks — Notice — Negligence — Question for Jury — Contributory Negligence — Defective Sidewalk Constructed by Owner.* — Before a city or other municipal corporation will be liable for injuries caused by a defective sidewalk, it must be shown that the city by its officers had notice of the defect, or that such defect had existed so long and under such circumstances as to raise the presumption of knowledge. But where a portion of the sidewalk is in bad condition by reason of loose boards and defective construction, it is not necessary that the city or its officers should have notice that the particular board which caused the injury was loose. Notice of the general bad condition of the walk at that place will be held sufficient. In an action for damages resulting from personal injuries caused by the alleged negligence of the defendant, the question of contributory negligence on the part of the plaintiff is, ordinarily, one of fact for the jury to determine, under proper instructions from the court. Where a sidewalk is constructed on a public street or thoroughfare in a city by an abutting property owner, without any direction or order by the officers of such city, the fact of such construction by the property owner without authority would not relieve the city from liability for damage to persons injured thereon without fault, if after the construction of such walk the city assumed jurisdiction over it, and ordered repairs to be made prior to the accident. Nor would the city be released from liability, even though it did not assume jurisdiction, if the walk was in a public street in constant use, and in the line of other sidewalks, constructed by direction of the city, or over which it had control. *City of Plattsmouth v. Mitchell*, S. C. Neb. Oct. 6, 1886; 29 N. W. Rep. 598.

11. CRIMINAL LAW—*Homicide—Murder—Indictment—Evidence—Hearsay—Exclamations of By-standers—Deposition—Proceedings to Take—Commissions.*—An indictment for murder which falls to allege that the act of killing was feloniously committed, is fatally defective. The exclamations of by-standers on the spot where a murder has been committed, giving expression to the opinion that the appellant ought to be hung, are clearly hearsay, and not admissible in evidence. There is no inherent power in a common-law court to issue commissions to take depositions to be read in behalf of litigants in a civil or criminal case; the right to take and use depositions of witnesses in behalf of the defendant in a criminal case is statutory, and does not exist in cases not provided for by the legislature. *Kaelin v. Commonwealth*, Ky. Ct. App., Oct. 19, 1886; 1 S. W. Rep. 594.

12. DEED—*Construction—Conditions—Statute of Limitations—Equitable Lien—Courts—Probate Court—Jurisdiction.*—One who accepts a deed accedes to all its terms, and he cannot hold to the beneficial, and repudiate the burdensome, part of the conveyance. The seven-years' statute, which bars the recovery of possession of real estate, has no application to a recovery upon an equitable lien. The probate court has no jurisdiction to declare a lien upon land, or to render a personal judgment for the recovery of money. *Dimukes v. Halpern*, S. C. Ark., Oct. 2, 1886; 1 S. W. Rep. 564.

13. EASEMENT—*Sewer Through Adjoining Premises—Construction of Deeds—Tenants in Common—Estoppel—Contract—To Grant Easement—Acceptance of Deeds—Waiver of Breach.*—Where A, having contracted to convey to C a house adjoining land owned by himself and B, and the use of a sewer running from the house "through his other land adjoining," gave a deed merely referring to the sewer by reserving to himself "the right to connect sewer-pipes with a sewer," and afterwards A and B conveyed the adjoining land to D, "together with the right to connect sewer-pipes with the sewer," and "subject to such rights, if any, as said C has to maintain a sewer across said premises," held, that as against D and his grantees, C had no easement to maintain a sewer across the premises adjoining his house; for, if the deed of A purported to convey such an easement, yet B was not a party to it, and if he could be held bound on the theory of ratification or estoppel, such estoppel would not extend to his grantees. Where A agreed to convey to C a house, and the use of a sewer "through his other land adjoining," and in performance of that agreement gave a deed only referring to the sewer by reserving to himself "the right to connect sewer-pipes with the sewer," and, being in fact only tenant in common of said adjoining land with B, afterwards joined with him in a deed thereof to D, so that C acquired no permanent right to maintain the sewer, held, that there was a breach of A's contract with C, and that the acceptance of the deed by C did not preclude him from maintaining an action for such breach. *Butterfield v. McNamara*, S. C. Conn., June 18, 1886; 6 Atl. Rep. 188.

14. EMINENT DOMAIN — *Railroad — Statute—Nuisance.*—The statutory sanction which will justify an injury to private property must be express or must be given by clear and unquestionable implication from the powers expressly conferred, so that it can fairly be said that the legislature contemplated the doing of the very act which occasioned the injury. If a railroad company has the right, under an act of the legislature, to acquire land by purchase (for the accommodation of its business), it must secure such a location as will enable it to conduct its operations without violating the just rights of others. Assuming that the general power given by the Laws of 1848, chap. 143, § 6, to the New York & New Haven R. R. Co. to run its trains into New York City over the New York & Harlem Railroad includes, as incidental thereto, the power to purchase land for an engine house, it does not sanction the maintenance of a nuisance, injurious to private property, resulting from the building and use of an engine house. *Cogswell v. New York, etc. Co.*, N. Y. Ct. Appl. Oct. 5, 1886; 4 Cent. Reps. 225.

15. EXECUTORS AND ADMINISTRATORS—*Suit of Bond — Jurisdiction—Parties—Courts—Jurisdiction of Texas District Court—Probate Orders.*—A suit to recover from the sureties on the bond of an administrator may be brought in the district court, when the amount involved amounts to \$500, exclusive of interest, and, if the administrator is dead, and an administrator *de bonis non* has been appointed, he is plaintiff in the suit; but in case there is no such appointment, and there are no debts

the heirs or other distributees of the estate may institute the action. While the Texas constitution deprives the district court of power to revise the orders of the county court by an original proceeding, it does not thereby prohibit an exercise of its acknowledged jurisdiction, because the probate orders of the county court may be a necessary part of the pleadings and evidence in a cause. *Fort v. Fittes*, S. C. Texas, Oct. 19, 1886; 1 S. W. Rep. 563.

16. **FRAUD—Fradulent Representation to Secure Wife's Signature to a Mortgage of Homestead.**—The fact that a wife signed a mortgage of the homestead on misrepresentations to her by her husband as to the claim it was given to secure, but nothing was done to prevent her from reading it, or to mislead her in regard to its contents, does not affect the mortgage in the hands of the payee of the note secured by it, if he was innocent of the fraud. *Müller v. Wolbert*, S. C. Iowa, Oct. 19, 1886; 29 N. W. Rep. 620.
17. **HUSBAND AND WIFE—Separate Estate—Action—Averments—Assumpsit—Affidavit of Defense—Book-Account—Commissions—Error—Feme Covert.** An allegation that the debt contracted for any act done for a married woman was at her instance and request is not sufficient; it must be averred, in some suitable language, that the act done was a necessity. A copy of a book-account charging commissions for the sale of a house, and items of money paid, is not within the affidavit of defense law. The statute limiting time within which a writ of error may be sued out does not apply to a *feme covert*. *Fenn v. Early*, S. C. Penn., Oct. 4, 1886; 6 Atl. Rep. 58.
18. **INJUNCTION—To Restrain an Action for Trespass—*Lis Pendens*—Specific Performance of Contract.**—A husband, as agent of his wife, sold certain land, the purchaser taking possession, and a portion of the purchase money being given, the balance to be paid on a stated day, and a deed to be executed therefor. Shortly before said day the wife denied this agency, repudiated the sale, and about the time of the commencement of an action for the specific performance of the contract, and the filing of the *lis pendens*, made a deed to another person. Soon after, instigated by the second purchaser, one of the defendants entered the barn on this land, and had the first purchaser arrested for trespass, who tendered his purchase money, and demanded a conveyance. An injunction was sustained restraining the defendants from taking possession, and from prosecuting the trespass suits during the pendency of the other action. *Hadfield v. Skelton*, S. C. Wis., Oct., 12, 1886; 29 N. W. Rep. 639.
19. **INSURANCE—Fire Insurance—Action—Evidence—Value of Goods Destroyed—Trial—Complaint—Answer—Instruction—Action—Value of Property—Evidence—Policy—Waiver—Breach of Conditions—Knowledge of Agents—Appeal—Effect of Evidence.**—In an action against a fire insurance company, the admission of the statements in evidence of a soliciting agent, proved to be an officer and stockholder of the company, if error at all, is error without prejudice. In an action against a fire insurance company, a witness may testify as to the value of goods destroyed, designated by certain

terms, if he is familiar with the designation, without the objection of his being called on to construe the policy, or to determine what goods are covered by the description. Where a defense is pleaded in answer to a complaint, and the issue thereon is fairly and fully presented in an instruction, it is as well presented in that connection as though it had been found in the statement of the pleadings and issues preceding the instructions. If, in an action on a fire insurance policy, there is no controversy at the trial as to the value of the property, and the plaintiff testifies that she paid a certain sum for it, and its value is stated at that sum in the application for insurance, in the absence of any evidence or claims to the contrary, the jury may find its value in that sum. Where, in an action against a fire insurance company, the company pleads the existence of a mortgage, and the plaintiff replies that when the insurance was effected she fully explained it, and further replies that any breaches of the condition of the policy which may have occurred were waived by the act of the assistant secretary of the company in requiring and taking proof of loss, which he pronounces sufficient, at the same time informing plaintiff that the loss would be paid, she is entitled to recover in the action. In an action against a fire insurance company, the court need not instruct the jury as to agent's authority to do certain acts on which a claim of waiver is based, where the reply of plaintiff pleads a waiver, which is not denied. The forfeiture of a policy of insurance on account of a breach of its conditions may be waived, and when the waiver is made, it will have the same binding force it originally possessed; following *Vide v. Germania Ins. Co.*, 26 Iowa, 9. In an action against a fire insurance company, knowledge of facts possessed by an agent is chargeable to the company. The verdict of a jury will not be disturbed because the evidence may be meager, or does not satisfy the mind of the court. *Sitz v. Hawkeye Ins. Co.*, S. C. Iowa, Oct. 19, 1886; 29 N. W. Rep. 606.

20. ——— **Waiver—Limitation—Subsequent Agreement—"Vacant and Unoccupied"—Increase of Risk—Forfeiture—Question for Jury—Vacancy Unknown to Assured.**—In an action on a policy of insurance begun in the United States Circuit Court within the time limited in the policy for bringing suit, an agreement by the parties to enter an action in this court and prosecute it here, after the time limited in the policy has expired, is a waiver by the defendant of that limitation. A stipulation in a contract of fire insurance that the policy shall be void "if the building shall be occupied or used so as to increase the risk, or become vacant and unoccupied for a period of more than ten days, or the risk be increased by any means whatever," includes such a desertion of the premises and removal from them as would materially increase the risk; and the words "vacant and unoccupied" are equivalent in meaning. When the natural interpretation of the undisputed facts show that the insured building was "vacant and unoccupied," within the meaning of those terms as used in the policy, and there is no evidence to rebut or modify that conclusion, it is error to submit the question to the jury. If an insured building becomes "vacant and unoccupied," under the terms of the contract of insurance, by the removal of a tenant from it, without the knowledge of the assured, the increased risk is still "within the control of the assured," and his ignorance of the vacancy is no

excuse. *Moore v. Phoenix, etc. Co.*, S. C. N. H., July 30, 1886; 6 Atl. Rep. 27.

21. — *Life Insurance—Insurable Interest—Support—Amount—Balance—Estate of Insured—Public Policy—Speculation—Motive.*—Where one contracted to support another for life in consideration of a policy of insurance on the life of the latter for the benefit of the former, the party who furnished support had an insurable interest, like an ordinary creditor, for the just amount of his claim for support, the balance belonging to the estate of the insured. The rule of law respecting insurable interest being founded on considerations of public policy, it was error in the court to charge the jury that the question raised in the above state of facts was entirely one of fact, namely, whether it was a speculation on the life of the insured, or a *bona fide* transaction upon benevolent motives. *Siegrist v. Schmoltz*, S. C. Penn., Oct. 4, 1886; 6 Atl. Rep. 49.

22. *LAND—Public Lands—Title to—Presumption—Estoppel—Vendor and Purchaser—Exception to the Rule—Public Policy—Const. Ark. 1868—Act of Congress, May 20, 1862.*—The United States government is the original source of title to lands in Arkansas, and the presumption of law is that the title remains with the government until some other disposition of it is shown; and where a man sells land in that State, claiming to have derived it from the State upon a swamp-land grant, and at the same time, according to the books of the United States land-office, the land was vacant and subject to homestead entry under the federal laws, the presumption is that the grantor had no title, and a note given for the purchase money is void. The general rule that a purchaser of land entering into possession under his contract of purchase cannot, in an action to foreclose a vendor's lien, so long as he retains possession, deny his vendor's title, does not apply to proceedings to collect a note given for the purchase money of land bought from the plaintiff and subsequently entered as a homestead by a resident of Arkansas under the federal laws; such a contract being against the policy of the State constitution of 1868, and the act of congress of May 20, 1862. *Sherman v. Eakin*, S. C. Ark., Oct. 9, 1886; 1 S. W. Rep., 559.

23. *LANDLORD AND TENANT—Tenancy at Will—Notice to Quit—Ways—Ascertaining Road by Reference to Plat—Evidence.*—Where the defendant sold a house to the plaintiff, and reserved the possession and use thereof four months, as part of the consideration of the sale, but continued to occupy it after the expiration of that time without any special arrangement, the consent of the plaintiff to such occupation was implied, and the defendant became a tenant at will, entitled to three months' notice to quit, in the absence of an agreement to pay rent at shorter intervals, before action could be brought for possession. Where, on account of the washing away of the shore of a lake, a house had been twice moved back, and a controversy arose as to the ownership of the land on which it stood, which had been described with reference to a certain lake road, the location of which was in question, it was held that the plat, as filed with the register of deeds, should govern in determining where said road should be, unless the jury were satisfied that it was actually laid out at a different point from

that marked on the plat. *Hoffman v. Clark*, S. C. Mich., Oct. 14, 1886.

24. *MORTGAGE—Deed by Son-in-Law and Wife, Absolute on Its Face, to Father-in-Law—Evidence—Sufficiency of—Intention—Foreclosure—Consideration—Interest—Witness—Facts Equally within the Knowledge of Deceased—Declarations of Deceased Grantee.*—Where a son-in-law is indebted to a father-in-law, and executes to the latter, in his life-time, a deed of conveyance for certain property, in which the wife of the son-in-law unites, such conveyance, though absolute on its face, may be proved to be a mortgage, and his executors may file a bill in equity for a foreclosure of the same, and apply the proceeds to the payment of the debt. Evidence in this case examined, and held sufficient to show that the instrument was intended to operate as a mortgage. In a suit in equity to foreclose a mortgage, it is not necessary to show that any particular time was agreed upon when the mortgage was to be paid, nor to show what interest it was agreed the mortgagor should pay. In the trial of a suit in equity to foreclose a mortgage executed by a husband and wife to a mortgagee or grantee who has died, evidence of husband and wife, so far as it relates to facts equally within the knowledge of the deceased grantee when living, is not admissible under How. St., § 7545. Where a suit is brought by the executors of a grantee or mortgagee, to have a deed which is absolute on its face declared a mortgage, and to foreclose the same for the payment of the mortgage debt, the declarations of the grantee or mortgagee, made after the deed was made, of his intention to hold the property under the deed, or any facts tending to show after-intention, are only admissible in evidence, so far as they tend to prove the original intention at the time the instrument was made. *McMillan v. Bissell*, S. C. Mich., Oct. 11, 1886; 29 N. W. Rep. 737.

25. — *Prior Incumbrance—Indexing Record—Constructive Notice—Notice of Prior Incumbrance—Vendor and Vendee—Rescission of Sale of Land—Vendor Taking Timber Claim in Payment—Tender—Jurisdiction—Sale of Land.*—Where, at the time of recording a mortgage upon land, there was an agreement on record creating and reserving to the mortgagor's grantor, the former owner, a contingent interest in the land, and the mortgagor's name was indexed as grantor, and that of the former owner as grantee, held, that the record imputed constructive notice to the mortgagee of the existence of the agreement. Where a deed drawn January 5th was not fully executed till January 15th, and agreement reserving and creating in the grantor a contingent interest in the land referred to the deed as made on the 5th of January, both the deed and agreement having been recorded, held that, as there was but one deed from the grantor to the grantee on record, the agreement and deed appeared to be connected, and a subsequent mortgagee could not be heard to say that he had no notice of the agreement. In rescinding a sale of land, part of the consideration of which was a timber claim which proved to be not as represented, the vendor made the following tender: "I hereby tender back all the interest which I received from you in said timber claim." Held, that the tender was sufficient, and it was not necessary to tender a deed of the

land covered by claim, no title ever having passed from the United States. Part of the consideration on the sale of certain land was a timber claim assigned by the purchaser to the vendor. At the same time there was a written agreement between the parties that if the purchaser's representations to improvements, etc., upon said claim should prove untrue, that the trade might be rescinded, and vendor's deed canceled. The representations proved untrue, and the vendor began an action in equity to cancel the deed, and to quiet his title. *Held*, that the action was not a claim of forfeiture for breach of condition subsequent, but a claim of right of rescission, under an agreement, for a cause existing at the time of sale, and that equity had jurisdiction. *Paige v. Lindsey*, S. C. Iowa, Oct. 20, 1886; 29 N. W. Rep. 615.

26. NEGLIGENCE—Obstructing the Sidewalk—Injury to Pedestrian—Court and Jury—Contributory Negligence—Crossing Skid—Presumption.—Whether an obstruction to travel, along a street or sidewalk, as by placing a skid across the sidewalk to load merchandise from a store into a wagon, is reasonably necessary, is usually a question of fact for the jury; and where plaintiff seeks to recover for injuries received in attempting to cross such a skid, the merchandise to be loaded being alleged to to have been packed "in kegs of the capacity of about five gallons each," and "each package weighing less than fifty pounds," it cannot be held, as matter of law, that such use of the sidewalk was reasonable, and that, therefore, no cause of action is stated. In an action to recover for injuries received by plaintiff in crossing a skid placed across the sidewalk by defendants, the fact that plaintiff attempted to cross the skid does not raise a presumption of contributory negligence on his part. *Jochim v. Robinson*, S. C. Wis., Oct. 13, 1886; 29 N. W. Rep. 640.

27. — Railroad Crossing—Negative Testimony—Court and Jury—Looking and Listening for Train—Presumption—Flagman at Crossing—Evidence.—Where in an action against a railroad company to recover for the death of plaintiff's intestate, who was run over by a train of freight cars, which were backing over a street crossing after dark, it was claimed by defendant, and testified to by its witnesses, that the bell was rung from the front of the train, and switchman with a light guarded the crossing; but several witnesses testified for plaintiff that they saw the train cross the street, but did not see a light displayed on the crossing, or near the end of the train, although they could have seen it if there had been one, and other witnesses, although several hundred feet away, testified that they did not hear a bell rung; and the testimony of the train hands was lacking in precision as to just where the switchman was with the light when the train crossed the street, and was confused and contradictory as to the management of the train; and other evidence tended to support plaintiff's theory: *held*, that a verdict for defendant should not have been ordered by the trial judge. Although plaintiff's intestate, who was killed at a railroad crossing, must have known of the crossing, yet it cannot be conclusively presumed, from the fact of the accident, that she failed to look and listen as she should have done before attempting to cross, and so was guilty of contributory negligence. Although there is no

statute or ordinance upon the subject, the absence of a flagman at a railroad crossing may be shown in evidence, in an action to recover for an injury received at the crossing after dark, to be considered by the jury, in connection with all the circumstances of the case, upon the question of defendant's prudence or negligence in running a train at the time and place in question. *Hoye v. Chicago, etc. Co.*, S. C. Wis., Oct. 12, 1886; 29 N. W. Rep. 646.

28. PLEDGE AND COLLATERAL SECURITY—Note—Judgments—Mortgage—Foreclosure—Satisfaction of Debt.—K takes an assignment of a mortgage, paying therefor the principal sum for which the mortgage was given. He also pays off two judgments against the land covered by the mortgage; taking, as collateral security for the payment of the judgments, interest, and costs on the mortgage, a note given by E B, W B, and J S. J S died after K had recovered a judgment on the note. L the administrator of J S, by order of court, proceeded to sell the real estate; B, the complainant, purchasing. K realized from the land he held the mortgage against within \$450 of the full amount due him on mortgage and judgment. This \$450 was tendered him by L but K refused it, and issued execution against the lands bought by the complainant, and claims the full amount of the judgment; he holding that the agreement under which he accepted the collateral security being "security to a certain amount, not for a certain amount." *Held*, that upon payment of the \$450, the claim of K is satisfied, and that not even a technical use of the words "to" and "for" will bear the defendant's construction. *Burd v. Keyser*, Ct. of Chancery N. J., Oct. 13, 1886; 6 Atl. Rep. 18.

29. SALE—Action for Price of a Horse-Power—Rescission for Breach of Warranty to be Made in Reasonable Time—Trial—Effect of Accepting Judgment—One Note Where Suit is Brought on Two—Waiver of Appeal.—In an action for the price of a horse-power and separator, which were sold with the warranty that the machine was well made, of good material, and was of as light draught as any other machine in the market, the warranty to be in force for a year, the defendant cannot set up the defense of a breach of warranty where he had failed to notify the seller of a defect within the warranty, and to return the machine within a reasonable time after the discovery of it. A plaintiff who has brought suit on two promissory notes does not, when the defendant admits a liability on one, but pleads a defense against the other, by accepting the amount which is admitted to be due, waive his appeal from a judgment which is adverse to him on the other note. *Upton, etc. Co. v. Huiske*, S. C. Iowa, Oct. 15, 1886; 29 N. W. Rep. 631.

30. — Bill of Sale—Executory and Executed Contract—Consideration—Appeal—From Justice's Court—Jurisdiction of Supreme Court.—Where, by a written contract, one party sold for a certain sum a crop of cotton and agreed to deliver it at a stated place as fast as gathered, the contract was held executory as regards the delivery, but executed as to the sale of the cotton; and though the consideration named in the bill of sale was part of a sum owed by the vendor to the purchas-

ers, which it was agreed should thus be satisfied, the title of the latter was not affected by their failure to enter a credit therefor on their books. Objections cannot be heard in the supreme court for the first time to irregularities which may have occurred in perfecting an appeal from a justice's court to the district court. *Brewer v. Blanton*, S. C. Tex., Oct. 19, 1886; 1 S. W. Rep. 572.

31. — *Rescission — Fraud — Replevin — Assumpsit — Estoppel — Purchase from Fraudulent Vendee — Consideration — Antecedent Debt.* — On the rescission of a contract of sale on account of the vendee's fraud, the vendor is not precluded from maintaining an action of replevin against purchasers from the vendee, by his subsequently bringing an action of *assumpsit* against the vendor for the price of part of the goods not replevied, and taking judgment by default therein. A purchaser from a fraudulent vendee cannot retain the goods against the vendor, who rescinds the sale, when the only consideration for his purchase was the payment of an antecedent debt due from the vendee to him. *Sleeper v. Davis*, S. C. N. H., July 20, 1886; 6 Atl. Rep. 201.

32. — *Warranty — Breach — Promissory Notes.* — The plaintiff brought suit on two promissory notes, which with \$100 had been given for a self-binding harvester. The defendant alleged damages for a breach of the warranty, by the terms of which, if the machine was defective, the agent agreed upon prompt notice to repair it, or else to take it back and refund the purchase money and notes. The machine proved defective, after being twice repaired, and the plaintiff then refused either to repair it again or to return the \$100 and notes. Judgment for the defendant was affirmed, prompt notice of the failure of the machine having been given by him, and the defendant not having been charged with its acceptance because he kept it beyond the time defined in the warranty, for the purpose of giving it a new and fair trial after it was repaired. The notes were canceled by the effect of the judgment, notwithstanding there was appended to them a waiver of "all defenses." *Osborne v. McQueen*, S. C. Wis., Oct. 12, 1886; 129 N. W. Rep. 638.

33. TELEGRAPH COMPANIES — *Stipulation in Message — Statutory Penalty.* — A condition in a message, which stipulates that all "claims" for damages must be presented within sixty days after sending the message, does not include the statutory penalty allowed for negligent delivery of the telegram. *Western, etc. Co. v. Cobbs*, S. C. Ark., Oct. 9, 1886; 1 S. W. Rep. 558.

34. TRADE-MARK — *"Patent Roofing" — Good-Will — Estate of Decedent.* — Where one carried on the so-called business of "patent roofing" in connection with a worthless patent during his life-time, one of his administrators who continues it under that name after his death, for his own benefit, should not be held liable to the estate as for the use of a trade-mark or good-will belonging thereto, when there is no evidence that the intestate adopted the expression "patent roofing" as a trade-mark, or with any other intention than as a mere designation of the kind of business he was engaged in, or that the business has any special value; particularly when the administrators all jointly carried on the business for a time when

they should have sold it out if it was of any great value, and plaintiffs (defendant's co-administrators) then sold to him the machine and office furniture for a small sum, and rented him the office. *Fay v. Fay*, Ct. of Chancery, New Jersey, Oct. 18, 1886; 6 Atl. Rep. 12.

35. WATER AND WATER-COURSES — *Diversion — Deed — Right of Way — Damages — Railroad Company — Fences — Cattle-Guards — Common Law — Right of Way — Damages — Owner — Deed — Waiver.* — Where the diversion of a water-course is expressly authorized by the terms of a deed from the grantor of a right of way to a railroad company, the company is not liable for the consequential damages resulting therefrom. There is no principal of the common law which obliges a railroad corporation to fence its track, or to provide cattle-guards, where the line traverses improved land. In estimating the owner's compensation for a right of way in an action against a railroad company, the additional fencing rendered necessary by the building of the road is an element of the same; but when the owner conveys the right of way by agreement, he waives, in advance, all such damages, it being presumed that these are included in the purchase price of the land. *St. Louis, etc. Co. v. Walbrink*, S. C. Ark., Oct. 2, 1886; 1 S. W. Rep. 545.

36. — *Mill — Easement — Deed.* — Land, conveyed by a deed from one who had acquired the same under foreclosure, was described therein as bounded on one side by a certain creek; the bank of the stream along the deeded premises was high and precipitous; the water rights in the stream had for a long time been used by the owners of a mill property on the stream just below the deeded property, and no attempt to use the water power had ever been made by the occupants of the deeded property until a short time before the execution of the deed, when it became available to them through the destruction of the mill dam below. *Held* (a), that, in view of the location and physical condition of the deeded property, title was acquired only to a strip of land along the stream, with no rights in the lands under water, or in the water power; (b), that the owners of the mill property below should not be restrained from rebuilding their dam. *Hall v. Whitehall, etc. Co.*, N. Y. Ct. App., Oct. 5, 1886; 4 Cent. Rep. 222.

37. WILL — *Construction — Life Interest or Absolute Interest — Precatory Trust.* — Testator by his will, after giving certain real and personal property to his wife, gave to his brother T M in trust for his sisters M C, C M, and H M, 4000l. of his East India five per cent. railway shares, and his Scinde and Delhi Railway shares, "on condition that they will support M M. At the demise of either or any of the above, the survivor or survivors to receive the increased income produced thereby. They are hereby enjoined to take care of my nephew J T N C as may seem best in the future." *Held* (1), that a trust was created in favor of the three sisters of the capital of the funds absolutely as joint tenants, subject to the condition of their supporting M M; (2), that no precatory or other trust was created in favor of the nephew J T N C. *Re-Moore; Moore v. Roche*, Eng. Ct. App., 1886; 54 Law Times Rep., 231.

QUERIES AND ANSWERS.*

[Correspondents are requested to draw up their answers in the form in which we print them, and not in the form of letters to the editor. They are also admonished to make their answers as brief as may be.—Ed.]

QUERIES.

81. If the jury believe from the evidence that Mrs. —, for the purpose of influencing said testator in making his will, raised prejudices in his mind against those who would otherwise have been the natural objects of his bounty, and by contrivance kept him from intercourse with such persons to the end, that those prejudices or impressions which she knew he had thus formed to the disadvantage of such persons (if the jury so believe) might be removed, then the jury are entitled to consider these facts in connection with other facts in the case, in deciding the issue relative to undue influence. But such facts would not of themselves amount to such proof as the law requires of undue influence sufficient to invalidate the will.

The above instruction was given to the jury in a will case, and was objected to by the contestants. The verdict sustained the will. The Mrs. — was distantly related to testator, and testimony proved the testator to be blind, over 80 years of age and confined to his bed-room at time of making will, by which, relatives more nearly related than the Mrs. —, were excluded. Is the instruction correct? Cite authorities. J.

QUERIES ANSWERED.

Query 27. [28 Cent. L. J. 408].—A contracts to build a house for B, and in the contract there is a clause that A "will deliver the building free of mechanics' or other liens." What effect would such a clause have on material men, sub-contractors and day laborers? If B paid A in full, according to contract, and it turns out that A has not paid for all the material, and still owes sub-contractors and day laborers, could they, under above claim, file a lien on said building?

Answer.—The party inquiring does not state where, and under what law the question is to be answered. Under the Iowa law, it is clear that they would not be entitled to a lien. As the case of *Steward & Hayden v. Wright et al.*, 62 Iowa, 335, holds that sub-contractors who furnish labor or materials for the erection of a building, are required to take notice of the terms of the principal contract, and the owner is protected in making payments to the principal contractor in accordance with the terms of his contract, unless notified of claims for material or labor furnished before such payments are due. And 64 Iowa, 338, *contra* in Nebraska.

J. R. C.

RECENT PUBLICATIONS.

CRIMINAL BRIEFS.—By Wm. Henry Malone, of Asheville, North Carolina, author of "Real Property Trials." Baltimore: M. Curlander, Law Bookseller, Publisher and Importer. 1886.

This is a work on criminal law and procedure, which we regard as well worthy of commendation. The author says, that the object of his book is "to state concisely, and at the same time clearly and accurately, all principles of law generally arising in criminal cases," and concludes his preface by saying: "It is hoped that such a condensed presentation of the

law, applicable to those questions with which the emergencies of the profession are most likely to confront the practitioner, will be of service in the administration of justice."

From this statement, it is manifest that Mr. Malone has not attempted the impossible task of condensing into the compass of a single volume of less than five hundred pages the great body of the criminal law; but has made a judicious selection of those questions which are most likely to "confront the practitioner," and has treated them as concisely as possible with due regard to their importance.

Mr. Malone's divisions of his subject are good. He pretermits all criminal process prior to the action of the grand jury, and after treating the jury system, generally and briefly, in a preliminary chapter, or "brief," as for some occult reason he calls his subdivisions, he enters upon the subject of his work with the procedure of the grand jury, indictment, presentment and information. The next four briefs treat respectively of "trial and its incidents," "evidence in criminal cases," "insanity as an excuse for crime," and "rules for the interpretation of criminal statutes." As these subjects are disposed of in one hundred and sixty-six pages, it is manifest that no degree of condensation could render the treatment exhaustive; nor, indeed, as we have already said, does it profess to be, but there are many important principles well and succinctly stated within those narrow limits. Following these six briefs are fourteen others, treating specifically a large number of offenses, and to these succeed three briefs, on verdicts and subsequent proceedings, the work concluding with two briefs on extradition and habeas corpus respectively.

The briefs are sub-divided into sections, indicated by italics, but not numbered, as they should have been. The typographical execution of the book is good, and the work, although not as full as could be desired, will prove very useful to the practitioner.

JETSAM AND FLOTSAM.

THERE has lately died at Helston, in Cornwall, an example of a practitioner in the law whose experience of it for length of time and permanence in one place is probably unparalleled. A legal practice once established, especially in a country town, very often lasts for many generations; but no man ever practiced as a solicitor in one firm for eighty years. The nearest approach to this distinction has been attained by a representative of that well-deserving class, which for want of a better name, is called lawyers' clerks. In the year, 1806, the late Mr. Treloar entered the service of a firm of solicitors in Helston, at the age of fifteen, not earlier than most of his class begin, and remained with the same firm until he died last week. Partners came and went, but the clerk continued, managing the estates of the clients of the firm, and acting as their deputy at boards of guardians, highway boards, and elsewhere. So valuable a servant was of course well paid, and Mr. Treloar became a man of substance, besides acquiring posts like that of registrar of marriages and manager of the gas company. He also took a leading part in the religious body to which he belonged; but he remained a lawyer's clerk to the end. Probably it was not worth his while, or he could not afford the time, to become a solicitor. Mr. Treloar has at length fallen a victim to the principle that nature, like the law, objects to perpetuities; but he has left a reputation which does credit to the profession of the law, although he was not a formally authorized practitioner of it.—*London Law Journal*.

The Central Law Journal.

ST. LOUIS, NOVEMBER 26, 1886.

CURRENT EVENTS.

COMPETENCY OF WITNESSES — DEFECT OF RELIGIOUS BELIEF.—It appears from a newspaper report (*Knoxville Journal*) that a circuit court in Tennessee was recently confronted with the legal-religious question. What constitutes such a defect of religious belief as will render a person incompetent to testify in a court of justice? The case has gone to the supreme court, and in the course of time we will hear from that body on the subject. Meanwhile we have abundant leisure for speculation.

It is well settled in England, that one who does not believe in a God, "the rewarder of truth and avenger of falsehood,"¹ is not a competent witness in a court of justice. The rule is sometimes otherwise stated; in some of the States it has been materially modified, and in five or six, including Missouri, abolished altogether. Formerly, in England, only Christians were permitted to testify—Jews, Mohammedans, Pagans, all manner of "mis-believers," as well as unbelievers, were rigidly excluded. But there, as well as here, this severity of the rule has been relaxed, and the only question which remains now is, whether public policy requires that it should be longer continued, even in its modified form, and whether the perfect liberty guaranteed by free institutions does not require that it should be abrogated altogether.

It is not a question of degree or amount of privation, loss or inconvenience, but of right. Those under the ban of this rule, whom we will call agnostics, that being the appellation usually adopted by them, may pass through a long life without suffering the least inconvenience from this *quasi* disfranchisement. The question is, whether it is consistent with the spirit of our institutions, which guarantee perfect freedom and absolute equality before the law to all manner of men, that one class should for opinion's sake be singled out and debarred from a right, or exempted from a duty, incumbent upon all others. Does public policy require that this distinction should

be continued? Is it in accord with our scrupulous abstention from all religious tests that we should continue this remnant of an effete system? We think not. The time is within living memory, when it was considered a reckless experiment to abrogate the disqualification of witnesses on account of interest. And yet the law and the country survived the total extinction of that rule. And so with the testimony of parties to a civil action, and it has now become well settled that the tribunal which is to decide upon the weight and effect of testimony may well be trusted with its credibility. The practical rule now is, "let everything go to the jury for what it is worth," and we do not see why the crotchets of the agnostic should exclude him from the witness-box any more than those of the Mormon or Spiritualist, Chinaman or Buddhist, do, the people who hold those extraordinary creeds.

Whether the punishment denounced by the law against perjury is sufficient to exclude false testimony without the aid of a religious sanction is not a question now to be taken into account. If it is not sufficiently severe or sufficiently certain it should be made so by proper legislation. It is not proposed to absolve the agnostic from compliance with the forms exacted from other witnesses. He should be required to swear or affirm like other people, and if in his eyes, the performance is a mere folly that is his affair, the law holds him all the same to tell the truth, under the penalties prescribed for perjury.

It is noteworthy that on this subject Tennessee is somewhat less progressive than some other States. In its constitution of 1870, art. IX., § 2, it is provided that: "No person who denies the being of a God or a future state of rewards and punishments shall hold any office in the civil department of this State."

There has been no judicial exposition of this clause, and it is a little remarkable that the advanced thinkers on theological and philosophical subjects in Tennessee, to say nothing of sticklers for personal liberty have not been heard from on the subject. It is evidently on the cards, that in a partisan political crisis, the Bradlaugh question, which so long agitated the British Parliament, might well chance to be reproduced on the banks of the Cumberland river.

¹ Lord Hardwicke in *Ormchund v. Barker*, 1 Atk. 48. Vol. 23—No. 22.

NOTES OF RECENT DECISIONS.

FEDERAL JURISDICTION—IMPAIRING OBLIGATION OF CONTRACT—MUNICIPAL CORPORATION—MONOPOLY.—There was recently before the United States Circuit Court, for the Eastern District of Michigan, a case¹ involving the power of a municipal corporation to grant an exclusive franchise to a corporation for a long term of years, and in connection therewith a question of federal jurisdiction. The facts were, that in 1868 the city of Saginaw made a contract with the gas-light company by which that company should, upon terms unnecessary to state here, have the exclusive right to light the streets, etc., for a term of thirty years. In 1886, the city contracted with an electric light company for city and commercial lighting. The gas-light company filed a bill in the United States Circuit Court, and the case was heard on a motion for a preliminary injunction.

These were two questions before the court:

1. Whether a federal court had jurisdiction of the question; and 2. Whether the contract between the city and the company was valid and binding upon the city.

Upon the first point, the court held that it had no jurisdiction by reason of the fact that one of the parties defendant, the electric light company, was a citizen of a different State from the plaintiff, upon the well established principle, that to give jurisdiction to a federal court on the ground of citizenship alone, all the parties properly plaintiffs must be citizens of a different State from that of which the parties properly defendants are citizens.² The court, however, finds jurisdiction over the question, in the fact that the case involves the well known clause of the Constitution of the United States: "No State shall pass any law impairing the obligation of contracts." That federal courts have jurisdiction of all cases involving a violation of this constitutional provision is too well settled to need the citation of authorities. Was the action of the defendant city in 1886 in contracting with the electric light

company in conflict with that clause? If the city had no greater power than a private corporation, its action would only have been, at the utmost, a breach of contract, for which the party aggrieved would have an ample remedy in the State courts. The question was whether the latter contract was really the act of the State through the instrumentality of the city, for it is only a law of a State that can conflict with the clause under consideration.³ After an examination of the general law of the State, the charter of the city, enacted in 1867, the amendment of the charter in 1871, and the city ordinance in the same year re-affirming the contract of 1867, the court concludes that the State by its acts conferred upon the city the right to "cause its streets to be lighted," but adds: "It is clear, however, that there is no authority expressly given to confer upon any corporation an exclusive right to occupy its streets for a number of years." Now if this means, as may fairly be inferred from the language employed, that the acts of the State, i. e., the charter of 1867, and the amendment to it of 1871, did not confer upon the city the right to grant the exclusive privilege for thirty years, the act of the city so granting that privilege was *ultra vires* and void. It would seem, therefore, to be unnecessary to demonstrate, as the court does very fully, that the contract between the city and the gas-light company is the grant by the former to the latter of a monopoly, and for that reason void, so far as its exclusive feature is concerned. It is sufficient to show that the city has done a thing which by the law of the State it had no power to do, and by a well settled rule of law its act in so doing is void.

The contract of 1886 with the Electric Light Company was fully within the powers granted to the city by its charter; by it the city conferred no exclusive right and exercised no doubtful powers. The contract was beyond all question the act of the State, through the instrumentality of the city, and if the antecedent contract of the city with the gas-light company was valid, it undoubtedly impaired the obligation of that contract. Therefore, it was certainly within the proper

¹ Saginaw Gas-Light Company v. City of Saginaw (Sept. 17, 1886), The Reporter, vol. 22, p. 378.

² Strawbridge v. Curtiss, 8 Cranch, 267; Coal Co. v. Blatchford, 11 Wall. 173; Pacific R. R. Co. v. Ketcham, 101 U. S. 289, 297; Removal Cases, 100 U. S. 457; Blake v. McKim, 103 U. S. 386; Shainwald v. Lewis, 108 U. S. 158; Hyde v. Ruble, 104 U. S. 407.

³ Railroad Co. v. Rock, 4 Wall. 177, 181; Knox v. Exchange Bank, 12 Wall. 379; Tarver v. Keach, 15 Wall. 67; Weston v. City of Charleston, 2 Pet. 462; Wright v. Nagle, 101 U. S. 791.

jurisdiction of the federal court to entertain the action and decide whether or not the last contract made by the city impaired the obligation of the former.

THE PRESENT LAW OF RENT.

Nature and Time of Payment.—Rent, which is an important incident of an estate for years and a lease, is defined to be a periodical return made by the tenant, either in labor, money or provisions, in retribution for the land that passes;¹ or it is in effect the price or purchase money to be paid for the ownership of the premises during the term,² which must be certain or capable of being reduced to a certainty by either party;³ and at common law it must issue out of the thing granted, and not be a part of the land itself,⁴ though it is frequently reserved in a certain portion of the products,⁵ and may also be reserved in labor,⁶ as well as produce.⁷

¹ 2 Greenl. Cruise Real Prop. 72; Coke on Littleton, 142 a; McGee v. Gibson, 1 B. Monroe, Ky., 105.

² Fowler v. Bott, 6 Mass. 67; Stone v. Patterson, 19 Pick. 476. Rent is a certain profit, either in money, provisions, chattels or labor issuing yearly out of lands and tenements in return for their use. Green v. Eales, Z. Q. B. 224 Tayb. hand & Terr. 369.

³ 2 Greenl. Cruise Real Prop. 72; Smith v. Tyler, 2 Hill 448; Cross v. Tome, 14 Md. 247; Bowzer v. Scott, 8 Black Ind. 36; Smith v. Colson, 10 Johns. N. Y. 9; Dutcher v. Culver, 24 Minn., 548.

⁴ 2 Greenl. Cruise Real Prop. 72; Coke on Littleton 47; and compare Buszard v. Capel, 8 Barn and C. 141; Mickle v. Miles, 31 Pa. St. 20.

⁵ See Ream v. Hamish, 45 Pa. St. 376; Butterfield v. Baker, 5 Pick. 522; Kler v. Peterson, 41 Pa. St. 357; Smalley v. Corliss, 37 Vt. 486; Buskirk v. Cleveland, 41 Barb. 610; Dockham v. Parker, 9 Me. 137; 23 Am. Dec. 547; Johnson v. Smith, 3 Pen. & W. 496; S. C. 24 Am. Dec. 339; Lillie v. Fifty Associates, 101 Mass. 432.

⁶ McGee v. Gibson, 1 B. Monroe 105; Boone Real Prop. 106.

⁷ McGee v. Gibson, 1 B. Monroe 105. Three kinds of rent, rent service, rent charge and rent seek, Taylor on Land and Tenant, 370; 2 Greenl. Cruise Real Prop. 72, 1475; 8 Kent's Com. 368; Coke 65; Cuthbert v. Kuhn, 3 Whart. 357; S. C. 31 Am. Dec. 513; Van Rensselaer v. Hays, 19 N. Y. 68; Hurst v. Lithgow, 2 Yeates 24; S. C. 1 Am. Dec. 326; Distress for rent, 2 Washb. Real Prop. 11; 8 Kent's Com. 473; 2 Greenl. Cruise Real Prop. 88; 4 Dane's Abr. 126; Youngleod v. Lowry, 2 McCord S. C. 39; S. C. 13 Am. Dec. 698; Diller v. Roberts, 13 Serg. & R. Pa. 60; S. C. 15 Am. Dec. 578; Lichtenthaler v. Thompson, 13 Serg. & R. 157; S. C. 15 Am. Dec. 581; Nosnins v. Paul, 4 Halst. N. J. 110; S. C. 17 Am. Dec. 455; McCreery v. Claffin, 37 Md. 435; 11 Am. Rep. 542; Hadden v. Knickerbocker, 70 Ill. 677; 22 Am. Rep. 80; Howe Sewing Machine Co. v. Sloan 87 Pa. St.

When the time for payment of rent is not fixed by custom or by express stipulation, it is not due until the end of the term;⁸ but if payable in produce, payment should be made in a reasonable time after the crops are gathered,⁹ and payments made by the tenant on account of rent generally without any direction or agreement as to its application, will be applied by the law on the rent due at the time¹⁰, and not on the rent then accruing.¹¹ Rent may be made payable in advance,¹² but a custom to pay in advance cannot be imported into an express covenant to pay quarterly,¹³ though a lessor's verbal agreement with the tenant to change, for a new consideration, the time of paying the rent from the beginning to the end of the month has been held valid¹⁴; and under a lease for years from a specific day, rent conditioned to be payable quarterly on certain days is not due until after midnight of such days;¹⁵ but where a lease, conditioned to be forfeited for non-payment of rent, provides no place for payment, payment should be demanded by the landlord of the tenant on the premises just before sunset on the specified day.¹⁶

Actions and Defenses.—In most cases an action of debt will lie for rent, under the common law practice,¹⁷ and an action of as-

436; 30 Am. Rep. 376; Survival of remedy (as in Waring v. Slingluff 63 Mo. 53) criticised 21 Cent. L. J. 107, entering through a window to distrain, 21 Cent. L. J. 300.

⁸ Garvey v. Dobyns, 8 Mo. 213; Ridgley v. Stillwell, 27 Mo. 128; Perry v. Aldrich, 13 N. H. 343; Gibbons v. Thompson, 21 Minn. 398; Boyd v. McCombs, 4 Pa. St. 146; Hopkins v. Helmore 8 Ad. & E. 463.

⁹ Brown v. Adams, 35 Tex. 447; Toler v. Seabrook, 39 Ga. 14; Lamberton v. Stouffer, 55 Pa. St. 276; and See Dockham v. Parker, 9 Me. 127; s. c. 23 Am. Dec. 547.

¹⁰ Hunter v. Osterhoudt, 11 Barb. 33.

¹¹ Hunter v. Osterhoudt, 11 Barb. 33 Boone Real Prop. 108.

¹² Rent payable in advance on a certain day may be paid at any time during that day; Smith v. Shepard, 15 Pick. 147; s. c. Am. Dec. 547.

¹³ Mitchell v. Weller, 1 Jur. 622.

¹⁴ Willgus v. Whitehead, 89 Pa. St. 131. If the tenant has paid the rent of the term in advance he will not be liable to pay the same again to an assignee of the reversion; Stone v. Patterson, 19 Pick. 477.

¹⁵ Ordway v. Remington, 12 R. I. 319; s. c. 34 Am. Rep. 646; Compare Sherlock v. Thayer, 4 Mich. 355.

¹⁶ Jenkins v. Jenkins, 63 Ind. 416; s. c. 30 Am. Rep. 229; Boone Real Prop. 108; and see Hartwell v. Kelly, 117 Mass. 235; Chapman v. Harney, 100 Mass. 353.

¹⁷ Duppa v. Mayo, 1 Sound 281; and see DeLancey v. Ga. Min, 12 Barb. 120; 9 N. Y. 9; Guild v. Rogers, 8 Barb. 504; Allen v. Bryan 5 Barn & C. 512; Trabue v. McAdams 8 Bush. Ky., 74. In England an action of

sumpsit for the use and occupation of land by permission of the plaintiff lies on an implied,¹⁸ as well as on an express, promise to pay rent;¹⁹ but an action for use and occupation will lie only where the relation of landlord and tenant exists between the parties,²⁰ and the defendant must have actually taken possession of the premises, either by himself, his agent or his under-tenant,²¹ though if the lease contains a covenant on the part of the lessee to pay the rent an action of covenant may be brought thereon.²²

Among the defenses to actions for rent²³ are, an eviction from the whole or a material part of the premises by the landlord,²⁴ payment or tender of the rent as provided in the agreement²⁵—a surrender in fact—and delivery of possession to, and its acceptance by, the landlord;²⁶ and it is also a good defense that

debt will now lie for the recovery of a rent charge in fee; *Thomas v. Sylvester*, Law R. 8 O. B. 368; 6 Eng. Rep. 103.

¹⁸ *Guns v. Scovill*, 4 Day Conn 228; s. c. 4 Am. Dec. 208; *Howard v. Runsen* 2 Aiken, Vt., 252; *Crouch v. Briles*, 7 J. J. Marshall, Ky., 255; s. c. 23 Am. Dec. 404.

¹⁹ *Sutton v. Mandeville*, 1 Munsf. 407; s. c. 4 Am. Dec. 549; *Eppes v. Cole*, 4 Har. 4 McH. Md., 181; *Swasey v. Little* 7 Pick. 296; *Warner v. Hale*, 65 Ill. 395; *Howard v. Shaw*, 8 Mees. & W. 118, where there is a lease under seal, no action for use and occupation can be maintained against the lessee or his assignee; *Keirsted v. Railroad Co.* 69 N. Y. 343; 25 Am. Rep. 199.

²⁰ *Smith v. Stuart*, 6 Johns, 49; s. c. 5 Am. Dec. 186; *Bancroft v. Wardell*, 18 Johns. 489; s. c. 7 Am. Dec. 396; *Edmonson v. Hite*, 43 Mo. 178; *McCloskey v. Miller*, 72 Pa. St. 154; *Espy v. Penton*, 5 Overy, 423; *Lankford v. Greene*, 52 Ala. 103; *Hathaway v. Ryan* 35 Cal. 194; and compare *Woodbury v. Woodbury* 47 N. H. 20.

²¹ *Bordman v. Osborn*, 23 Pick. 295; *Waring v. King*, 8 Mees. & W. 571; and see *Mayor, etc. v. Saunders*, 3 Barn. & Adal 421; *Edmonson v. Kite*, 43 Mo. 176; *Bedford v. Terhune*, 30 N. Y. 453.

²² 2 Greenl. Cruise Real Prop. 94; *Vyvyan v. Arthur* 1 Barn, etc. 418; *Boone Real Prop.* 110.

²³ See *Farris v. Houston*, 74 Ala. 162, destruction of lime kiln; *Warren v. Wagner*, 175 Ala. 188; s. c. 51 Am. Rep. 446.

²⁴ *Hayner v. Smith*, 63 Ill. 430; s. c. 14 Am. Rep. 124; *McClew v. Price*, 59 Pa. St. 1420; *Tunis v. Grandy*, 22 Gratt. Va., 109; *Alger v. Kennedy*, 49 Vt. 109; 24 Am. Rep. 117; *Holmes v. Gulon*, 44 Mo. 164; *Colburn v. Morrill*, 117 Mass., 262; 19 Am. Rep. 415; *Shumway v. Collins*, 6 Gray 227; *Edgerton v. Page*, 1 Hilt. N. Y. 328; *Morrison v. Chadwick*, 7 Com. B. 383. If after eviction the lessee returns and occupies again, the rent revives; *Morrison v. Chadwick*, 7 Com. B. 383; *Martin v. Martin*, 7 Md. 378; and compare *Hunter v. Relley*, 43 N. J. L. 480.

²⁵ *Carter v. Carter*, 5 Bing. 406; *Sandford v. Fletcher*, 4 Term Rep. 511.

²⁶ *Page v. Ellsworth*, 44 Barb. 696; *Elliott v. Aiken*, 45 N. H. 30; *Fuller v. Ruby*, 10 Gray 290; *Fisher v. Millikins*, 8 Pa. St. 111.

a part of the demised premises are occupied for an immoral purpose, with the knowledge and consent of the landlords;²⁷ but at common law the abandonment of the premises by the tenant because untenable would have been no defense to an action against him for the stipulated rent.²⁸ And where a landlord leases premises to a tenant for the carrying on of a certain business and covenants that he will not, during the term of the lease, lease other adjacent premises to other parties for the carrying on of a similar business, the tenant injured by the breach of such a covenant is not entitled to set off his damages in replevin upon a distress for rent.²⁹

Lien for.—In some of the States, and in England, statutes have been enacted giving landlords a lien upon the tenant's goods, or upon the crops growing or grown upon the demised premises, to secure the payment of rent,³⁰ the lien in such cases attaching at the commencement of the tenancy,³¹ and the landlord may maintain a special action against a stranger, who, with notice of a lien upon the crop, destroys, removes or so converts the crop or changes its character that the landlord cannot enforce his lien.³² And the acceptance of a collateral promise by a purchaser of goods from a tenant does not release the landlord's lien;³³ nor, where goods are levied on, can a third person after failing

²⁷ *Dyett v. Pendleton*, 8 Cowen, 127; *Townsend v. Gilsey*, 1 Sweeny, 155; 7 Abb. N. S. 159, and compare *Dewitt v. Pierson*, 112 Mass. 8; 17 Am. Rep. 58. Tenant holding after knowledge of bad repute of house liable for rent. *Carhart v. Ruder*, 11 Daly, 101.

²⁸ *Graves v. Cameron*, 58 How. Pr. 75; *Boone Real Prop.* 110. False representations that premises tenable. *Jackson v. Odell*, 14 Abb. N. C. 42, and see *Bradley v. De Goulcuria*, 14 Id. 53.

²⁹ *Alleguett v. Smart*, 14 Cent. L. J. 159.

³⁰ See *Doam v. Garretson*, 24 Iowa, 351; *Givens v. Easley*, 17 Ala. 385; *Brighton v. Powell*, 52 Ala. 123; *Tallafero v. Pry*, 41 Ga. 622; *Washington v. Williamson*, 23 Md. 244; *Woodside v. Adams*, 40 N. J. L. 417; *Reed v. Thoyts*, 6 Mees. & W. 410; Valid agreement for lien; See *Wisner v. Oelnpaugh*, 71 N. Y. 113.

³¹ *Smith v. Meyer*, 25 Ark. 609; *Powell v. Hadden*, 21 Ala. 748; *Fowler v. Rapley*, 15 Wall. 328. Compare *Harris v. Dowmann*, 3 Mackey, (D. C.), 90.

³² *Hussey v. Peebles*, 53 Ala. 432; *Boone Real Prop.* 111; purchases from tenant of property other than crops takes it freed from lien, in Illinois; *Hadden v. Knickerbocker*, 70 Ill. 677; s. c. 22 Am. Rep. 80; and compare *O'Hara v. Jones*, 46 Ill. 288; *Martin v. Black*, 9 Paige, 641; *Bach v. Meats*, 5 Maule & S. 200; lessor's right when postponed to that of a *bona fide* mortgage without notice; *Thomas v. Bacon*, 34 Hun. 88.

³³ *Block v. Latham*, 639, ex. 419.

in an attempt to claim them as his own, claim a landlord's lien on them.³⁴

Liability for.—A party who continues to occupy the premises of another, after being notified by the owner that if he does so, he will be expected to pay rent, is bound to pay rent therefor.³⁵ And a written proposition to a tenant, in anticipation of the end of his term, to charge in future an increased rent for the premises, commits the tenant to such increase if he holds over.³⁶ Where there is no provision in a lease for the suspension of rent while repairs are being made in accordance with its terms, the tenants can have no deduction for the same during that period.³⁷ And where a sealed lease stipulates for a certain rent, a part agreement to pay more rent cannot be enforced, although made because of additional expenses incurred by the lessor in putting up a new building on the land.³⁸ One who enters on property with the knowledge of the price asked must pay it, although he said he would not.³⁹

Apportionment of Rent.—It is now an established doctrine that when there is a severance of the reversion, either by the act of the parties or of the law, the rent follows and, is apportioned⁴⁰—that is, it becomes payable to the several grantees or assignees, *pro rata*, according to the relative values of their respective portions;⁴¹ and the doctrine applies where the reversion is severed by the death of the lessor and a descent to his heirs, and

the heirs may separately bring actions for their several proportions;⁴² while a rent itself may be apportioned by a devise of it to several persons.⁴³ But an apportionment of the rent by the landlord to different persons cannot be made without the tenant's assent,⁴⁴ though with such assent it may be;⁴⁵ and it has been held that an apportionment will be made at the instance of a tenant where a part of the premises is taken for public use;⁴⁶ as when a public street is opened through the demised premises,⁴⁷ while, where a testator seized in fee, devised real estate by a will dated before the English apportionment act of 1880,⁴⁸ and confirmed it by a codicil dated after the act, it was held the rents were apportionable between the executor and the devisee;⁴⁹ and it seems that the result would have been the same without the codicil.⁵⁰

Destruction of Premises.—It has been repeatedly held that the destruction of the leased premises by fire, occurring through accident or negligence, does not afford ground for relieving the tenant from the payment of rent;⁵¹ but if there be a substantial destruction of the subject matter, out of which rent is reserved in a lease for years, by an act of government, or of the public enemy, the tenant may elect to rescind,⁵² and on surrendering all benefit therefrom, he shall be dis-

³⁴ Edwards' Appeal, 105 Pa. St. 108.

³⁵ Ill. Cent. R. Co. v. Thompson, 5 N. E. Rep. 117; and see Griffin v. Kinsey, 75 Ill. 411; Higgins v. Halligan, 46 Ill. 178.

³⁶ Reithman v. Brandenburg, 19 Cent. L. J. 417.

³⁷ McClenahan v. Mayor, etc. of New York, 5 N. E. Rep. 793, affirming 32 Hun. 242. Query concerning implied agreement to pay rent to room-mate, 13 Cent. L. J. 479.

³⁸ Smith v. Kerr, 33 Hun. 567.

³⁹ Thompson v. Sanborn, 52 Mich. 141. A reduction of rent, indorsed by the lessors on the lease through fear that the lessee firm might fail unless it received some accommodation, and so the lessors realize nothing, has been held to be on sufficient consideration and to bind the lessors. Jaffing v. Greenbaum, 64 Iowa, 492.

⁴⁰ See Coke on Littleton, 147 b; 2 Greenl. Cruise Real Prop. 117; Jacques v. Guild, 4 Cush. 384; Daniels v. Richardson, 22 Pick. 565.

⁴¹ Cole v. Patterson, 25 Wend. 456; Newall v. Wright, 3 Mass. 188; Reed v. Ward, 22 Pa. St. 144; Russell v. Allen, 2 Allen, 42; Martin v. Martin, 7 Md. 368. The apportionment must be according to value and not to quantity or number of acres. Van Rensselaer v. Gallup, 5 Denio, 454; and compare Reed v. Ward, 22 Pa. St. 150.

⁴² Cole v. Patterson, 25 Wend. 456; Jones v. Felch, 3 Row. 63; Crosby v. Loop, 13 Ill. 625.

⁴³ Ards v. Watkin, Cro. Eliz. 687, 641; Boone Real Prop. 112.

⁴⁴ Bliss v. Collins, 5 Barn. & Ald. 876; s. c. 1 Dowl. & R. 291. See matter of Eddy, 10 Abb. N. C. 876.

⁴⁵ Ryerson v. Quackenbush, 26 N. J. L. 254. Under the New York Statute the right to rent follows the ownership of the estate during the period when it is earned by the property. Matter of Eddy, 10 Abb. N. C. 826.

⁴⁶ Cuthbert v. Kuhn, 3 Whart. 357; s. c. 31 Am. Dec. 518.

⁴⁷ Cuthbert v. Kuhn, 3 Whart. 357; s. c. 31 Am. Dec. 518; and see O'Conner, 1, O'Conner, 2 Grant. Cas. 245; Dyer v. Wightman, 66 Pa. St. 429. But compare Workman v. Niffin, 30 Pa. St. 371; 31 Am. Dec. 517, note.

⁴⁸ §§ 33 and 34, Vict. C. 35.

⁴⁹ Capron v. Capron, Law R. 17 Eq. Cas. 288; s. c. 7 Eng. Rep. 822; Boone Real Prop. 112.

⁵⁰ Capron v. Capron, Law R. 17 Eq. Cas. 288; s. c. 7 Eng. Rep. 822.

⁵¹ See Graves v. Berdan, 29 Barb. 100; s. c. 26 N. Y. 498; Izon v. Gorten, 5 Bing. N. C. 501. s. c. 35 Eng. C. L. 198; Cowell v. Lumley, 39 Cal. 151; s. c. 2 Am. R., 490; Lofft v. Dennis, 1 El. & E. 481; Smith v. Ankins, 13 Smedes & M. 39.

⁵² Coogan v. Parker, 2 So. Car. 225; s. c. 16 Am. R., 659.

charged from the payment of rent.⁵³ Where the lease was of a saw mill and one mill in an adjoining factory, and both were destroyed by fire, it was held that the tenant was discharged from rent for the room, but not for the saw mill.⁵⁴ And when real and personal property are leased by a single instrument for an amount in gross, and the personalty is a substantial part of the property leased, its destruction without the fault of the lessee, by fire or otherwise, entitled the lessee to an apportionment of rent.⁵⁵

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⁵³ Coogan v. Parker, 2 So. Car. 225; s. c. 16 Am. R., 659; Boone Real Prop. 112. Compare Edwards v. Netherington, 7 Mo. & Ry. 117; s. c. 16 Eng. C. C. 271; Cowie v. Goodwin, 88 Eng. C. L. 162; s. c. 9 Car. & P. 378.

⁵⁴ Wormuck v. McQuarry, 28 Ind. 103.

⁵⁵ Whitaker v. Hawley, 25 Kan. 674; s. c. 37 Am. R., 277, Boone Real Prop. 112; but compare Farewell v. Dickinson, 6 Barn. & C. 261; Bussman v. Gauster, 72 Pa. St. 286; Sutcliffe v. Atwood, 15 Ohio St. 185.

NUISANCE BY NOISE IN A PRIVATE HOUSE.

In communities where the population is densely packed together everyone must submit to inconvenience, and sometimes to serious annoyance, from the proximity of his neighbors. The beauty of the prospect is shut out by brick walls; the purity of the atmosphere is defiled by the smoke from innumerable chimneys; the air resounds with the cries of men and the noise of their works; exhalations, foul beyond description, rise from the soil; and a hundred variously offensive odors diminish the comfort of life. These are the inevitable consequences of human aggregation; and whoever, from choice or force of circumstances, dwells in a great city, must endure the evils that are incident to the situation. Some of the evils, indeed, are needlessly aggravated by the inconsiderate conduct of adjoining householders; and it must have fallen to the lot of many of our readers to have suffered in this way, especially from immoderate or unseasonable noises. We propose to consider in this article the limitation imposed in respect noise upon the occupiers of private houses

in a town, and the corresponding rights of their neighbors to restrain by injunction the continuance of the noise. In the discussion of this question we shall have to rely almost entirely on first principles; for there seem to be no reported cases in which the owner or occupier of a private house has obtained an injunction restraining his boisterous or musical next-door neighbor from making a noise in the ordinary use and occupation of his house as a private residence.

In the recent case, indeed, of *Holden v. Hitchcock & Co.*,¹ which came before Mr. Justice Grantham, sitting as vacation judge, on the 29th ult., an injunction was granted restraining the continuance of a nuisance by noise. But the facts of that case were somewhat peculiar, and were as follows: Some forty young men, employees in the defendant's establishment, were accommodated with sleeping quarters in a house, No. 6a Pilgrim street, situated in close proximity to the plaintiff's residence; and, according to the allegation of the plaintiff, they made diabolical noises late into the night, by howling, whistling, singing and playing musical instruments. The defendant, on the other hand, adduced evidence to show that the young men were extremely well behaved, orderly and quiet, and that they were placed under the care of a superintendent, who saw that all lights were out at eleven o'clock, and who slept on the premises. The noisy delinquents also made affidavits in which they one and all denied the charge brought against them, while admitting the singing of the hymns on Sunday mornings, and the possession by some of their number of two violins and a piccolo. The learned judge came to the conclusion, on the evidence, that an intolerable nuisance was created by the "roaring forty," and accordingly granted an injunction restraining, not them, but their master, from continuing the nuisance. Whether this decision can be upheld or not, it is clear that it does not govern the ordinary case of user as a private residence; and we must therefore seek elsewhere for light on that subject.

The broad general principle which governs this and other similar cases is, that in order to give a right of action, either for damages or for an injunction, the acts complained of

¹ Before Vacation Judge, Sept. 29, 1886.

must amount to a nuisance. Whether this carries us much nearer the full comprehension of the subject may be doubted, for it is always a most difficult question to determine whether any particular act, or series of acts, amounts to what is known to the law under the general term "nuisance," but it, at all events, brings us within reach of definitions. Blackstone gives us one in the following terms: "Nuisance, *nocumentum*, or annoyance, signifies anything that worketh hurt, inconvenience or damage," and a little farther on he continues, "the rule is, *sic utere tuo, ut alienum non lædas*, so that the nuisances which affect a man's dwelling, may be reduced to these three: 1. Overhanging it, which is also a species of trespass, for *cujus est solum, ejus est usque ad coelum*. 2. Stopping ancient lights; and 3. Corrupting the air with noisome smells; for light and air are two indispensable requisites to every dwelling. But depriving one of a mere matter of pleasure, as of a fine prospect by building a wall, or the like; this, as it abridges nothing really convenient or necessary, is no injury to the sufferer, and is therefore not an actionable nuisance" (Bl. Comm. III, 217). Now, it will be observed, that Blackstone's definition is far too wide,² and that the enumeration which he puts forward as exhaustive, is singularly incomplete, and—the most striking feature for our purpose—omits all mention of nuisance by noise. Lord Justice Rolt has supplied us with a definition of a nuisance as "a material injury to property, or to the comfort of the existence of those who dwell in the neighborhood."³ But, perhaps, the most satisfactory definition, or rather description, of a nuisance is that given by Lord Justice Knight Bruce, in *Walter v. Selfe*.⁴ "Ought this inconvenience," he says, "to be considered in fact as more than fanciful, more than one of mere delicacy or fastidiousness, as an inconvenience materially interfering with the ordinary comfort, physically, of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain and sober and simple notions among the English people." This statement has since been re-

peatedly cited with approval, and if we apply it to the circumstances under consideration, we at once exclude from relief a large class of sufferers, viz.: those delicate people whose nervous systems are abnormally sensitive to disturbance by noise. There is scarcely any quality in which there is such a marked diversity between individuals as this one of susceptibility to irritation through the sense of hearing. The poet Shelley was distracted by sounds that other men could not distinguish; in the late Mr. Babbage this sensibility amounted to disease; but ordinary mortals can read, think and sleep without being disturbed by the romping of children or a sonata of Beethoven's, when softened by transmission through a foot of brickwork. In judging whether the offensive sounds amount to a legal nuisance or not, we must estimate their effect upon the average healthy human being, and it is only they interfere with his material comfort that they fall within the province of the law. However harsh it may seem, the sick or the dying cannot be protected by the court from the torments of ordinary sounds⁵. But, fortunately, in such cases, the wider equity of good taste and feeling supplements the imperfection of our code, and universally protects the sufferer from unnecessary annoyance.

It is in general, necessary, as pointed out by Lord Westbury, in *St. Helen's Smelting Co. v. Tipping*⁶, to mark the difference between an action brought for a nuisance upon the ground that the alleged nuisance produces material injury to the property, and an action brought for a nuisance on the ground that the thing alleged to be a nuisance is productive of sensible personal discomfort. But where the nuisance is caused by noise this distinction is unimportant in determining the issue whether a nuisance is created or not; for though its effect may be to drive away lodgers, and thereby materially injure the property of the plaintiff, yet this result is produced only by the operation of the nuisance in the first instance in producing "sensible personal discomfort." The injury to property, however, though merely the consequence of the personal discomfort, may be a most important element in estimating the amount of damages,

² *Harrison v. Good*, 19 W. R. 346.

³ *Luscombe v. Steer*, 15 W. R. 1191.

⁴ *De G. & Sm.* 322.

⁵ *Hardman v. Holberton*, W. N., 1868, p. 379.

⁶ 13 W. R. 1083; 11 H. L. Cas. 642, 650.

or in determining the court to grant an injunction⁷.

How far, it may be asked, does the question of nuisance depend upon the use of which the complaining party puts his premises? In *Sturges v. Bridgman*,⁸ the mortars of the defendant had been pounding away for sixty years without creating a nuisance, and it was only when the plaintiff, who was a physician, built a consulting-room at the bottom of his garden, close to the noise, that the noise became a nuisance. An injunction was granted because the plaintiff had a right to protection, in what, having regard to the locality, was a reasonable user of his premises. There is here manifestly an element of great difficulty introduced, for not only has the defendant a right to make a reasonable amount of noise, but also the plaintiff may, in some cases, require exceptional stillness. Everything depends on the character of the locality and the nature of the surrounding circumstances. Lord Justice Thesiger, in delivering the judgment of the Court of Appeal in *Sturges v. Bridgman*, puts two hypothetical cases; one of a man going into the midst of the tanneries of Bermondsey, or into any other locality devoted to a particular trade or manufacture of a noisy or unsavory character, and building a private residence upon a vacant piece of land, the other of a blacksmith's forge built in the middle of a moor, to which, in course of time, habitations approach; and he finds no difficulty in deciding these extreme cases. The blacksmith, not having protected himself by a sufficient curtilage, must go down before the advancing wave of population, but the house builder in Bermondsey must continue to regale himself with the sweets of the tanyards. Lord Selborne, in his luminous judgment in *Ball v. Ray*, makes use of the following observations: "With regard to the question of law in the case I shall say very little, because these questions are eminently questions of fact rather than law; but I desire to say as much as this: In making out a case of nuisance of this character there are always two things to be considered—the right of the plaintiff and the right of the defendant. If the houses adjoining each other are so built that

from the commencement of their existence it is manifest that each adjoining inhabitant was intended to enjoy his own property for the ordinary purposes for which it, and all the different parts of it, were constructed, then, so long as the house is so used, there is nothing that can be regarded in law as a nuisance which the other party has a right to prevent. But, on the other hand, if either party turns his house, or any portion of it, to unusual purposes in such a manner as to produce a substantial injury to his neighbor, it appears to me that that is not, according to principle or authority, a reasonable use of his own property, and his neighbor, showing substantial injury, is entitled to protection." Everything is here rested upon reasonable uses of the defendant's premises, and there could not be much doubt in that case to the unreasonableness of keeping horses in the ground-floor of a house in Mayfair; but it is expressly stated by Mellish, L. J., that the noise of a pianofort from a neighbor's house, or the noise of a neighbor's children in their nursery, are noises which we must reasonably expect, and must, to a considerable extent, put up with." Only "to a considerable extent," be it observed, for even with pianoforts and children there is a limit which cannot be transgressed. But there can be no doubt that a strong case would have to be made out before the court would interfere with these too ordinary disturbances. Lord Selborne says, in *Grant v. Finney*,⁹ after referring to the nursery and the music-room, that "such things, to offend against the law, must be done in a manner which, beyond fair controversy, ought to be regarded as excessive and unreasonable." These words seem to indicate that, as between two occupiers of adjoining houses, much must be suffered before an appeal can be successfully made to the interference of the court. Possibly, the melancholy man who practises the French horn late into the night may be stopped, or, indeed indicted, on the authority of an ancient case,¹⁰ but "scales" may, we fear, continue their hideous monotony during daylight, and our neighbors' children howl to their hearts' content, without danger of an injunction.—*Solicitors' Journal, London.*

⁷ *Ball v. Ray*, 21 W. R. 282; L. R. 8 Ch. 467.

⁸ 28 W. R. 200; L. R. 11 Ch. D. 852.

⁹ 21 W. R. 129; L. R. 8 Ch. 8.

¹⁰ *Rex v. Smith*, Str. 704.

CARRIER—INJURY RESULTING FROM ACT OF GOD—BURDEN OF PROOF—PRACTICE.

DAVIS v. WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY.

Supreme Court of Missouri, June 21, 1886.

1. *Carrier—Act of God—Burden of Proof.*—In an action against a common carrier for loss of goods, where the carrier interposes the act of God as a defense (as here an extraordinary and unprecedented flood), he need not show affirmatively that his negligence did not co-operate with such cause to produce the injury, but the *onus probandi* is on the plaintiff.

2. *Practice—Defense of Act of God Under General Denial.*—The defense that the injury results from an act of God is available under a general denial.

Appealed from St. Louis Court of Appeals.*

Noble & Orrick, attorneys for plaintiff; *H. S. Priest*, attorney for defendant.

RAY, J., delivered the opinion of the court:

This action was begun by plaintiff, to recover damages sustained by their goods, consisting of silks and other valuable dry goods, whilst in defendant's possession, as a common carrier. Upon a trial in the circuit court plaintiffs had a verdict and judgment in their favor for \$6,184.29, from which defendant appealed to the St. Louis Court of Appeals, where the same was affirmed, and defendant has appealed therefrom to this court.

The goods, when damaged, were in course of transportation from New York to East St. Louis, by "The South Shore Line," which, it appears, did a "transportation business" over several connected railroads, including that of the defendant.

The merchandise arrived at Toledo on the 11th day of February, 1881, and the car, being in a crippled condition, was sent to the transfer house, where the goods were unloaded and placed on the platform at 2:30 o'clock p. m. of said day, at which time the defendant gave its receipt for the goods to the connecting road. This transfer house, it seems, is a place where freight going in both directions, east and west, is exchanged by numerous railroads connecting at Toledo, and, as also appears, freight thus passing through said exchange depot is, in the usual and ordinary course of business, subject to some necessary and unavoidable delay, occasioned by the switching, unloading and transfer of the same from one railroad to another. By 8 o'clock p. m., of said February 11, 1881, the defendant had reloaded the goods from the platform of the transfer house into one of its cars, preparatory to shipment of the same to East St. Louis, which car containing plaintiff's goods was left, with other cars, standing at the platform waiting to be attached to defendant's train to St. Louis, which, it seems, would, in the ordinary course of business, leave Toledo about 10 or 11 o'clock that night, or would

be switched with others, in the usual course of business, out of the transfer house at or before 11 o'clock, at which hour the men usually quit work for the night.

The evidence indicates pretty clearly, we think, that in handling and taking the freight in its turn (which was the duty of the carrier in the premises, in the absence of perishable qualities in the property, or other special circumstances, giving it preference), the car in question could not have been gotten out, in the usual course of business, in time for the earlier train for St. Louis that night.

The testimony of Rich and Stowe, who were sworn in plaintiff's behalf, is, we think, substantially to this effect: About midnight, on said February 11, the waters from a flood in the Maumee river reached the railroad tracks at the transfer house, and soon rose high enough to submerge and damage plaintiff's dry goods whilst in said car at the platform awaiting shipment. The evidence offered in plaintiff's behalf, as well as that for defendant, show that the waters in which said goods were submerged, as charged in the petition, were the waters of an extraordinary flood occurring in the Maumee river. The character and magnitude of this flood is not called in question, but, on the contrary, is conceded to have been unprecedented, and such as is denominated an act of God, properly so called. There is further evidence also, offered by plaintiff, tending—at least in some degree—to support the allegation in the petition that defendant negligently permitted the goods to be submerged. The evidence for plaintiff in this behalf, is not, perhaps, harmonious; indeed, it is, we think, conflicting and contradictory; but it is sufficient, we think, to meet the objection urged upon us, with great earnestness, that there is no substantial evidence of negligence to go to the jury. A summary of this evidence prepared by the court of appeals, with special reference to this objection, will be found in the opinion of that court. 13 Mo. App. Rep. 449-450.

The evidence we deem of most importance, and upon which, as the same is now preserved in the record, the liability of defendant, if any, we think is that tending somewhat to show that defendant was informed and aware of the impending and approaching flood, in time to have removed the goods of plaintiff to higher ground or place of safety, and that tending, in like manner, to show that it omitted, on the night of February 11, after it was manifest that there would be an unusual flood and danger therefrom, to employ the force and means employed by other railroads and persons, similarly situated at the time, to move or switch the cars containing plaintiff's goods to the higher ground, a half mile west of the transfer house, where they would have been safe from the flood, and which there is evidence tending to show, could have been done as late as 11 o'clock that night. It is not necessary to set out the substance of the testimony in defendant's behalf to

* 13 Mo. App. Rep. 449, which opinion is reversed.

the contrary. Reference will be made to its general scope in the further progress of this opinion.

In this connection we may say, as is well said by that court: "We are not concerned with the weight of evidence. If there is substantial evidence of negligence on the part of defendant, directly contributing to the injury, it is quite immaterial that there is a great deal of testimony to the effect that by no diligence could defendant have foreseen or avoided the mischief;" but whilst this is so, such a state of the evidence makes, we think, the burden of proof a question of great importance in the case.

The second instruction given at plaintiff's instance, is as follows:

2. If the jury believe that plaintiff's goods were injured while in the possession of defendant as a common carrier for transportation, it is incumbent on the defendant to establish, by a fair preponderance of evidence, that the damage or loss was the result immediately and proximately of the "act of God." Proof by plaintiff of the damage and loss of the goods while in the possession of defendant, as aforesaid, makes a *prima facie* case of negligence or misconduct on the part of defendant, which must be overcome by proof that the injury was the result of an inevitable accident, or, in other words, an act of God, and not its own negligence or misconduct.

If the preponderance of all the evidence does not establish that the direct, immediate and efficient cause of the injury was an inevitable flood or inundation, the defendant is liable, and although the cause of the loss may have been an act of God, such as a great flood in the Manumee river, yet if the defendant unnecessarily exposed the goods of plaintiff to such peril by any culpable or negligent act or omission of its own, it is not excused.

The doctrine this instruction announces on this subject, as to the burden of proof, presents, we think, a serious difficulty in the case, and its propriety, in view of the evidence and in connection with other instructions given in the cause, is the question we now propose to discuss briefly.

It is familiar doctrine that the law imposes upon the common carrier the obligation of safety as to goods whilst in his possession, and unless relieved from liability by the act of God or the public enemy, he is responsible in damages, although there may be no actual negligence on his part. Whenever the loss occurs from other causes the law raises a presumption against him, upon grounds of public policy. If, therefore, plaintiff shows delivery of his goods to the carrier, and a subsequent loss thereof, he need do no more. This is a sufficient statement, ordinarily, of his cause of action, and a showing to that effect is sufficient to make out a *prima facie* case. The *onus probandi* is then on the carrier to bring the case within one or the other of said exemptions. If, in establishing his said defense, facts and circumstances also appear, tending to show that his

negligence co-operated to produce the damages, he must, we think, bear the burden of satisfying the jury that they did not directly contribute to the damage, and he is not relieved of liability unless he so shows. In other words, when the burden is cast on him he must make a case in which no negligence of his own appears from the evidence. In that event he is excused *prima facie*, unless plaintiff then shows, or it appears from the facts in the case, that his negligence causes or co-operates to produce the damage complained of. Whether or not the burden is cast upon the defendant to establish one or the other of said exemptions, which, under the law, relieves him, may depend, we think, upon the state of plaintiff's evidence; or, in the language of a text-writer of acknowledged authority, on the nature of the case the plaintiff makes out. See Wharton Neg., §§ 128-129, 661.

Where, as in the case before us, the act of God appears in the testimony in plaintiff's behalf as a cause of the damage is, the *onus*, in that event, on the defendant, and does the presumption of law thus declared in the instruction then exist? May the plaintiff, under this state of facts, ignore such exception, appearing in the evidence in his behalf, and insist on this legal presumption, whilst proving at the same time the existence in the case of one of the exemptions which releases the defendant?

The right of recover must, in this, event, depend, we think, upon the alternatives presented by the evidence; or, in other words, upon the facts and circumstances and inferences of fact properly deducible from the evidence itself. This presumption of law does not, in this event, co-exist with proof by plaintiff of said exceptions, which, under the law, excuses the defendant. This state of the case which we have been considering upon plaintiff's evidence was not changed, we think, at the close of all the evidence, so far at least as the question we are considering is involved. That for defendant only confirmed the remarkable character of the flood in question, and tended to show that defendant could not have foreseen the danger or avoided the damage to the goods by the exercise of reasonable and practicable diligence; whilst that for plaintiff, in rebuttal, was as to this conflicting, except as to the character of the flood in said river.

It may be well to observe in this connection that, under the ruling of this court in the case of *Ellot v. The Railroad Co.*, 76 Mo. 518, this defense is available to the defendant under the general issue, and need not be especially and affirmatively set up. But it is said that upon authority the rule is otherwise, and that the contrary has been declared in several cases in this State. We will examine those cases briefly.

In the case of *Wolf v. The Express Co.*, 43 Mo. 423, the wine, which was the subject of the controversy, arrived at East St. Louis the 31st of December, and was taken in severe weather from the

cars and stored and exposed on a platform for a number of days, and thereby became frozen and damaged. The jury were told that the burden of proving that the injury complained of was caused by the act of God rested upon the defendant in the first instance, and then they were further told that if the defendant permitted said wine to lay carelessly exposed and become damaged thereby they would find for plaintiff. The instructions were approved, and they are, we think, correct in that sort of a case.

Wagner, J., speaking for this court, says: "After the damages to the goods have been established, the burden lies upon the carrier to show they were occasioned by the act or peril which the law recognizes as constituting an exemption, and then it is still competent for the owner to show that the injury might have been avoided by reasonable skill and attention."

Again, in the case of *Reed v. The Railroad Co.*, 60 Mo. 206, the same judge says, for the court, that: "When the loss of the goods is established, the burden of the proof devolves upon the carrier to show that it was occasioned by some act which is recognized as an exception. This shown it is *prima facie* an exoneration, and he is not required to go further and prove affirmatively he was guilty of no negligence. The proof of such negligence, if asserted to exist, rests on the other party." p. 206.

The remaining case cited by plaintiffs in this behalf is that of *Pruit v. The Railroad*, 63 Mo. 529. In that case two certain lots of hogs, the subject of the action, were delivered to the carrier for shipment. There was a very unreasonable delay of a month or more in shipping the hogs, and the snow storm and cold weather occurred in which the hogs were frozen to death or damaged. The case comments on the difference between the rulings of the New York courts and those of Massachusetts, and other courts upon the subject of proximate and remote damages, or damages which the negligence of the carrier concurs with the act of God to produce—and the court says, it is well to observe that the latest decisions of this court, referring to *Wolf v. Express Co.*, and *Reed v. Railroad*, incline to the position of the New York courts, which hold that where the negligence of the carrier concurs in, and contributes to, the injury, the defendant is not exempt from liability, on the ground that the immediate damage is occasioned by the act of God or inevitable accident, but there is no discussion as to the burden of proof in the case.

In *R. Co. v. Reeves*, 10 Wall. p. 189 and 190, Miller J., speaking for the Supreme Court of the United States, says: "One of the instances always mentioned by the elementary writers of loss by the act of God is the case of loss by flood and storm. Now, when it is shown that the damage resulted from this cause immediately he is excused. What is to make him liable after this? No question of his negligence arises unless it is made by the other party. It is not necessary for him to prove

that the cause was such as released him, and then prove affirmatively that he did not contribute to it. If, after he has excused himself by showing the presence of the overpowering cause, it is charged that his negligence contributed to the loss, the proof of this must come from those who assert or rely on it." Upon the question before us, the case of *Reeves v. The Railroad* is cited in support of the text in the case of *Reed v. The Railroad*, 60 Mo., and the language of Wagner, Judge, in the *Reed* case, and in that of *Wolf v. The Express Co.*, is almost identical with that employed by Judge Miller in *Reeves v. The Railroad*.

The Court of Appeals, in its opinion in this case, uses the following language upon this subject: "It is true that when the evidence for plaintiff shows damage, and at the same time '*vis major*', sufficient in itself to account for the damage, there is no presumption that the negligence of the carrier, rather than the *vis major*, was the efficient cause of the damage. The general rule laid down in instruction number two might, perhaps, by amplification, have been made more fully and exactly applicable to the case presented by the evidence. But the whole instruction taken together was not, we think, misleading."

In this view we are unable, upon the ground indicated, to concur. We think it erroneous, under the authorities of this court which we have cited, and that it is contradictory and irreconcilable with the 6th instruction given at defendant's instance, which is as follows: "The court further instructs the jury that if the evidence shows that the injury to plaintiff's goods was caused by a sudden, violent and extraordinary flood, at the city of Toledo, whilst the goods of plaintiff were in the cars, in the transfer house at Toledo, the verdict of the jury must be for the defendant unless the plaintiff shows that the defendant was guilty of some specific negligence with reference to the goods, which actively co-operated with the act of God to produce the injury." This correct instruction for defendant was neutralized and lost to it by the misleading and contradictory instruction number two, *supra*, given for the plaintiff.

It will be observed that it was not only charged in the petition that defendant negligently permitted the goods of plaintiff to be submerged, but it was also charged that defendant negligently permitted the goods of plaintiff to remain in bulk wet after they had been submerged. If this was so it was a breach of duty, for which defendant would be liable for any aggravation of damages so occasioned. It was the duty of defendants to preserve the property and limit the damages as far as it could by the exercise of all reasonable and practicable diligence.

The fourth instruction given for plaintiff submits this question to the jury in an instruction which we think is unexceptionable in form and phraseology. But we are not satisfied that there

was any sufficient evidence in the case authorizing it. In this behalf the court of appeals says: "There was evidence that the car could have been opened on February 13th, but I do not find any evidence tending to show that the goods would have been benefitted by opening the car then, or that further damage would have been thereby prevented, or how far the goods were injured by not opening the car as soon as it was accessible."

If the evidence was thus deficient in these respects, and from our examination we think it is, the instruction should not have been given. James H. Rich, who was an agent of defendant at Toledo, but testifying in plaintiff's behalf, says: "The floor of the transfer house was covered with water for over two days. We couldn't have gotten into the transfer house for four days after the flood, then found the floor covered with mud and water. It would have been impossible for us to handle goods on the platform without injuring them." To a like effect is the testimony of Doan Blinn, testifying for defendant in this behalf.

The evidence shows that defendant put its force at work removing the ice and other obstructions, and gained access to the transfer house by the 17th of February, whereas other railroads, similarly situated, did not reach their warehouses for several days thereafter; and further shows that it then forwarded the goods to St. Louis, where they arrived February 23d. The evidence does not show that this was not as prudent and reasonable a course as the defendant could have adopted under the circumstances, or that the damages to the goods were increased any by this course of defendant.

The instruction being without evidence sufficient to justify a finding upon this issue, was for that reason, we think, improperly given.

For these reasons we are of opinion that the judgment of the Court of Appeals, as well as that of the Circuit Court, should be reversed, and the cause remanded for further proceedings in conformity herewith, and it is so ordered. All concur.

NOTE.—Burden of Proof.—Proof of delivery of goods to a common carrier, and of such loss of them as renders a demand useless, throws the burden of evidence upon the carrier to show that the loss of the goods was occasioned by causes for which he is not liable, either by reason of the exemption in his contract of shipment or by the exemption accorded him by the law where the loss happens by the act of God or the public enemy.¹ And it is held that if the carrier fails to deliver goods within a reasonable time, he must pay damages occasioned by the delay, unless he shows there is no negligence on his part.²

But in actions like the principal case, where the carrier sets up the act of God as a defense, upon the

question whether it is sufficient for the carrier to show that the loss was occasioned by one of the excepted causes for which he is not liable, as here an act of God, or whether he must go further and show affirmatively that his negligence in no way mingled or co-operated with the excepted cause to produce the loss, or whether the burden is upon the shipper to show the contributing negligence of the carrier, there is a conflict in the cases. But it seems that the weight of authority, both in this country and in England, is in harmony with the doctrine of the principal case.³ And it is also held that where the evidence leaves the question in doubt the plaintiff cannot recover.⁴

In *Clark v. Barnwell*,⁵ the injury was occasioned by one of the excepted causes specified in the bill of lading. The court, per Nelson, J., said, that although the injury was due to one of the excepted causes in the bill of lading, yet the owner of the vessel must be held responsible if the loss could have been avoided by proper and reasonable skill and attention on the part of his servants; but in such case the burden of proof becomes shifted upon the shipper to show such negligence. This rule is fully approved in *Wertheimer v. Penn R. R. Co.*⁶ "If the carrier proves that the injury or loss was occasioned by one of those occurrences which are termed the act of God, *prima facie* he discharges himself, and the onus of proving that the alleged cause or agency would not have produced the loss or injury without his negligence or defective means, is thrown upon the plaintiff."⁷

In *Colton v. R. R. Co.*,⁸ it is held that the burden is upon the transporter. To same effect is *Farnham v. R. R. Co.*⁹

In *Transportation Co. v. Downer*,¹⁰ the trial court instructed the jury that it devolved upon the carrier to bring itself within the exception by showing that it had not been guilty of negligence. The supreme court reversed the cause because of this instruction, holding that the *onus probandi* was upon the shipper. Many other cases held substantially the same.¹¹

As above stated, the authorities do not all concur in the doctrine of the principal case. Much discord exists. Many held that the carrier must affirmatively show that he was not negligent, and that the loss was to be attributed alone to one of the excepted causes which exonerates him from liability. The reasons of this view are fully and succinctly stated in *Berry v. Cooper*,¹² which case see.

"That is a sound rule which devolves the onus on him who best knows what the facts are. In case of

¹ *Hutchinson on Carriers*, §§ 766-767, pp. 593-594, and cases in note 1, p. 594; *Lawson on Carriers*, § 243, pp. 373, 374, 375, note 12; 2 *Greenl. on Ev.* (14th ed.) § 218, note b., p. 206.

⁴ *Middle v. Stride*, 9 Car. & P. 380; *Hutchinson on Car.*, § 768, p. 594; *Lamb v. R. R. Co.*, 46 N. Y. 271. But see dissenting opinion in the last case.

⁵ 13 How. (U. S.) 372.

⁶ 17 Blatchf. C. C. 421.

⁷ *New Brunswick Navigation Co. v. Tiers*, 24 N. J. (Law), 677.

⁸ 67 Pa. St. 211.

⁹ 55 Pa. St. 53.

¹⁰ 11 Wall. (U. S.) 129.

¹¹ *Wilson v. S. P. R. E.*, 13 Reporter (Cal.), 302; *Westcott v. Fargo*, 61 N. Y. 542; *Richardson v. Sewell*, 2 Smith (C. B.), 205; *Ohrlloff v. Briscall*, L. R. 1 P. C. 231; s. c., 13 Jur. (N. S.) 672; s. c., 35 L. J. P. C. 63; s. c., 14 L. T. (N. S.) 873; s. c., 4 Moore P. C. C. (N. S.) 70; 15 W. R. 202; *Ezech v. Gen. Steam Nav. Co.*, L. R. 8 C. P. 14; s. c., 37 L. J. C. P. 3.

¹² 28 Ga. 543.

¹ *Alden v. Pearson*, 3 Gray (Mass.), 343; *Riley v. Horne*, 5 Bing. 217.

² *Nettles v. R. R. Co.*, 7 Rich. (S. C.) 190; *Schrivver v. Sioux City R. R. Co.*, 24 Minn. 506; s. c., 31 Am. Rep. 353; 2 *Redfield on Ry. L.*

loss, proof of delivery devolves at once on the carrier, the *onus* of exempting himself from liability, and nothing can be more reasonable before he can take shelter under an exception to require proof of his care.¹³ * *

¹³ *Baker v. Brinson*, 9 Rich. (S. C.) 201, 208. See, also, *U. S. v. Backman*, 28 Ohio St. 144; *Mann v. Birchard*, 40 Vt. 286. For similar rulings, see 2 Greenl. on Ev. (14th ed.) § 319; *Whiteside v. Russell*, 8 W. & S. 44; *Swindler v. Hillard*, 2 Rich. 286; *Slocum v. Fairchild*, 7 Hill (N. Y.), 293.

RAILROAD COMPANY — NUISANCE — DAMAGES—ONE RECOVERY—EMINENT DOMAIN.

CHICAGO & E. I. R. CO. v. LOEB.*

Supreme Court, Illinois (On Rehearing), October 2, 1886.

Railroad Companies — Nuisance — Damages — One Recovery—Eminent Domain.—There should be but one response in damages on the part of a railroad company for land taken or injured by it under the law of eminent domain, and where the original owner of property claimed to have been damaged by smoke and cinders of the railroad could have sued and recovered for the depreciation of the value of the property caused thereby, the right of action is in him for a recovery of all damages that have been, or may be, caused by the operation of the road, and there is no right of recovery in his alliance, who bought the property after the railroad had been constructed. *DICKEY J.*, dissenting.

Appeal from appellate court, first district. Case.

Wm. Armstrong, for appellant, Chicago & E. I. R. Co.

The original owner could not have transferred to the appellee whatever cause of action he may have had. *Chicago & A. Ry. Co. v. Maher*, 91 Ill. 312.

Neither the construction nor the operation of a railroad is a nuisance, unless, by negligent management, it becomes so. *Wood*, Nuis. 75; *Randle v. Pacific Ry. Co.*, 65 Mo. 325; *Danville, etc. Ry. Co. v. Com.*, 73 Pa. St. 38; *Harris v. Thompson*, 9 Barb. 350; *Fitch v. Pacific Ry. Co.*, 45 Mo. 322; *Whart. Ev.* § 360.

H. O. McDaid, for appellee, Adolph Loeb.

There can be more than one taking of property, and every substantive, independent cause of damage to property that depreciates its value is a taking. *Rigney v. Chicago*, 102 Ill. 64; *Tanner v. Volentine*, 75 Ill. 627; *Walker v. Butz*, 1 Yeates, 574; s. c., 4 Dall. 147; *Pittsburg, Ft. W. & C. Ry. Co. v. Reich*, 101 Ill. 176.

When a structure in itself produces no actual damage, but the use or operation is the sole cause of damage, the use is the gist of the action, and

the right of action accrues when the damage occurs, and not before. *Crosby v. Bessey*, 49 Me. 543; *Polly v. McCall*, 37 Ala. 20; *Branch v. Doane*, 17 Conn. 402; *Cooper v. Barber*, 3 Taunt. 99; *Bonomi v. Backhouse*, El., Bl. & El. 638; *Murgatroyd v. Robinson*, 7 El. & Bl. 391; *Holmes v. Wilson*, 10 Adol. & E. 509; *Norcross v. Thomas*, 51 Me. 503; *Brightman v. Bristol*, 65 Me. 426; *Barnes v. Hathorn*, 54 Me. 124; *Roberts v. Read*, 16 East, 215; *Rex v. Pappineau*, 2 Str. 686; *Barclay v. Com.*, 25 Pa. St. 503; *Welsh v. Stowell*, 3 Doug. 332; *Moody v. Supervisors*, 46 Barb. 659; *Gray v. Ayres*, 7 Dana, 375; *Ely v. Supervisors*, 36 N. Y. 297; *Brown v. Perkins*, 12 Gray, 89; *State v. Paul*, 5 R. I. 185; *Thompson v. Gibson*, 7 Mees. & W. 456; *Battishill v. Reed*, 18 C. B. 696; *Norton v. Volentine*, 14 Vt. 246.

The throwing of smoke, cinders, etc., on the property of another, causing damage to the same, is a nuisance. *Chicago, M. & St. P. Ry. Co. v. Hall*, 90 Ill. 45; *Cooper v. Randall*, 53 Ill. 24.

One who continues a nuisance commits a new wrong. *Cooley*, Torts, 611; *McDonough v. Gilman*, 3 Allen, 264; *Nichols v. Boston*, 98 Mass. 39; *Staple v. Spring*, 10 Mass. 72-74; *Pillsbury v. Moore*, 43 Me. 154; *Morris Canal Co. v. Ryerson*, 27 N. J. 457; *Moore v. Dame Browne*, 3 Dyer, 319b.

SHELDON, C. J. Delivered the opinion of the court:

This was an action on the case, brought by Adolph Loeb against the Chicago & Eastern Illinois Railroad Company on June 9, 1880, in the superior court of Cook county, to recover damages sustained from the operation of defendant's railroad by throwing smoke, cinders, and ashes upon plaintiff's premises. Upon a trial by the court without a jury there was judgment for the plaintiff for \$1,200, which was affirmed by the appellate court for the first district, and the defendant appealed further to this court.

The declaration avers that plaintiff was the owner of three certain lots, in Chicago, with the buildings thereon, which were used for dwellings, and that defendant "wrongfully and unjustly maintained and operated, near by plaintiff's property, divers railway tracks and switches upon the street within 10 feet of the property; that steam-engines have passed and repassed along the property, and in doing so have unlawfully and unjustly caused to be thrown thereon, and deposited in and upon plaintiff's property, large quantities of smoke, cinders, dust, soot, ashes, sparks of fire, and other substances, and in operating the same they greatly disturbed and vibrated the buildings; that, by reason of the close proximity to said premises, the defendant has constantly thrown and deposited, upon plaintiff's property, smoke, cinders, soot, dust, and ashes, and other substances, which greatly damaged the same, and depreciated the value of the property." There were two pleas—the general issue, and the

* S. C., 8 Northeastern Reporter, 460.

statute of limitations of five years.

The following facts appear: The Chicago, Danville & Vincennes Railroad Company was created by a private charter February 16, 1865, and during the year 1872, under its charter and provisions of an ordinance of the city of Chicago, it built a railroad on the west side, and on one of the public streets. It used the same as a railroad until April, 1877, when all its property in this State was sold, under a mortgage foreclosure, to Messrs. Hindekoper, Dennison, and Shannon, who afterwards conveyed the same to the Chicago & Nashville Railroad Company, which company consolidated with the State-Line & Covington Railroad Company, creating the Chicago & Eastern Illinois Railroad Company the defendant. The plaintiff, during the year 1876, purchased the three lots in question, being 75 feet on May street and 125 feet on Carroll avenue, near the said railroad, which railroad had been in constant operation since 1872; and on the lots there were four tenement houses at the time of his purchase. After he purchased the lots the plaintiff purchased two more houses and moved them on the lots, making then six houses on the lots. The plaintiff rented the houses to tenants, and the same have, ever since he became the owner thereof, been occupied by his tenants.

At the trial the defendant submitted to the court the following proposition of law: The plaintiff in this case, having purchased the property described in the declaration after the railroad was built and in operation, he cannot recover in this action for the matters stated in the declaration, for the reason that the entire cause of action for which he is now suing was in his grantor, and it makes no difference whether his grantor sued for the same or not. The court refused the proposition, and the defendant took exception. The soundness of the above proposition is to be considered.

The position taken by appellee is that the operating of the railway caused a private nuisance to his property; that the construction of the railroad was lawful and produced no damage, but that the operation of the railroad was the sole cause of the injury; and that in such case, where the structure in itself does not cause damage, but its use, then the damage arising from the use is the cause of action; that the grantee of premises upon which a nuisance is erected is liable for damages ensuing from his maintenance of it, because every day's continuance of a nuisance is a new nuisance. There is quite a weight of authority to the effect that one may bring suit for the deterioration in value of real property from a nuisance, alleging its permanency, and that by such an action the plaintiff consents to the continuance of a nuisance, and accepts the judgment recovered as a compensation therefor; that such recovery will have the effect to give the defendant a permanent right to do the acts which constitute the nuisance as fully as though there had been a condemnation of the property by the ex-

ercise of the power of eminent domain. Section 3, *Suth. Dam.* 413, 414. Thus, in *Elizabethtown, L. & B. S. R. Co. v. Combs*, 10 *Bush*, 393, the action was for the throwing of smoke, cinders, and ashes on premises, and the court, in speaking of the right to a subsequent recovery, which was denied, say: "We have heretofore held, in actions for injury to real estate by trespassers, that the plaintiff can only recover compensation for the injury done up to the commencement of the action; but that was in case of injuries not continuing and permanent in their character. The injury in this case, if any, is permanent and enduring, and no reason is perceived why a single recovery may not be had for the whole injury to result from the acts complained of." And in *Jeffersonville, M. & I. R. R. v. Esterle*, 13 *Bush*, 669, which was also an action for throwing of smoke, cinders, and ashes on land, the court say: "By instituting this action for damages, the lot-owner, in effect, consents that the railroad company may continue, for all future time, to use the street as it is now using it, and, as consideration therefor, to accept such judgment as may be therein rendered." In *Central Branch U. P. Ry. Co. v. Andrews*, 26 *Kan.* 711, an action to recover damages for interference with an alley, it is said by the court upon this point: "The plaintiff has chosen to consider the obstruction of the alley as a permanent injury to his lots, as a *quasi* condemnation, and permanent taking and appropriation of a certain interest in his property. * * * It seems to us that he gives his consent [that his property shall be permanently appropriated] when he brings an action for such damages. It seems to us that he then consents that the railroad company shall permanently appropriate his property in the alley, for he then brings his action for damages because of such appropriation." In *Fowle v. New Haven & N. Ry. Co.*, 112 *Mass.* 334, where the action was for damages caused by the building of a railroad in such a manner that at times the current of a certain stream would be thrown upon the plaintiff's land, the court say: "And if it (the injury) results from a cause which is either permanent in its character, or which is treated as permanent by the parties, it is proper that entire damages should be assessed with reference to past and probable future injury." And see *Town of Troy v. Cheshire Ry. Co.*, 3 *Fost.* 83; *Powers v. City of Council Bluffs*, 45 *Iowa*, 652; *Kansas Pac. Ry. Co. v. Muhlman*, 17 *Kan.* 224.

It has frequently been held by this court that, in an action brought for deterioration in the value of real estate from a nuisance of a permanent character, all damages for past and future injury to the property may be recovered; and that one recovery in such action will be a bar to all future actions for the same cause. *Ottawa Gas Co. v. Graham*, 28 *Ill.* 73; *Illinois Cent. Ry. Co. v. Grabill*, 50 *Ill.* 242; *Cooper v. Randall*, 59 *Ill.* 321; *Decatur Gas Co. v. Howell*, 92 *Ill.* 19; *Chicago & V. Ry. Co. v. Maher*, 91 *Ill.* 312. The latter was

an action of much the same character as the present. It was an action of trespass, for damage to the premises of an adjoining land owner by the construction and operation of a draw railroad bridge across the Chicago river, on which plaintiff's property abutted, and which was used as dock property. After the bridge was constructed and had been in operation for considerable time, Maher, who was the owner when the bridge was built, sold the premises to the plaintiff in the suit, who was his wife. The same question was presented here as here, whether the plaintiff might recover for damages she had sustained by the continuance of the obstruction since she purchased. The solution of that question was found by the court in the determination that the character of the cause of injury was such, from its permanency, that one recovery would be a bar of all future actions growing out of the erection of the structure; that Maher, the original owner, might have sued for and recovered all the damages which were sustained by the property from the erection, whether at the time or in the future; that that being true, the right of action was in him for a recovery of all damages that were, or might be, caused by the structure, and, as that right could not be transferred to his grantee, the plaintiff, there was in her no right of recovery. The distinction which appellee's counsel draws in that case, that it was one of trespass, some piles in the protection of the bridge having been actually driven in Maher's land, does not make a satisfactory discrimination. There is no significance in that action having been one of trespass, and not case, as our statute has abolished all distinctions between the actions of trespass and trespass on the case. The decision was not rested upon the point of that act of trespass committed being the only cause of action, but upon the permanent character of the structure as giving a right of recovery once for all; and the continuance of the obstruction since the purchase by the plaintiff was urged as ground of recovery in the case, which was met by the court in the manner above stated.

If the above doctrine as to entireness of recovery in one action, where the cause of injury is of a permanent kind, is to be admitted, it should apply peculiarly in this character of case. The cause of damage here is not a nuisance proper.

A railroad track laid upon a street of a city by authority of law, properly constructed and operated in a skillful and careful manner, is not in law a nuisance. *Randle v. Pacific R. R.*, 65 Mo. 332; *Danville Ry. Co. v. Com.*, 73 Pa. 38. In *Illinois Cent. Ry. Co. v. Grabill*, above cited, it was said: "There is no complaint in the declaration of annoyance by the running of engines, the escape of steam, or otherwise, near her (plaintiff's) premises. Such consequences of the construction and use of railroads must be borne by all living near them, and without hope of redress, for they are inseparable from the purposes and objects of such

structures." And see *Moses v. Ft. Wayne & C. R. R. Co.*, 21 Ill. 516.

There is no complaint here that the railroad is not properly constructed, or that it was not operated in a skillful and careful manner. It belongs to the idea of a nuisance that it is abatable. In the original actions, assize of nuisance and *quod permittat prosterne*, the former being brought against the one who levied the nuisance, and the latter against the allenee of him who levied the nuisance, the judgment thereon, besides damages for the temporary loss sustained, was for an abatement of the nuisance. These actions finally went into disuse, and the action on the case became the remedy, and a party injured by a private nuisance might bring his action *toties quoties*, until the obstinacy of the party maintaining such nuisance should be overcome by repeated recoveries against him and the nuisance be abated. 3 Bl. Comm. 222. But a railroad, or the operation of it, is not to be abated. It is built for the accommodation of the public. This is the object which justifies the exercise of the power of eminent domain, and the public welfare demands that there should not be discontinuance of the operation of a railroad. Thus, there is not in such case the same reason as exists in cases of ordinary private nuisance for allowance of bringing actions as injury is done, which, as Blackstone says, will have the same effect as assize of nuisance, or *quod permittat*, "unless a man has a very obstinate as well as ill-natured neighbor, who had rather continue to pay damages than remove the nuisance."

For the class of injuries here sued for, there was no remedy, as we understand, previous to the constitution of 1870. The constitution of 1848 provided only that private property should not be taken for public use without just compensation. The provision for the first time was incorporated in the constitution of 1870 that "private property shall not be taken or damaged for public use without just compensation. Such compensation, when not made by the State, shall be ascertained by a jury, as shall be prescribed by law." Before the adoption of the latter constitution where there was land taken for public use, there was provision for compensation. But where there was other disconnected land not touched by the improvement, but damaged merely, as complained of in this case, no compensation was provided. To meet this want, the clause of the constitution, restrictive of the exercise of the power of eminent domain, provides that private property shall not be taken or damaged for public use without just compensation. We think it to be within the true intent and meaning of this provision as to damage that there should be but one proceeding for recovery of damage, in which there should be recovery for the entire damage, past, present and future; that it should be similarly regarded, in this respect, as the provision in regard to the taking of the property, where there is but one proceeding, and an assessment of compensation and damages once for all. The two provisions are coupled together,

and are both in restriction of the exercise of the power of eminent domain.

In respect to the awarding of compensation for the taking of private property for public use, Mills, in his work on Eminent Domain, section 216, says: "The appraisalment embraces all past, present, and future damages which the improvement may thereafter reasonably produce." Had the railroad track in this case been laid over a portion of one of these lots, then, in the condemnation proceeding for the taking of such portion, compensation would have been assessed for the value of the portion thus taken, and for the damage to the residue of the lot not taken. Such assessment would have embraced all future damage. As well here, in this case of no taking of land, might all the damages, past and future, from the operation of the railroad, be assessed as they might be to the remainder, in such supposed case of the taking of a part of the piece of land. If there might be successive recoveries from time to time of the constantly recurring damages, then, as was said in the *Grabill* case, "a similar recovery might be had at every term of the court, and, in this shape, the plaintiff might recover ten-fold the value of the property." We do not think that this constitutional provision intended any such result,—that the just compensation given for the damaging of land might be greater than that for the taking of the land.

The just compensation to be made for damage to land was, in our opinion, intended as an indemnity, not for successive, constantly accruing damages, as they may afterwards be suffered, but for all the damage the land owner may suffer from all the future consequences of the careful and prudent operation of a railroad; it being the immediate damage done to the land-owner's estate by changing its permanent condition, and impairing its present value. See *Heard v. Middlesex Canal Co.*, 5 Metc. 81. The action for damage may be regarded as in the nature of one kind of condemnation proceeding. Upon this point of estimation of damages it was said, in the *Maher* case, that the structure being permanent in its character, "it could be determined with a reasonable degree of certainty how much it depreciated the value of the land, as a permanent structure—how much less it was worth after the erection of the structure than before." This measure of damages is recognized in the cases above cited from *Bush*, and in *Chicago & I. R. Co. v. Baker*, 78 Ill. 316, and *Chicago & P. R. Co. v. Stein*, 75 Ill. 41; and also in *Powers v. City of Council Bluffs*, *supra*, a case of damage to premises resulting from the improper construction of a ditch, where the court say: "The plaintiff's damage was susceptible of immediate estimation. No lapse of time was necessary to develop it. It was the difference between the value of his lots as they would have been if the ditch had been properly constructed, and the value of them as they were, with the ditch as it was." Page 657. And

on page 650 it was said: "If the cause of the injury is permanent, the damage can be foreseen and estimated." With so much of certainty, can the benefits or damages to real property, which will result from the construction of a railroad, be foreseen—that the mere location of the line of a railroad has an immediate effect upon the value of all real property in the vicinity, in enhancing or depreciating it? As all damages, then, which will be sustained as the necessary result of the operation of the road, can be immediately estimated at the time of the construction and putting in operation of a railroad, from the effect on the value of the land to be damaged, it would seem to answer all just purpose of the land owner to allow but one action, in which there might be recovery for all damages. The allowance of successive actions for damage, as it should occur from day to day, as new damage, would seem to serve but the purpose of harassing and the wasting of means in expenses of litigation. The law does not favor the multiplying of actions.

A further view is that the plaintiff purchased the property as it was with its surroundings. The railroad was there and in operation, and plaintiff bought the property with the disadvantage of the railroad. The railroad must be presumed to have decreased the market value of the property from what it would have been without the road, and it is to be taken that plaintiff paid but this decreased value for the property; so that, in effect, he has been allowed for all these damages, resulting necessarily from the operation of the railroad, in the reduced price which, on that account, he paid for the property, and for him now to recover for such damages in this action would be getting for himself a double allowance for the same thing—these damages.

The conclusion is that, as the former owner could have sued and recovered for the depreciation in the value of the property caused by the railroad, the right of action was in him for a recovery of all damages that were or might be caused in the operation of the railroad, and that there is no right of recovery in his assignee, the appellee. It follows that there was error in refusing the above proposition of law, and the judgment will be reversed, and the cause remanded.

DICKEY, J.: I cannot concur in the views here expressed. I do not think our laws give to railroad companies a right by prescription in five years, without payment of compensation. If possible, I will prepare an opinion expressive of my views of this case.

The appellee thereupon filed a petition for rehearing, which was overruled, and, October 5, 1886, Scholfield, J., handed down the following opinion in the judgment of the court as set out above in the opinion of Sheldon, C. J.:

SCHOLFELD, J.: As I understand this record, I concur in the judgment rendered, and I also concur, in the main, in the reasoning of the opinion by Mr. Justice Sheldon. To avoid misapprehension,

however, I prefer to state in my own way, briefly, the grounds on which my conclusion is based. A railroad in the streets of a city, when not authorized by law, is a *nuisance per se*; and hence there may, in such cases, be recoveries by those whose property is injured thereby, from time to time, until it shall be abated. But, before the adoption of our present constitution, it was held that, where there was legislative authority, a city council might authorize the location, construction, and operation of railroads in the streets of cities, and there could be no recovery by adjacent property holders for injuries sustained in consequence of their location, or of their construction, or of their operation in the usual and ordinary manner of constructing or operating railroads, that all damages thus arising were *damnum absque injuria*. *Moses v. Pittsburgh, Ft. W. & C. R. Co.*, 21 Ill. 522 *et seq.* The only clause in our present constitution affecting the question is that which provides that "private property shall not be damaged for public use without just compensation." This court held, in *Stetson v. Chicago & E. R. Co.*, 75 Ill. 74, (and the ruling has since been followed in kindred cases,) that it is not indispensable to the right to construct and operate a railroad in the streets of a city that the damages occasioned thereby to adjacent property holders shall have been previously ascertained and paid; in other words, that a railroad may be lawfully constructed and operated in the streets of a city, notwithstanding it shall cause injuries to adjacent property holders, the damages resulting from which shall not have been previously ascertained and paid.

It is sufficiently accurate to say that this railroad is permanent. The company is authorized, by its charter and by an ordinance of the city council, to locate and construct its road in the street. The right to locate and construct a railroad implies the right to operate it in the usual and ordinary manner, and, while the constitution requires that damages arising from injuries thereby occasioned shall be compensated, yet, according to the doctrine of the *Stetson* case, such injuries are not in the nature of a nuisance, for which the railroad can be abated, but are rather in the nature of a condition subsequent. It must result from the railroad being lawfully constructed in the street and from the company having the implied right to use and operate it as railroads are ordinarily used and operated, that the railroad company has the further necessarily incidental right to injure adjacent property in the manner and to the extent that such ordinary use and operation will necessarily injure it, subject to the right of the owner to have compensation made therefor. And the railroad being permanent, the injury must be equally permanent, affecting the property from the time the road is constructed; and a right of action therefor then accrues, on the authority of the cases referred to in the opinion of Mr. Justice Sheldon, to recover, once for all, the damages resulting

from the injuries sustained to the property. And it is manifestly upon this assumption that the general assembly have provided in the eminent domain act for the compensation, once for all, of such damages. The authority to lay tracks in the streets measures the extent of the contemplated probable use; and, on the question of damages to adjacent property, it is therefore to be assumed that the tracks authorized to be laid may be used to the full measure of their capacity; and so, at once and ever after, the character and degree of damages sustained by the adjacent property holder is patent to all.

I concede that if, after the road is constructed, authority be given by the city council, and new tracks shall be laid which were not within the authority conferred by the council when the road was constructed, or that if the tracks laid when the road was constructed shall be subjected to a new and more burdensome use which was not within the authority conferred by the city council when the road was constructed, and adjacent property holders shall be injured by such new tracks, or such new and more burdensome use, they may recover for the damages resulting therefrom; and I also concede that the adjacent property holders may recover from time to time for damages resulting from willful or negligent acts as to which the company would not have been protected by its charter, and the license and authority of the city council to lay its tracks in the streets, before the adoption of the present constitution. But the vibration caused to appellee's property, the casting of smoke, soot, etc., upon it, here complained of, I understand result from the ordinarily prudent use and operation of the railroad, as such roads are in general used and operated. The injury for which damages are claimed, is that necessarily to be anticipated as resulting from the mere fact of the prudent construction and operation of a railroad in the streets of a populous city.

NOTE:—The constitutional provision in Illinois that parties shall be entitled to damages for injury to land by the operation of public works, such as railroads on other lands adjacent or abutting, is a limitation upon a common law right. The general rule is thus stated by the Supreme Court of Maine:¹ "It is a fundamental maxim of the law that a man may sue his own land for lawful purposes as he pleases. He may make erections or excavations thereon to any extent whatever. Within his own limits he can control not only the face of the earth, but every thing under it and over it." He may dig down his own land so near his neighbor, that the latter's house may be so endangered that its removal becomes necessary, and for this he is not responsible, provided the consequences to his neighbors result from his own reasonable and lawful use of his own land.² So a proprietor may control the flow of mere surface water over his own land at his pleasure

¹ *Moorison v. Bucksport, etc. Co.*, 67 Me. 353.

² *Thurston v. Hancock*, 12 Mass. 220, and cases cited.

without obligation to any proprietor above or below.³ He may prevent such water coming upon his land from adjoining land,⁴ or retain it on his own land.⁵ And he may so dig for proper purposes on his own land as to cut off the sources of his neighbor's water.⁶

And, generally, it may be said, that if the use made by a proprietor of his own land is reasonable and lawful his neighbors cannot hold him responsible for disastrous consequences to them. Unless the use falls within the legal definition of a nuisance, the proprietor's right to do as he pleases with his own cannot be controverted. And as the operation of a railroad, even in the streets of a city is, if authorized by its charter, a lawful business; it follows that it cannot be regarded as a nuisance, and neither can it be so rendered by the jarring, noise, smell, smoke and soot, necessarily incident to it.⁷ A structure authorized by the legislature cannot be a public nuisance.⁸

If, therefore a railroad company has in due course of law secured the right of way over the streets of a city, its rights to the land covered by it is, for its purposes, as absolute as if it owned the fee simple of the city; and when it has once satisfied the demands authorized by the constitution of the contiguous property holders its right to carry on its lawful business in a lawful manner is as absolute as that of any tradesman in the town.

It is true that there can be more than one taking of private property for public uses, and that every successive act by which the value of the property is further impaired is in contemplation of law a new "taking,"⁹ yet when the proceeding for compensation is statutory, and in its terms contemplates the injuries to be suffered in the future and professes to include damages for such future injuries, an injury suffered after such compensation has been made or waived, can hardly in reason or in law be regarded as a fresh "taking." It is equally true that one who continues a nuisance commits a new wrong,¹⁰ and the principle would apply very fully in the case under consideration if it were conceded or established that the operation of a railroad was a nuisance at all.—[ED. CEN. L. J.]

³ Moorison v. Bucksport, etc. *supra*.

⁴ Bangor v. Lansell, 51 Me. 54.

⁵ Gannon v. Hargaden, 10 Allen 108; Rawstren v. Taylor, 11 Exch., 369; Flagg v. Worcester, 13 Gray 601; Bates v. Smith, 100 Mass. 181, 182; Rathke v. Gardner, 184 Mass. 14.

⁶ Chase v. Silverstone, 63 Me. 175.

⁷ Randle v. Pacific Railroad, 65 Mo. 325.

⁸ Danville, etc. Co. v. Commonwealth, 78, Penn. St. 29, 38; Rex v. Pease, 4 Barn. & Ad. 17.

⁹ Rigney v. Chicago, 102 Ill. 64.

¹⁰ McDonough v. Gilman, 3 Allen 264; Nichols v. Boston, 98 Mass. 39.

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MICHIGAN	8, 19, 27, 30
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1. **ARBITRATION—Submission—Award.**—Where, in an action on contract to recover a judgment for a sum of money agreed to be paid to the plaintiff annually, and for a support during his life, the defendant pleads an award of arbitration, and the submission provided that all matters of difference were submitted between them, it cannot be objected that an award made by them that the defendant should pay to the plaintiff the sum of \$200 in five years, in equal payments, without interest, is not in accordance with the submission, and that the time of payment fixed by the arbitration is not within the terms of the power conferred on them. *Donican v. Mulry*, S. C. Iowa, Oct. 19, 1886; 29 N. W. Rep., 612.

2. — **What May be Submitted—Contract—Disputed Boundary.**—All controversies of a civil nature, including disputes concerning real estate, may be the subject of arbitration. *Stigers v. Stigers*, 5 Kan. 652, referred to and disapproved. A dispute had long existed between the plaintiff and defendant in regard to the boundary line, running north and south, dividing two contiguous tracts of land which they owned. The defendant claimed that a certain hedge was standing upon the true line, while the plaintiff claimed that it was three rods further east. A written agreement was finally entered into, establishing the boundary on the line claimed by the defendant. As a part of the contract the defendant agreed to pay the plaintiff for the strip of land lying between the established line and the one claimed by the plaintiff, which was ascertained to be two and one-half acres, the value thereof to be fixed by arbitration. *Held*, in an action on the agreement to recover the value of the land, that the mutual concessions of the parties in fixing the disputed boundary line, and the relinquishment by the plaintiff of his claim to the disputed strip of land, is sufficient consideration to support the defendant's promise to pay the value of the strip, and that the contract is valid, and should be upheld. *Finley v. Fink*, S. C. Kans., Oct. 7, 1886; 12 Pac. Rep., 15.

3. **CORPORATION—Dividends on Preferred Stock—Impaired Capital—Railroad—Statute.**—Where an act of the legislature allowed a railroad corporation, whose finances were embarrassed by a large floating debt which it could not meet, either to pay the debt with the proceeds of second mortgage bonds to be thereafter issued, or to issue preferred stock for the purpose, by consent of a majority of the stockholders, and provided that the holders of such preferred stock should receive "out of the net earnings" of the company, annually, a certain per cent. on said stock, arrearages for any year to be paid out of net earnings of subsequent years before paying anything on the common stock, and the company adopted the latter method, and issued preferred stock, *held*, that dividends on the preferred stock were payable from the net earnings of any year, notwithstanding an existing deficiency of nearly a quarter of a million dollars, and notwithstanding the provision of the general statute forbidding any corporation to declare a dividend while its capital is impaired, said deficiency having existed prior to the act of the legislature. *Cotting*

WEEKLY DIGEST OF RECENT CASES.

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ENGLAND	31
ILLINOIS	7, 17
INDIANA	11, 20
IOWA	1
KANSAS	2, 4, 5, 23
KENTUCKY	37, 39
MAINE	14, 26, 29
MARYLAND	34

v. *New York, etc. Co.*, S. C. Conn., July 20, 1886; 5 Atl. Rep., 831.

4. **CRIMINAL LAW—Appeal—Evidence—New Trial—Newly-Discovered Evidence.**—Where the testimony offered by the State, when taken alone, is competent and sufficient to sustain the prosecution, a verdict which has been approved by the district court will not be set aside in the supreme court for insufficiency of the evidence. As a general rule, newly-discovered evidence, the purpose of which is to discredit a witness in the original trial, does not afford adequate ground for the granting of a new trial. The declarations of a party other than the defendant which formed no part of the *res gestæ*, although they may amount to an admission that he committed the offense charged against the defendant, are not admissible in evidence in behalf of the defendant, and an application for a new trial based on such evidence was properly refused. *State v. Smith*, S. C. Kans., Oct. 7, 1886; 11 Pac. Rep., 908.

5. — **Bigamy—Indictment—First Marriage—Evidence—Admission—Reputation—Res Gestæ—Increasing Punishment.**—In a prosecution for bigamy it is not necessary to allege in the information or indictment the exact time and place of the first marriage. It is sufficient, in that respect, to allege and prove that the marriage relation existed between the accused and his first wife at the time of the second marriage. In such a prosecution, the deliberate admissions of the defendant of a former marriage, coupled with cohabitation and repute, is evidence tending to prove an actual marriage, upon which a jury may convict. The declarations of the defendant, made in his own favor, respecting the first marriage, which formed no part of any statement or conversation called out by the State, and which were no part of the *res gestæ*, are inadmissible for the defense. The district court may, until the term ends, revise, correct, or increase a sentence which it has imposed upon a prisoner, where the original sentence has not been executed or put into operation. *State v. Hughes*, S. C. Kans., Oct. 7, 1886; 12 Pac. Rep., 28.

6. — **False Pretenses—Practice.**—On the trial of an indictment, where evidence has been given which directly tends to support the allegations of the indictment, the court may refuse to rule that there is no evidence to prove such allegations, or that there is a variance between the allegations and the proof. Although one cannot be convicted for false representations, upon a statement of his opinion as to the value of an article, yet he can for a false representation of what it is selling for. The offense of obtaining money by false pretenses is complete in a county in this State, where the representations were made by there sending a cashier's draft for the money to the defendant, at his request, to New York, by the hands of defendant's agent, or by depositing the draft in the mail at his request, he having received the money on the draft in New York. Where the bill of exceptions purports to set out all the evidence, and there is no evidence therein of a material fact necessary to support a conviction, the exception to the indictment must be sustained. *Commonwealth v. Wood*, S. J. C. Mass., Oct. 21, 1886; 3 N. Eng. Rep., 94.

7. **DEED—Apt Words of Conveyance—Bond for Deed—Further Assurance—Statute of Limitations—Partition—Adverse Possession.**—The words, "I

have this day bargained, and do grant, bargain, sell, and confirm," in an instrument, purporting to convey land, signed, sealed, acknowledged, and recorded, are adequate to pass the title, and a subsequent provision in the instrument binding the grantor in a penal sum to make a good and sufficient deed does not limit or qualify the apt words of conveyance. Such a provision is merely a covenant for further assurance. A grandchild cannot, after the lapse of more than twenty years from the attainment of his majority, bring a suit for partition of land against other grandchildren who have been in undisputed and adverse possession since the death of the common ancestor, for more than that length of time. *Johnson v. Filson*, S. C. Ill., Oct. 6, 1886; 8 N. E. Rep., 818.

8. — **Recording—Husband and Wife—Homestead.**—The recording of a deed raises a presumption of delivery, to be explained or rebutted, however, by the intention of the party recording the same. Any act presumptively a delivery will not be a delivery if the intent to make it such is wanting, or is expressly negated by other acts or words of the grantor. Where the only act looking toward a delivery is the recording of the deed, the effect of such recording must be qualified, limited and governed by the intention of the party recording, which intention is shown by what he said to the register of deeds when he left the instruments with him for record; and what he said to the register at the time is part of the *res gestæ* and admissible in evidence to explain the character of his intent. Where a husband deeds the homestead to a third party, who simultaneously deeds it to the wife, the transaction in law is a simple conveyance from the husband to the wife; in such case, the deed to such third person would not be void because of the wife not joining in its execution. Where the wife after leaving her husband, who continued in possession of the land, sold the same to a third person who deeded it to her brother, it will be deemed a conveyance from a sister to her brother, the plaintiff, who under the circumstances was chargeable with notice of the title. *Stevens v. Castel*, S. C. Mich., Oct. 14, 1886; 2 W. Rep., 724.

9. **DOWER—At Common Law and by Statute—Estoppel.**—Dower, at common law and under the statutes of Pennsylvania, is an estate in the land and not a mere lien. The act of March 29, 1882, charges the widow's dower on the land in partition proceedings; and the orphans' court cannot divest the dower, by decree or otherwise, unless the widow's consent is procured in such manner as to pass her estate. Her consent will not be implied from knowledge of the proceedings, and that the court had ordered a cash sale. Such knowledge will not operate as an estoppel and prevent her from recovering her dower, in an action of assumpsit brought against an assignee of the land. Evidence that the administrator's deed omits reference to dower, or that the whole of the purchase money was paid to the administrator or that the assignee of the land understood from his vendor or the scrivener that the land was clear from incumbrance, is inadmissible, where the widow is not a party to these transactions. *Defenderfer v. Eschleman*, S. C. Penn., Oct. 4, 1886; 4 Cent. Rep., 290.

10. — **Wife Joined in Mortgage—Title Defeated—Rights Restored.**—Whenever the title

under a deed or mortgage of real estate given by a husband in which the wife joins is defeated, her act in joining in the conveyance becomes a nullity, and she is restored to her original situation, and may, after the death of her husband, recover dower, as though she had never joined in the conveyance. *Hinchliffe v. Shea*, N. Y. Ct. Ap. Oct. 5, 1886; 7 East. Rep. 326.

11. EQUITY—*Fraud—Rescission in Part—When Proper—Contract—Part Written, Part Parol—Consideration must be Averred and Proved—Account—Acknowledgment of Correctness—When may be Shown Incorrect—Mortgage—Assumption of Debt—Party Paying Equitable Part Treated as Surety.*—A party who has been fraudulently induced to make a contract cannot, as a rule, affirm it in part and avoid it in part; but where the contract is divisible into several independent parts resting on different considerations, he may retain the subject of one part, and at the same time maintain a suit in equity to rescind another part on equitable terms, or, by tendering back the consideration or benefit received under that part, treat it as rescinded at law. A contract party in writing, which cannot be made complete without supplying an essential part by parol evidence, is to be treated as a parol contract; and one who relies upon such a contract, which does not show upon its face that it was made upon an adequate consideration, must aver and prove that there was a sufficient consideration for it. A written acknowledgment that an account is correct, made without consideration, will not estop a party from showing that it is incorrect as against parties having notice of its incorrectness before acting upon it. Where two persons purchase real estate as tenants in common, giving a purchase-money mortgage thereon, and afterwards make partition thereof, the one who pays his equitable share of such mortgage debt stands in the relation of surety to one who purchases from the other, and assumes his share of the mortgage debt, and such surety is entitled to have the land so purchased first sold to satisfy the mortgage debt before the portion set apart to him shall be taken. *Higham v. Harris*, S. C. Ind., Sept. 15, 1886; 8 N. E. Rep. 255.

12. — *Limitation of Actions—Presumption of Payment, from Lapse of Time—Liens—Laches.*—The common law presumption of payment, arising from the lapse of time, arises upon every species of security for the payment of money, including evidences of debt excepted out of the statute of limitations. Equity follows the law in this respect. The lien of a contractor for the construction of a railroad is presumed to have been paid after the lapse of twenty years, where there are no circumstances or evidence showing that it has not been paid. Such contractor cannot, therefore, after the lapse of such time, under such circumstances, enforce such lien by bill in equity or otherwise. *Hayes' Appeal*, S. C. Penn. Oct. 4, 1886; 18 Weekly Notes of Cases, 322.

13. EVIDENCE—*Admissions.*—Declarations of defendant, contained in letters signed by him and mailed by his order, which directly contradict his testimony on the trial, are admissible in evidence against him, although the letters are not addressed to the plaintiff. *Hosmer v. Groat*, S. J. C. Mass., Oct. 29, 1886; 3 N. Eng. Rep. 78.

14. EXECUTION—*Levy—Officer's Return—Amendment.*—If the return of an officer making a levy contains sufficient matter to indicate that in making the extent all the requirements of the statute have been complied with, an amendment of a mere clerical error may be made, notwithstanding any intervening interest of a subsequent bona fide purchaser. *Peaks v. Gifford*, S. C. Me. Sept. 24, 1886; 5 Alt. Rep. 879.

15. FALSE IMPRISONMENT—*Commitment for Contempt—Process not Void—Court's Jurisdiction—What it is—Commitment for Contempt—Attorney Resisting Motion for Discharge.*—All the facts constituting an alleged contempt were undisputed, and were presented to the court having jurisdiction of the proceedings for consideration upon a hearing. After the hearing the court decided that a contempt had been committed, and ordered the party guilty thereof to be committed. *Held*, that the decision of the court was an exercise of the judicial function, and that the decision, although afterwards set aside as erroneous, did not render an order or process based upon it void, nor subject the party procuring it to an action for damages for false imprisonment. The power of a court to entertain jurisdiction of an action does not depend upon the existence of a sustainable cause of action, but upon the performance by the party of the prerequisites authorizing the court to determine whether one exists or not. In an action for false imprisonment, where the defendants, as authorized attorneys, resisted a motion for the discharge of the plaintiff, who had been committed for contempt, pending an appeal to determine whether he was guilty of such contempt, and where the motion for the discharge was overruled by the court before whom it was made, *held*, that the defendants were not liable in damages for false imprisonment; *held*, further, that they were not responsible for the action of the sheriff in continuing the imprisonment after the order of commitment was claimed to have been complied with. *Fischer v. Langbein*, N. Y. Ct. App. Oct. 5, 1886; 8 N. E. Rep. 251.

16. HUSBAND AND WIFE—*Divorce in One State—Proceedings for Alimony in Another.*—A and P were married in West Virginia, at their domicile, where A retained his domicile, but P went to Tennessee, where, in *ex parte* proceedings, she obtained a divorce *a vinculo* from A; but, as there was no personal service upon A, her application for alimony was dismissed without prejudice and to enable her to sue for it elsewhere. She then brought suit here for alimony alone, and to reach certain property in Ohio belonging to A; in which case she obtained service upon A, who also appeared and filed pleadings in the case, and on trial the court found sufficient cause, and allowed her alimony. *Held*, P had a right thus to bring her action for alimony alone, and she could have her claim therefor determined, and, if sustained upon trial, the court could allow her reasonable alimony out of the property of A. *Woods v. Waddle*, S. C. Ohio, Oct. 19, 1886; 8 N. E. Rep. 297.

17. INJUNCTION—*Threatened Trespass—Threatened Nuisance.*—An injunction will not be granted to restrain one from committing a threatened trespass, where it is not alleged that the defendant is not insolvent. A very strong case must be made by the bill to justify the court in granting an in-

junction to restrain a threatened nuisance. *Thorn-ton v. Roll*, S. C. Ill., Sep. 9 1886; *The Reporter*, vol. 22, 586.

18. **INSURANCE—Agent Negligence of.**—An excep-tion will not be sustained to a finding of the trial court that an agent of an insurance company, in-structed to cancel a policy, did not use due dil-igence in delaying until a loss occurred five days thereafter, when he could have given notice of the cancellation within half an hour. The court prop-erly refused to rule that "inasmuch as, by the terms of the policy, the company had sixty days after proof of loss in which to pay the amount thereunder, the action was prematurely brought" against the agent for the loss sustained by his negligence, the proof of loss having been made and the writ dated the same day. The offer of de-fendant to prove that "orders generally from the companies are to cancel the policy as soon as con-venient, and that it is generally understood that an agent has from five to ten days in which to cancel a policy," was rightly refused. *Phoenix etc. Co. v. Frissell*, S. J. C. Mass., Oct. 22, 1886; 3 N. Eng. Rep. 69.

19. — **Fire Insurance—Practice—Testimony.**—The condition in a fire insurance policy, that in-sured shall not effect a second insurance without the written consent of the insurer, is not waived by the fact that the agent of the company saw the policy of a second insurance, subsequently taken out by the insured, read portions of it, and con-versed with insured upon its terms. The taking out of the second policy rendered the first policy void. Motions to strike out testimony should not prevail when the testimony offered is competent, and no objection is made thereto at the time it is offered. *Robinson v. Fire Association, etc.*, S. C. Mich., Oct. 11, 1886; 5 W. Rep. 715.

20. **JUDGMENTS—Liens—Statutory—Subordinate to Prior Equities—Deed—Mistake in Description—Prior Equity.**—Judgment liens are general statutory liens; they cannot be created by agree-ment, and they will not be allowed to stand in the way of prior specific qualities. In 1863, T obtained a deed by which it was attempted and intended to convey certain real estate, including that in con-troversy, but, by mutual mistake of the parties and scrivener, the description did not include such real estate. In 1879, appellant obtained a sheriff's deed thereto on a sale on a judgment against T in 1872. In 1875, appellee obtained a judgment against T's grantor, after he had parted with all interest in the real estate, except the naked legal title, and in 1883 he obtained a sheriff's deed thereof, on a sale upon said judgment made in 1884, but at T's request, his grantor made a deed to his wife, correcting the mistake, in 1879, and she made a deed to appellant in 1884. T and appellant have continued in possession. Held, that appellant's equity is superior, and he is entitled to have his title quieted as against ap-pellee. *Wells v. Benton*, S. C. Ind., Oct., 12, 1886; 8 N. E. Rep. 444.

21. **NEGLIGENCE**—In an action for causing the death of plaintiff's intestate, where the only evidence is that, while engaged in defendant's employment in making starch, he was injured by starch being blown out of the boiler upon him, there being no evidence that the boiler was out of repair or im-properly constructed, such evidence does not sus-tain due care on his part or negligence on the part

of defendant, and the court may order a verdict for defendant. *Blanchette v. Border City, etc. Co.*, S. J. C. Mass., Oct. 29, 1886; 3 N. Eng. Rep. 92.

22. — **Railroad Crossing—Whistle—Evidence—Character of Railway Train.**—It is the duty of a railroad company, in running its trains over its track, to have the whistle of its engines sounded three times, 80 rods from the place where the railroad crosses any public highway, except in cities and villages. Where no whistle is sounded, or other alarm given, and damages are sustained by a train of cars running over cattle upon the highway, the company is chargeable with negli-gence; and it is not relieved from its liability therefor merely by the evidence of the owner of the cattle, in charge of the same, that he saw the smoke and heard the puffing of the engine drawing the train more than half a mile from the crossing, because no one is bound to conclude that the en-gine or train will cross the highway without sound-ing the whistle 80 rods from the crossing. Where a person has lived several months on a farm near a railroad crossing of a public highway, and his business requires him to cross the track frequently, and he is able to tell the time the regular trains cross the crossing, he is competent to testify whether a particular train is an irregular or extra one. *Missouri, etc. Co. v. Stevens*, S. C. Kans., Oct. 7, 1886; 12 Pac. Rep. 26.

23. **PARTITION—Trust—Instructions—Notice.**—Where the court gives binding instructions to the jury to find for one party or the other, it must be assumed that the evidence advanced by the other party is true and that every fact fairly inferred therefrom is true. The title of all heirs in the real estate of a decedent is extinguished by a decree and sale in partition of the orphans' court and delivery of sheriff's deed, and the interest of the heirs is thereby converted into personalty. To es-tablish a trust by parol, the evidence must be full, clear and convincing. When real estate is held by a title regular on its face, a *bona fide* mortgagee thereof, or one claiming title under such mort-gagee, is not liable to be affected by any secret trust or equity if he be without notice thereof. Notice to an attorney or agent in a particular transaction, given in the course of that transaction, is notice to the principal. Partition is made of lands of tenants in common; when their possession is com-mon; when the possession of one is adverse to the others the proper remedy is ejectment. *Bigley v. Jones*, S. C. Penn., Nov. 8, 1886; 17 Pitts. Leg. Jour. (N. S.) 140.

24. **PAYMENT—Plea of—Burden of Proof.**—Where an allegation of payment is denied no burden is cast on the plaintiff to prove that the defendant has committed fraud or perjury. The burden is on the latter to establish the alleged payment and whether he succeeds or fails the verdict is no evidence that he is guilty of forgery or fraud. If under a plea of payment the evidence is so evenly balanced that the jury cannot tell which prepon-derates, the defense fails. Where the execution of a receipt is denied, the party offering it must sat-isfy the jury by the weight of the evidence that it was executed by the other party. Where no re-quest is made to the court to charge on the question of the burden of proof, failure to do so is not a subject of error. *Mitchell v. Metcchell*, S. C. Penn., Nov. 9, 1886; 17 Pitts Leg. J. (N. S.) 143.

25. **PUBLIC LANDS—State Lands—Swamp Lands—**

- Impeaching Titles.**—Where land is a part of the swamp and overflowed lands granted by congress to the State and the State has never sold or disposed of it, the state alone is competent to impeach the title of those claiming it, or to complain of any disposition made of it by the United States. *Driver v. Evans* S. C. Ark., Sept., 25, 1886; 1 S. W. Rep. 518.
- 26. SALES.**—A sale of real and personal property was made for a lump sum. A portion of the price was paid and the possession of the property delivered. The legal title to the real estate was in a third person to secure a certain sum of money, less in amount than the balance of the purchase money. The purchaser paid off the incumbrance and took a deed from such third person. *Held*, that the purchaser was liable to the vendor for the amount of the purchase-money less the partial payment, and the amount paid in discharge of the incumbrance. *Bartlett v. Baker*, S. C. Me., Sept. 23, 1886; 7 East Rep. 249.
- 27. — Fraud — False Representations.**—Upon the sale of a mill, where representations of the vendor made to the purchaser were mere expressions of opinion, and not statements of the existence of positive facts, upon which the purchaser had a right to rely in making the purchase; and where the testimony shows that the purchaser made a personal examination of the property, and also made inquiries of parties living at the place where it was located; and he had ample opportunity of ascertaining all the facts bearing upon the desirability of making the purchase, and the value of the property—such representations would not be sufficient to found the charge of fraud upon, if they should prove to be untrue. Representations that farmers would bring in enough logs from the surrounding country to stock the mill, or that the amount of logs would be cut by farmers and be delivered at the mill for custom sawing, for four or five years in succession, sufficient to meet the capacity of the mill, were representations of mere matters of opinion, and not sufficient to establish fraud. Fraud cannot be presumed, but must be established by a preponderance of evidence, and where two witnesses affirm, and two others no more interested in the subject-matter and fully as creditable deny, the fraud, it is not proved. Where fraud is relied on in a suit to set aside a deed of a steam saw-mill, lands and appurtenances, and to set aside mortgages and notes given thereunder, an alleged defect in the title, when connected with the fraud alleged, must stand or fall with that allegation, and, the fraud not being established, complainant must seek his remedy in another action. *Allison v. Ward*, S. C. Mich., Oct. 14, 1886; 5 West. Rep. 780.
- 28. SET-OFF—Trust—Assignment.**—A set-off, to be allowed, must be a debt between the same parties and in the same right, and complete when the action was instituted. A bank received a cashier's check of another bank, as a conditional payment of the debt of a third party. The latter bank made an assignment in trust for creditors and the check was not paid on presentation. At the time of the assignment there was, on the books of the first bank, a credit to the insolvent bank of the proceeds of notes, indorsed and discounted for the latter's accommodation. In an action by the first bank against the debtor, for the debt, *held*, that this deposit was not a valid set-off against the debt. *Union, etc. Bank v. Cannonburgh, etc. Co.* S. C. Penn., Oct. 4 1886; 4 Penn. Rep. 262.
- 29. TRESPASS—Replevin—Officer.**—The owner of personal property may maintain trespass against the plaintiff in replevin suit, who causes such property to be taken on the replevin writ, as the property of another, the defendant in replevin; and the fact that the plaintiff in replevin acted as a servant of the officer in serving that writ would not protect him though the officer might have a valid defense. *Williams v. Bunker*, S. C. Me., Sept. 23, 1886; 7 East. Rep. 249.
- 30. TROVER—Sheriff—Pleading—Attachment.**—In an action of trover against a sheriff for seizing under attachment the property of plaintiff for the debt of a third person, where the defense was that plaintiff's title was fraudulent as to the creditors of the attachment debtor, the embarrassed circumstances of the attachment debtor may be shown as a material circumstance tending to sustain the defense. Where, in such action, the pleadings of defendant contain the substance of the general issue and a good notice that he intends to prove plaintiff was not the owner of the property at the time of its seizure, they are sufficient. Where the person making the affidavit for the writ of attachment avers that she is the agent of the party suing out the writ, it is a sufficient averment of agency. That a bond filed for an attachment was defective is not an objection which goes to the jurisdiction, as a new bond could have been filed. Testimony as to transactions between the parties to the alleged fraudulent transfers, involving an investigation of facts and circumstances which would tend to show whether or not the attachment debtor was acting as owner or as agent of the property, was properly admitted. *Adams v. Kellogg*, S. C. Mich; 5 W. Rep. 722.
- 31. TRUST FOR CHILDREN—Default of Appointment—Class When to be Ascertained.**—By her will E H in exercise of power to appoint amongst her children or remoter issue given to her by the will of M H directed her trustees to pay the income of a certain trust fund to such child or children of hers as should survive her, during their lives, in equal shares if more than one, and in case of the death of any of her children in her lifetime, or afterwards, she directed that the issue of such child, or any one or more of them, should take his, or her, or their parents' share, in such shares and proportions of his, her, or their parents should by will appoint; in default of such appointment such issue to take equally as tenants in common. E H had several children, all of whom were born in the lifetime of M H and all of whom were born in the lifetime of M H and all of whom survived E H. Some of these children were now dead, without having exercised the power of appointment given by the will of E H. They had children, of whom some predeceased and others survived their parents. *Held*, that the persons to take in default of appointment by the children of E H were all the children of such children, whether they survived their parents or not.—*Re Hutchinson; Alexander v. Jolley*, Eng. Ct. Appl; 55 Law Times Rep. 527.
- 32. WATER AND WATER-COURSES — Navigable Waters—Islands—Riparian Owner.**—Where, by the terms of a patent, land is bounded by a navigable river, the title extends no further than the edge of the stream, and does not include an island, through the channel between that and the mainland may not be navigable. *Packer v Bird*, S. C. Cal. Sep. 28, 1886; 11 Pac. Rep. 873.

33. WAYS — Of Necessity — Grantor May Designate — Private — By Prescription — Evidence — Grantor's Declaration.—In case of a grant of land which is inclosed by other land of the grantor, a right of way by necessity arises, but the grantor has the right to designate the way to be pursued. He may designate a new way in preference to one already in use, and in such case a subsequent purchaser of his remaining land takes the same subject to such right of way. The use and enjoyment of a right of private way across the land of another for five years is sufficient to create a right of way by prescription, provided the user is under claim of right, is continuous, uninterrupted and exclusive, and within the knowledge and acquiescence of the owner. In case of a dispute concerning the existence and location of a right of way claimed by plaintiff as a of necessity, the declarations of the original owner of both plaintiff's and defendant's lands, who designated the way to be used at the time of his conveyance to plaintiff, are admissible. *Kripp v. Curtis*, S. C. Cal., Sept. 22, 1886; 11 Pac. Rep. 879.

34. WILL—Charge on Land—Legacy.—A testator directed his executor to satisfy and pay his just debts, etc., out of his "estate," and gave and bequeathed to K \$200, which he directed his executor to pay out of his "estate." Testator then gave, devised, and bequeathed all the rest, residue, and remainder of his estate, real, personal, and mixed, to his niece, J. C. Held, that the real estate was given to J. C. unconditionally, and was not charged with payment of the legacy to K. *White v. Kaufman*, Md. Ct. App., Oct. 9, 1886; 5 Alt. Rep. 865.

35. — Construction—"Death Without Issue"—Conditional Limitation.—Where land was devised to one, and if he died without issue, then to certain others, subject to the proviso that certain legacies should be paid by the primary devisee, and by a subsequent clause in the will it was provided that, if the primary devisees should die before the provisions of the will became an act, then the devisees over should perform all the conditions as to the payment of legacies required of the primary devisee, held, that the words "death without issue" referred to the death of the primary devisee at any time, and not merely to his death in the lifetime of the testator, and that the primary devisee took a fee subject to a conditional limitation. *Vanderzee v. Haswell*, N. Y. Ct. App., Oct. 5, 1886; 8 N. E. 247.

36. — Contest — Evidence -- Remarks of Contestant—Undue Influence—Circumstantial Evidence—Trial—Order of Evidence -- Objection—Competency for Two Purposes.—In a will contest a remark made by one of the beneficiaries, who was also a witness in the case soon after the date of the will, that he and Aunt Fanny had got the will fixed as they wanted it, and other similar remarks, admissible in evidence, both as admissions by a party in interest, and also to contradict his testimony that he used no undue influence, and cannot, therefore, be excluded on the ground that other beneficiaries under the will should not be affected by his admissions. Undue influence may be found from all the facts and circumstances surrounding a case, even if there is no direct and positive evidence. If evidence which would be competent, both as an admission of a party in interest and as a contradiction of that party's testimony, is admitted, no objection being made at the time, before

the party in question has testified, and afterwards counsel ask the court to charge that the testimony is inadmissible, but the court charges that it is admissible as a contradiction of the party's testimony, there is no error. *Saunders' Appeal*, S. C. Conn., June 18, 1886; 6 Atl. Rep. 193.

37. — Provision for Maintenance — Rights of Widow—Rights of Children—Statute of Limitations -- Devise -- Pleadings -- Devisees -- Action to Set Aside Sale.—Where a testator devises land to his widow for the support of herself and family, and to be divided between their children at her discretion, (naming them), the children have a present interest in the same; and, where the widow makes a sale, they are entitled to an immediate right of action, not only against the widow, but against the purchaser also, to have the sale set aside, and the land restored to them, for the purposes for which it was intended. Where land is devised by a testator to his widow for the support of the family, and to be divided between their children at her discretion, and the widow makes a sale of it, the right of action which accrues to the children immediately after the sale, to have the same set aside, and the land restored to them for their support, is absolutely barred by the lapse of thirty years. Where a petition is filed by the devisees of a testator to have a sale set aside, made by the widow, who is also a devisee under the will, and the petition shows that the action is barred, and that they are not within any exceptions of the statute saving their rights thereto, the rule requiring the statute to be pleaded in cases where it is sought to be availed of does not apply. *Stillwell v. Leavy*, Ky. Ct. App., Oct. 21, 1886; 1 S. W. Rep. 590.

38. — Testator — Witnesses — Publication — Imperfect Declarations — Sufficiency of, when Proof — Construction — Description of Gift — Words Sufficiently Definite.—Where a testator cannot speak at all, or only with difficulty, he may communicate his knowledge by signs or by words, unintelligible to some listeners: but if he does it in a manner capable of conveying to the minds of the witnesses his own present consciousness that the paper being executed is a will, it is a substantial and sufficient compliance with the provisions of the statute of wills requiring a publication at the time of the testamentary act. While the imperfect and indefinite declarations of a testator cannot be made sufficient by proof of a previous conversation with the subscribing witnesses not connected with the *factum* by the words of publication used, yet, if they are so connected by the very language of the testator, at the time of execution, as to make them an essential part of the communication he has made, they are sufficient proof of the due publication of the will. The words of a testator in his will, "I leave and bequeath to my niece * * * all the money I die possessed of in several banks and bonds, besides all I bequeathed to her in my former will," are sufficiently definite and certain to transfer to the niece whatever money the testator had at his death, which was on deposit or stood to his credit in any banks, or was invested in and represented by bonds. *In re Will of Beckett*, N. Y. Ct. App., Oct. 5, 1886; 8 N. E. Rep. 506.

39. — Equal Legacies to Daughters—Ademption—Evidence—Burden of Proof—Cross-Peti-

tion.—Where a testator left \$100 to each of his six daughters, excepting two of them, one of whom had already received that amount, and the other of whom had received \$80, and was to have \$40 more, and it appeared that prior to the date of the will he contemplated giving \$100 to one of the four by crediting her and her husband with that amount in a sale of land to them, the deed to be in the wife's name, but the husband then refused to accept such a deed, the fact that the deed was accepted by them after the making of the will should not preclude such daughter from receiving her legacy. Upon a proceeding in equity against heirs to subject certain land devised to the payment of legacies, which, by the terms of the will, are to be charged upon the land devised only in case there is not sufficient undevised land to pay the same, if the defendants seek, by cross-petition, to have certain other land, held adversely by petitioner, surrendered as part of the estate, the burden is on them to show title in themselves or their ancestors. *Davis v. Justice*, Ky. Ct. App., Sept. 18, 1886; 1 S. W. Rep., 588.

40. WITNESS—*Competency—Child*.—Where it appears to the presiding judge that a child, offered as a witness, does not sufficiently understand the nature and obligations of an oath, he may permit the child to be properly instructed, if of sufficient age and intellect to receive instruction. If the judge find the witness competent, it is no objection that she has been instructed by a Christian minister since the last adjournment of the court. The court cannot be called upon to express its opinion to the jury as to whether the testimony of a witness is contradictory and conflicting. Where the court has fully and properly instructed the jury upon a point, further instruction may be refused. On the trial of an indictment for incest by a father upon a daughter, the testimony of medical experts as to the daughter's condition soon after the commission of the offense is admissible. *Commonwealth v. Lynes*, S. S. C. Mass., Oct. 22, 1886; 3 N. Eng. Rep. 89.

RECENT PUBLICATIONS.

THE RIGHTS AND OBLIGATIONS OF MARRIAGE—together with the Rules of the Common Law and the Regulations of Particular Statutes Governing the Relations of Husband and Wife, and Parents and Child, throughout the United States. And the Law suspending the Dissolution of Marriages and the Granting of Divorces. By Maxwell Brothers' Counselors at Law. New York; L. 7 E. Strouse & Co., Law Publishers, 1886.

This is a very small book (114 pages,) on a very large subject. It of course makes no pretention to be exhaustive, nor is it addressed exclusively to the legal profession. The authors say in their preface: "The purpose of this little work is to furnish a brief statement, in convenient form, of the leading principles which govern the relations growing out of the marriage union, and is addressed alike to the legal profession and to the general reader who may find in its pages the answer to such questions respecting the reciprocal rights and obligations of husband and wife and parent and child, and questions touching the severance of those relations, as most commonly

and frequently arise in every-day experience." The book is well written and well arranged. There are six chapters, each divided into suitable sections; and as far as it goes, and for the purposes which it is designed to accomplish is, in all respects, well executed. It is a matter of question with us, however, whether these little compendiums are of any value to the profession or to the general reader either. They are not sufficiently full for the lawyer who most needs resort to the regular text-books, digests and reports. As to the general reader we apprehend that, notwithstanding its lucidity, this work, like others of its class, will prove misleading. The condensation necessary in so short a book has prevented the authors from noting many differences and distinctions that may be material in questions investigated by the amateur, whose want of practice in such matters might well superinduce error.

JETSAM AND FLOTSAM.

AN OCULIST'S TEST.

In a large factory in which were employed several hundred persons, one of the workmen, in wielding his hammer carelessly allowed it to slip from his hand. It flew half way across the room, and struck a fellow-workman in the left eye. The man averred that his eye was blinded by the blow although a careful examination failed to reveal any injury, there being not a scratch visible. He brought a suit for compensation for the loss of half of his eyesight, and refused all offers of compromise.

The day of the trial arrived, and in open court an eminent oculist retained by the defence examined the alleged injured member, and gave it as his opinion that it was as good as the right eye. Upon the plaintiff's loud protest of his inability to see with his left eye, the oculist proved him a perjurer, and satisfied the court and jury of the falsity of his claim.

And how do you suppose he did it? Why, simply by knowing that the colours green and red combined make black. He procured a black card on which a few words were written with green ink. Then the plaintiff was ordered to put on a pair of spectacles with two different glasses, the one for the right eye being red and the one for the left eye consisting of ordinary glass. Then the card was handed him, and he was ordered to read the writing on it. This he did without hesitation, and the cheat was at once exposed. The sound right eye, fitted with the red glass, was unable to distinguish the green writing on the black surface of the card, while the left eye, which he pretended was sightless, was the one with which the reading had to be done.

RECENTLY in Kern county, California, a man charged with murder was held by the superior court in \$500 bail. A few days after a prisoner was before a justice, charged with stealing a suit of clothes. He was held to answer, and when the question of bail came up the justice said, after figuring awhile: "The judge of the superior court releases a man who is charged with murder on \$500 bail. I think, after comparing the degrees of crime, I will give you a chromo and let you go."

The Central Law Journal.

ST. LOUIS, DECEMBER 3, 1886.

CURRENT EVENTS.

CRIMINAL LAW REFORM.—A newspaper article has lately attracted our attention, in which the writer, after citing a recent case in which a prosecution failed by reason of a defective indictment, is led into a train of reminiscences of numerous similar cases in which guilty defendants went "unwhipt of justice," because, of what he denominates, the "technicalities of the law." No doubt like cases are constantly occurring in every part of the country, and this fact, together with the popular feeling that the administration of the law is uncertain and dilatory, fosters and keeps alive the tendency in many sections to lynch law.

The question at once arises, what is the remedy for the uncertainty of justice which grows out of the technicality of the law? How can it be so arranged that, when a prisoner has been indicted for a heinous crime, tried, convicted, and has appealed, he shall not escape, because, in the initial pleading—the indictment—there appears a flaw that abrogates the whole proceeding, and if it does not set him free at once, compels the prosecution to begin *de novo* with infinitely less hope of success than at first, when the matter was fresh, the witnesses all well in hand, and all the circumstances were favorable to conviction? Of course, everybody looks to the legislature. The law, they say, must be simplified; these cast-iron rules must be abrogated; common sense must supercede technicality. If, however, we will look into the criminal codes of most of the States, we will find that they have already gone very far in that direction. The Missouri statute, for example,¹ condones almost every conceivable blunder which a court or a prosecuting attorney could reasonably be expected to commit. The legislature, of course, should do its share, examine carefully the existing law, and apply appropriate remedies to such defects as they may discover, taking

care, however, that in stopping a small leakage, do not open a larger one. Strange, as it may seem, there is a limit to safe generalization and simplification. Unexpected results sometimes confront the bold innovator. For example, the ludicrous blunder of the California codifiers, who so simplified the law on the subject of bigamy, that in that State a man lived, and, for aught we know still lives, with two *lawful* wives.

Although the legislature should do what it can, the true remedy for this evil, in our opinion, can only be found in greater care in the trial courts. The indictments should be carefully scrutinized as soon as they are returned by the grand jury, and, as far as possible, all technical questions should be settled *in limine*, and the rules of practice should be so modified as to accomplish this purpose.

The fragility of indictments is a matter for special wonder—in fact, a professional phenomenon. The gentlemen who prepare these instruments are specialists—experts; for years they are wholly addicted to practice in criminal causes. They have, as to all common law crimes, the precedents of a thousand years, carefully annotated, classified, and labeled by numerous text-writers. As to offenses, created and defined by statute, they have the statute itself, and the rule that it is always safe to follow the terms of the statute. They are relieved of many chances of error by the statutes of *jeofails*, usually broad, sweeping, and indulgent in the highest degree; and yet hardly a week passes in which we do not hear of an important case in which an indictment is quashed. The ingenuity of the counsel for the defense finds a flaw, a fissure, "not as deep as a well nor as wide as a church door, but it will serve;" it suffices to compel the quashing of the indictment. Then the case must needs "go over" to next term, and the prosecution begins *de novo*, and in the *interim* witnesses die, or are spirited away, and papers disappear, and, in short, the prosecution fails. And the strangest thing of all is that, in the profession and out of it, a failure of justice from this cause is regarded as a visitation of Providence, an act of God, in the nature of a tornado, an earthquake or a tidal wave. In ante-railroad times, the tolerant newspapers of that generation had a stereotyped phrase,

¹ Rev. Stat. (1879) § 1821.

brought into use whenever they chronicled the upsetting of a mail-coach: "No blame is attached to the driver."

NOTES OF RECENT DECISIONS.

CHattel Mortgage—Landlord and Tenant—Landlord's Lien Under Lease—Voluntary Assignment—Rights of Assignee—Fraud.—In a recent case in the New York Court of Appeals¹ the court held that a lien for rent, created by lease of a store, for a term of five years upon the stock in trade, of the lessee, which he was permitted by the terms of the instrument to sell at retail and replenish from time to time, was fraudulent and void upon its face, and was of no effect as against the assignee of the lessee, who had made a general assignment, for the benefit of his creditors, with preferences however, which would absorb the whole of the proceeds of the stock in trade.

The court said that the lien was good as between the parties to the lease,² not only as to the property in the possession of the lessee at the time of the execution of the instrument, but also as to subsequently acquired property.³ The court seems to concede that, in the absence of statute, the assignee in a voluntary assignment had no higher or better rights than his assignor, but that when, as in this case, he represents creditors he may well treat as void all agreements made in fraud of their rights, and that his powers in this respect are, under the New York statute, even greater than those of the creditor himself who can only proceed against his debtor's property, covered by a fraudulent lien, after he has obtained a judgment and issued an execution.⁴

The court further held, that although the lease did not purport to convey the title to the property, it was, nevertheless, a chattel mortgage, and as such subject to the statutory provision for the filing of such instruments. And thus the attempt of the lessor to establish a secret trust in the goods in favor of the lessor was defeated.

¹ Reynolds v. Ellis, October 5, 1886; 7 East. Rep. 343.

² McCaffray v. Woodin, 65 N. Y. 459; s. c., 22 Am. Rep. 644; Wisner v. Ocumpaugh, 71 N. Y. 113.

³ Southard v. Benner, 72 N. Y. 424.

In some of the States there have been different rulings. In Rhode Island, for example,⁴ it has been held that an unrecorded mortgage of personalty was good against an assignee for the benefit of creditors, because the assignee could have no better right than the assignor, and the mortgage was good between the parties who executed it. In Kentucky, in a recent case,⁵ the Court of Appeals says, that an assignee for the benefit of creditors generally "is a purchaser for value; that he stands in the shoes of the debtor his assignor, and can assert no equity that the debtor himself could not assert." * * *

The Supreme Court of Nebraska has held that, in case of a voluntary assignment for the benefit of creditors, the assignee represents the assignor and can make no defense that his assignor could not make.⁶ And in Missouri, it is held that the assignee, under a voluntary assignment, does not represent the creditors, and cannot on their behalf dispute a conveyance of his assignor's goods *inter partes* as being in fraud of creditors.⁷ So in Pennsylvania, in an old case,⁸ it is said: "The assignee is the debtor's instrument for distribution. * * * As he stands in no privity to the creditors, he cannot arrogate to himself any of their powers or rights."

A manifest distinction exists, and should be borne in mind, between a voluntary assignment, and one made under the operation of a bankrupt or insolvency law. In the first the assignee is the creature of the assignor; in the latter he is the officer of the law. To the first the reasoning of the foregoing rulings very clearly apply; to the latter they are wholly inapplicable. The assignee in a voluntary assignment executes the orders of the assignor as expressed in the assignment; the statutory assignee is the trustee of the law, and acts for the creditors in accordance with the provisions of the statute.

The distinction between these two classes

⁴ Wilson v. Esten, 14 R. I. 621; Williams v. Winsor, 12 R. I. 9; Gardner v. Commercial Nat. Bank, 18 R. I. 155.

⁵ Bridgford v. Barbour, 80 Ky. 529, 534, 535.

⁶ Hensel v. Cremer, 18 Neb. 398. See also Pillsbury v. Kington, 31 N. J. Eq. 619.

⁷ Heinrich v. Wood, 7 Mo. App. 236; Schultz v. Chrisman, 6 Mo. App. 393; State use, etc. v. Rowe, 40 Mo. 563; Gates v. Labaume, 19 Mo. 17.

⁸ Vandyke v. Christ, 7 Watts & S. 374.

of assignees is obliterated in New York by the act of 1858, ch. 314, which provides: § 1. "That any executor, * * * assignee, or other trustee of an estate, or the property and effects of an insolvent estate * * * may, for the benefit of creditors, * * * disaffirm, treat as void, and resist all acts done, transfers and agreements made in fraud of the rights of any creditor," etc. This statute, according to the ruling in the case under consideration, abrogates the distinction between the voluntary and the statutory assignee, divests the former of his character as agent and instrument of his assignor, makes him the trustee for the creditors, and confers upon him all the powers exercised by an assignee in bankruptcy, or one who holds that office under the insolvent laws of a State.

NAMES OF CORPORATIONS.

Must Have Name.—It is somewhat difficult for one to think of a corporation without a name, and one author has said: "The names of corporations are given of necessity; for the name is, as it were, the very being of the constitution; for though it is the will of the king that erects them, yet the name is the knot of their combination, without which they could not perform their corporate acts; for it is nobody to plead and be impleaded, to take and give, until it hath gotten a name."¹ Coke likens its name to an individual's proper or baptismal name, and when bestowed by a private founder he compares him to a god-father.² This is not strictly correct, for a change of a letter in a name may make it entirely another name, while a change of a word, or even more, may not make any essential difference in their sense,³ as we shall hereafter see.

May Have More Than One Name.—A corporation may have more than one name. Thus, though incorporated by one name it may be authorized to sue in another.⁴ So in

an old case, where the college of physicians were incorporated by the name of the president, college or commonalty of the faculty of physic, and afterward in the king's patent it was granted that the president of the college should sue and be sued in behalf of the college, it was held that an action could be brought in either name.⁵ But this case is somewhat shaken by two others, in which it is declared that a corporation may not have two names for the same purpose.⁶ In view, however, of the absolute power of the legislature, it is undoubtedly competent for it to authorize corporations to have two or more names for the same purpose.⁷

May Acquire More Than One Name by Usage.—So a corporation may acquire a second or other names by prescription or usage.⁸ Thus, one court said: "We know not why a corporation may not be known in its public proceedings by several names, as well as individuals."⁹ And this is true of a municipal corporation.¹⁰

Who Bestows the Name.—Until recently the king in England, in granting his patent, usually designated the name by which the corporation was to be known, or else the recitations in it were such as to indicate what it should be known by;¹¹ and the same was true of charters granted by parliament.¹² And in this country it is said that the recitation in the act of incorporation may be such as to indicate the name by which the corporation shall be known.¹³ Under the municipal corporations act of England, provisions are made for the name of a city or borough, and the style in which it shall sue and be sued; and such a borough is now known as the

⁵ College of Physicians v. Salmon, 5 Mod. 327; 2 Salk, 451; Ld. Raym. 630.

⁶ Anon., 3 Salk. 102; Attorney-General v. Farnham, Hardres, 504.

⁷ 1 Kyd. Cor. 230.

⁸ Willcock on Mun. Cor., 34; Mayor of Carlisle v. Blamire, 8 East. 487; Gifford v. Rockett, 121 Mass. 431; s. c., 7 Amer. Cor. Cas. 462.

⁹ Minot v. Curtis, 7 Mass. 441.

¹⁰ Clement v. City of Lathrop, 5 Amer. Eng. Cor. Cas. 563. See generally, Dutch West India Co. v. Moses, 1 Stra. 614; Knight v. Mayor of Wells, 1 Ld. Raym. 80; Smith v. Plank Road Co., 30 Ala. 650; South District v. Blakeslee, 18 Conn. 227; Melledge v. Boston Iron Co., 5 Cush. 158.

¹¹ 2 Bac. Abr., 441, citing 1 Salk. 191, p. 3.

¹² Glover Cor. 52, 53; Willcox Cor. 35; Grant Cor. 50.

¹³ Trustees v. Park, 1 Fairf. (Me.) 441; School Com. v. Dean, 2 Stew. & Port. 190.

¹ 2 Bac. Abr. 440 (Amer. ed.); see Smith's Merc. Laws, 133.

² 10 Co. 28; 2 Inst. 696.

³ Newport Mechanics Manf. Co. v. Starbird, 10 N. H. 123.

⁴ College of Physicians and Butler, Jones 261; s. c., Lit. 163, 212, 350; Cro. Car. 256.

"mayor, alderman and burgesses of the borough of —," and a city as the "mayor, alderman, and citizens of the city of —." ¹⁴

Failure to Name.—If the incorporating act or instrument should contain an omission to designate the name of the corporation, and the name cannot be gathered from the contents of the act or instrument, no doubt, at this present age, the corporation might acquire one by usage. ¹⁵ And it seems reasonable, in such an instance, that the incorporators or directors should have the power to bestow a name upon the corporation, the same as an individual may take upon himself a name and be liable thereby in a suit against him. A case not far from supporting this proposition arose in Indiana. A city under a special charter bore a certain name. A general law for the incorporation of cities was enacted with a provision that no city then incorporated should be bound by it unless it accepted its provisions. In this general act there was no provision designating the name of a city incorporated under it, by which it should be known. A city having accepted the provision of the general act, it was held that it was authorized to retain its old corporate name, and such the court would presume it did. ¹⁶

Change of Name and Effect.—The name of a corporation may be changed, usually with the consent of the incorporators, and if the identity and ancient rights of the corporation are preserved the change can in nowise effect it, either in its liabilities, duties or property. ¹⁷ Such a change does not relieve it from its liabilities, ¹⁸ even to the paying of the

taxes due from it in its old name; ¹⁹ for it does not create a new corporation. ²⁰ And this is true even of a city. ²¹ In an old case it was said, where the new charter alters the constitution of the corporation and remodels it, it loses its name; but if the constitution in all its integral parts remain the same, though the new charter give them a new name, the old one remains. And an illustration is given, as if a mayor be added, or a mayor and masters be made mayor and alderman, or an abbot and a convent a dean and chapter, in which instances they lose their old name, because new integral parts of the corporation are added. "But if the bailiff and burgesses *Villae de Gippo* accept a charter constituting them bailiff and burgesses *Villae Gipwiki*, and giving them farther privileges, this is a new name only, for the old corporation remains in its integral parts." ²² And of a corporation it was judicially said, that "though the name and style of the corporation and the mode of electing members were changed, the identity of the body itself was not affected." ²³

Same Continued.—If the name of a corporation is changed, all new suits on its old obligations must be brought in its new name; ²⁴ and it is essential to allege the

Passmore, 3 T. R. 119. 247; Colchester v. Brooke, 7 Q. B. 383; Colchester v. Seaber, 3 Burr. 1806; Bellows v. Bank, etc., 2 Mason, 43; Olney v. Harvey, 50 Ill. 463; Neely v. Yorkville, 10 S. C. 141; Heckel v. Sandford, 40 N. J. L. 180.

¹⁹ Macon & Augusta R. R. v. Goldsmith, 62 Ga. 463; s. c., 7 Amer. Cor. Cas., 16. It is to be remarked that a corporation has no right or power of itself to change or alter the name originally selected by it without recourse to such formal proceedings as are prescribed by law. Goodyear Rubber Co. v. Goodyear Rubber Mfg. Co., 8 Amer. & Eng. Cor. Cas., 317; Regina v. Registrar, etc., 10 Q. B. 889; Episcopal, etc. v. Episcopal Church, 1 Pick. 372.

²⁰ Town of Reading v. Wedder, 66 Ill. 80; s. c., 4 Am. Cor. Cas. 371; Morris v. St. Paul & Chicago R. R. Co., 19 Minn. 528; s. c., 4 Amer. Cor. Cas. 501; Trustees of University v. Moody, 62 Ala. 89; s. c., 6 Amer. Cor. Cas. 190.

²¹ State v. Mayor, 24 Ala. 706; Ready v. Mayor, 5 Ala. 339; Broughton v. Pensacola, 33 U. S. 266.

²² 2 Bac. Abr. 441, citing Regina v. Bailiffs, etc., of Ipswich, 2 Ld. Raym. 1239; s. c., 2 Salk. 433; see Knight v. Mayor, etc. of Wells, 1 Ld. Raym. 80; s. c., Lutw. 508.

²³ Doe, etc. v. Norton, 11 M. & W. 913, 923; see Corporation of Ludlow v. Tyler, 7 Cor. & P. 537; Attorney-General v. Wilson, 9 Sim. 30; Attorney-General v. Kerr, 2 Beav. 420; Attorney-General v. Corporation of Leicester, 9 Beav. 546.

²⁴ Mayor of Colchester v. Seaber, 3 Burr. 1806; 5

¹⁴ Attorney-General v. Corporation of Worcester, 2 Phillips, 8; Corporation of Rochester v. Lee, 15 Sim. 376; Grant on Cor. 342; Rawlinson on Cor. 3; 1 Dill Municipal Cor. § 35 and note, § 176.

¹⁵ Smith v. Plank Road, 30 Ala. 650; Anonymous, 1 Salk. 191; Pitts v. James, Hob. 124; Gifford v. Rockett, 121 Mass. 431; s. c., 7 Amer. Cor. Cas. 462; Ayray's Case, 11 Co. 19; 2 Kent Com. 292.

¹⁶ Johnson v. Common Council of Indianapolis, 16 Ind. 227.

¹⁷ Rosenthal v. Madison, etc. R. R. Co., 10 Ind. 358; President, etc. v. Jackson, 7 Blackf. 36; Eaton & Hamilton R. R. Co. v. Hunt, 20 Ind. 457; Episcopal Charitable Society v. Episcopal Church, 1 Pick. 372.

¹⁸ Hazelett v. Butler University, 84 Ind. 230; s. c., 9 Amer. Cor. Cas. 252; Dean v. LaMotte Lead Co., 59 Mo. 528; s. c., 8 Amer. Cor. Cas. 188; Bucksport & Bangor R. R. Co. v. Buck, 68 Me. 81; s. c., 7 Amer. Cor. Cas., 318; 4 Co., 87b.; Girard v. Philadelphia, 7 Wall. 1; Regina v. Bewdley, 1 P. Wms. 207; Rex v

identity of the corporation as known by its two names.²⁵ If, however, the courts are bound to take judicial knowledge of the name of the corporation both before and after the change, the allegation of identity would be unnecessary. The mere change of name by the legislature while suit is pending does not abate the suit,²⁶ and there is no reason why a change made under like condition by the corporators should be good cause for an abatement. So where the name of a corporation was changed pending suit, and judgment was taken in the old name, it was held too late to then object that the title of the case was not changed to correspond with the new name.²⁷ The name of a corporation having been changed by an amendatory act requiring acceptance by the corporators before it would be binding, and the corporation having brought suit after its passage by its old name, it was held not necessary for the corporation to allege and show that its corporation had rejected the amendatory act.²⁸

Constitutionality of Act Changing Name.—Where the constitution of a State provided that the legislature should not pass any law granting any "private charter or special privileges," and the legislature passed an act changing the name of a particular corporation, it was held a valid act and not within the prohibition of the constitution.²⁹ But unless the right is reserved in its charter, or by a general law before its incorporation, the legislature would have no power to arbitrarily change the name of a corporation; for often the name alone is a valuable franchise, and to so change that name would be in direct conflict with the clause of the constitution pro-

hibiting the impairing of the obligation of a contract.

Protected in Use of Name.—And this leads up to the statement that, under the proper circumstances, a corporation will be protected in its use of its name, the same as a firm or individual who has acquired a property right in a name or mark will be protected against one unauthorizedly using it. The long user of a name may render it a valuable acquisition. Notably in this country is that of certain railroads where, by advertising and usage, they have so fixed the name in the minds of the traveling and shipping public as to bring to them, to the exclusion of as equally good and competing lines, thousands of dollars a year.³⁰ If the plaintiff has a remedy at law, however, an injunction will not lie.³¹ Neither can an individual corporator maintain an action to enjoin the unauthorized usage.³² Another phase of this question is well stated in the following quotation: "There is no reason why a corporation may not acquire a property right to the use of another name or a trade-mark, or as incidental to the good-will of a business, as well as an individual; and if it has acquired such a right it will of course be protected in its enjoyment, to the same extent as an individual would be. It cannot be deprived of the right by the assumption of the name subsequently by another corporation, and it is immaterial whether the latter selects its name by the act of corporators who organize under the general laws of a State, or whether the name is selected for it in a special act by the legislative body. Manifestly, if the defendant had no right to use the name by which the complainant was incorporated, or one practically identical with it at the time of the latter's incorporation, the title of the complainant is clear, because it adopted the name formally, publicly and legitimately, for all its corporate purposes."³³ But the United States courts have no power to restrain a State officer, simply because certain persons are taking the

Dane Abr. 181; *Scarborough v. Butler*, 3 Lev. 237; *Simapee v. Eastman*, 32 N. H. 470; *Colton v. Mississippi, etc. Co.*, 22 Minn. 372; s. c., 7 Amer. Cor. Cas. 608; see *Pope v. Capital Bank*, 20 Kan. 440; s. c., 7 Amer. Cor. Cas. 130.

²⁵ *West v. Carolina Life Ins. Co.*, 31 Ark. 478; s. c., 6 Amer. Cor. Cas. 190; *Rosenthal v. Madison, etc. Plank Road Co.*, 10 Ind. 368; *Cahill v. Briggs*, 8 B. Mon. 211; *Reedy v. Tuscaloosa*, 6 Ala. 327; *Madison College v. Burke*, 6 Ala. 494.

²⁶ *Thomas v. Frederick School*, 7 Gill. & J. 369.

²⁷ *Water Lot Co. v. Bank of Brunswick*, 53 Ga. 30; *Talbott v. Hale*, 72 Ind. 1.

²⁸ *Beene v. Cohawba R.*, 3 Ala. 690.

²⁹ *Wells Fargo & Co. v. Oregon Ry. & Nav. Co.*, 16 Amer. & Eng. Cor. Cas. 71.

³⁰ *Newby v. Oregon, etc. R. R. Co.*, Deady, 609; *Ex parte Walker*, 1 Tenn. Ch. 97; *Holmes v. Holmes, etc. Manf. Co.*, 37 Conn. 278.

³¹ *London, etc. Soc. v. London, etc. Ins. Co.*, 11 Jur. 988.

³² *Newby v. Oregon, etc. R. R. Co.*, Deady, 609.

³³ *Goodyear Rubber Co. v. Goodyear's Rubber Mfg. Co.*, 8 Amer. & Eng. Cor. Cas. 317.

necessary steps before him for the formation of a corporation with a name identical with a well known and well established corporation already in existence in another State, and doing business in the State where the proceedings are instituted; for this is an undue interference with the State by the federal authorities. In the case cited, the question was left undecided what the court would do if the bill were filed against the company after its incorporation.³⁴

In What Name May Sue.—It is a mere truism to say that a corporation cannot sue in the individual names of its corporators³⁵ like an association or society,³⁶ but must bring the suit in its corporate capacity.³⁷ Since the officers and agents of a corporation should know its exact name, it is held to much strictness in bringing an action in its exact name, and any variance not trifling will be sufficient to defeat the action.³⁸ As we have seen, a corporation may be authorized to sue in one name and enter into corporate obligation by another, but this rarely, if ever, now occurs.³⁹ If the action is brought by the plaintiff corporation in a wrong name, the defendant can take advantage of it only by a plea in abatement,⁴⁰ and a plea of *null tiel* corporation in bar would perhaps be a waiver of the misnomer.⁴¹ However, if the corporation has acquired a new name by reputation, and by such it is universally known,

there is no reason why it may not sue by that name the same as an individual may; and there are cases that not only lend color to this statement but support it.⁴²

When Must Aver Identity with the Corporate Name Used.—It is no uncommon thing for a corporation to carelessly enter into a contract by a name not strictly its own, or to have a deed so executed to it, or to have a bequest thus made to it, or the naming of a corporation in a judicial proceeding is often necessary, although it is not a party to the suit, in connection with a written instrument, wherein it is referred to by a name not strictly its own or by one entirely different. In all such instances the name used must be set out as well as the true name, and identity of the names, as applicable to the corporation, must be averred; and if the misnomer applies to the plaintiff the action must be brought in its true name;⁴³ and the same is true with reference to the defendant corporation.⁴⁴ The variance, if a written instrument, may be so slight as to be immaterial, and the identity of the corporation may be ascertained from the name used. In such an instance averring identity is unnecessary.⁴⁵ And the old author-

³⁴ Lehigh Valley Coal Co. v. Hamblen, 8 Amer. & Eng. Cor. Cas. 201; see the case of Ottoman Cehvey Co. v. Dane, 85 Ill. 208; s. c., 6 Amer. Cor. Cas. 460. What is necessary in Illinois to affect a change of name, see Anthony v. International Bank, 93 Ill. 225; s. c., 6 Amer. Cor. Cas. 453.

³⁵ Habicht v. Pemberton, 4 Sandf. 657.

³⁶ Pollock v. Dunning, 54 Ind. 115; Hays v. Lanier, 8 Blackf. 322.

³⁷ Bradley v. Richardson, 2 Blatchf. 343; Insane Hospital v. Higgins, 15 Ill. 185; Campbell v. Brunk, 25 Ill. 225; Trustees of Lexington v. McConnell, 3 A. K. Mar. 224; Mauney v. Motz, 4 Ired. Eq. 195; Porter v. Neckervis, 4 Rand. 359; Hay v. McCoy, 6 Blackf. 69.

³⁸ Tipling & Pexal, 2 Bulst. 233; Turvill v. Aynsworth, 2 Str. 787; s. c., 2 Ld. Raym. 1515; President, etc. v. Jackson, 7 Blackf. 36.

³⁹ Chancellor of Oxford's Case, 10 Co. 57.

⁴⁰ Stafford Corporation v. Bolton, 1 B. & P. 40; Hoereth v. Franklin Mill Co., 30 Ill. 157. See Burnham v. Savings Bank, 5 N. H. 446.

⁴¹ Trustees of M. E. Church v. Tryon, 1 Denio, 451; Gray v. Monongahela Navigation Co., 2 W. & S. 156. In one case an amendment was allowed at the hearing, and this is no doubt a correct practice. Hoboken, etc. v. Martin, 2 Beas. 427; Bank of Utica v. Smalley, 2 Cow. 770; s. c., 14 Amer. Dec. 526.

⁴² Lynne Regis, 10 Co. Rep. 126; Stafford v. Bolton, 1 B. & P. 41; Ipswick v. Johnson, 2 Barnard, 120; School District v. Blakeslee, 13 Conn. 227; Queen v. Registrar of Joint Stock Cos., 10 Q. B. 839; Episcopal Charitable Society v. Episcopal church, 1 Pick. 372; King v. Norris, 1 Ld. Raym. 837; Queen v. Bailiffs of Ipswick, 2 Ld. Raym. 1232; Alexander v. Berney, 28 N. J. Eq. 90; Angell & Ames, Cor., sec. 645. A corporation may sue by the name of the creation, although, expressly authorized to sue by another name. Physicians College v. Talbois, 1 Ld. Raym. 153.

⁴³ Northwest Distillery Co. v. Brant, 69 Ill., 658; New York African Society, 13 Johns. 38; Berks, etc. Turnpike Co. v. Myers, 6 S. & R. 12; Commercial Bank v. French, 21 Pick. 486; Alloways Creek Township v. Strong, 5 Halst. 1323; Vansant v. Roberts, 3 Md. 119; Hagerstown Turnpike Co. v. Creque, 5 Har. & Johns., p. 123; Oler v. Baltimore, etc. R. R. Co. 41 Md. 583; s. c., 7 Amer. Cor. Cas. 349; Washington Co. National Bank v. Lee, 112 Mass. 440; s. c., 5 Amer. Cor. Cas. 440; All Saints Church v. Lovett, 1 Hall 191; Hammond v. Shepard, 29 How. Pr. 128; Boisgerard v. New York Banking Co., 2 Sandf. Ch. 23; Hoboken, etc. v. Martin, 2 Beas., 427.

⁴⁴ Gifford v. Rochett, 121 Mass. 431; s. c., 6 Amer. Cor. Cas. 462; Taton & S. Boston Turnpike v. Whitney, 10, Mass. 327; Gilmore v. Pope, 5 Mass. 491; Tucker v. Seaman's Aid Society, 7 Met. 188; Woolwick v. Forest, 1 Penning, 115.

⁴⁵ Motts v. Hick, 1 Cow., 513; Northwestern Distilling Co. v. Brant, 69 Ill. 659; Thacher v. West River National Bank, 19 Mich. 196; Chadsey v. McCrary, 27 Ill. 253; Pitman v. Kintner, 5 Blackf. 250; Mayor and Burgesses of Lynne Regis, 10 Co. 125;

ities lay it down as a rule, if the words used are synonymous with the words of the corporate name, this is sufficient without averring identity.⁴⁶ Where a corporation, declaring in covenant by its modern name, stated that the citizens of the incorporation were from time immemorial incorporated by divers names of incorporation, and at the time of making the deed declared on by the plaintiff, were known by a certain other name, by which name the plaintiff granted to them a certain water-course, and covenanted for its quiet enjoyment, it was held that the deed granting the water-course to them by such name was evidence as against the defendants who claimed under the grantor, that the corporation was known by that name at the time upon an issue taken on that fact.⁴⁷

Misnomer of Defendant Corporation.—Like an individual sued by name not his own a corporation will be bound, unless it pleads the misnomer in abatement.⁴⁸ Of course a slight variance between the name as laid and as proven is not fatal, as alleging the defendant is a "railroad" corporation, and the proof show it is a "railway" corporation.⁴⁹ Where the plaintiff brought the defendant into court by a name it had been formerly known by, but the defendant's name had recently been changed, the court allowed the writ and complaint to be amended by the insertion of the then true name.⁵⁰ In many jurisdictions, if service has been had upon the proper corporation by a wrong name, the correct name may be inserted on motion,⁵¹

but this is not the case in others.⁵²

Variance of Defendant's Name in Judgment.

—It sometimes occurs that where a judgment has been rendered against a corporation by a wrong name, a variance arises in proceedings subsequent to its rendition. Thus, where an execution was issued upon a judgment against a railway company, and levied upon land of the same company under the name of a railroad and then sold, it was held that the name being otherwise identical parol evidence was admissible to show their identity, and, possibly, the court would be justified in assuming the two names to refer to the same corporation, although this question was not decided.⁵³ But a judgment against a corporation cannot be corrected by striking out the name under which it was sued and served with process and substituting its true name.⁵⁴ If it is necessary to plead a judgment taken against a corporation by a wrong name, it must be so served in order to bind it.⁵⁵ The corporation cannot escape liability on the judgment when thus rendered against it by an erroneous name.⁵⁶ In a suit against "the president and trustees of the Savings bank in the county of Strafford," to recover payment for serving a writ of execution for them, a copy thereof in the name of the "Savings bank of the county of Strafford" was held to be inadmissible in evidence.⁵⁷

Action by or Against Officers of Corporation.

—It is sometimes difficult to say whether the action is by or against the officers of the corporation, or against the corporation. Thus, a bill for an injunction charged certain wrongs to have been done by a corporation, setting out its name, but prayed for an injunction against the president and directors of the corporation and a third person, and for a subpoena to issue to the president and directors and such third person. It was held that the corporation itself was not a party to

Brock District v. Bowen, 7 U. C. Q. B. 471; Trent, etc., v. Marshall, 10 U. C. C. P. 336; Whithy v. Harrison, 18 U. C. Q. B. 603; Bruce v. Cromar, 22 U. C. Q. B. 321; Molden v. Miller, 1 B. & Ald. 699; Kentucky Seminary v. Wallace, 15 B. Mon. 45; Medway Cotton Mf. Co. v. Adams, 10 Mass. 360; People v. Love, 19 Cal. 676; Bower v. State Bank, 5 Ark. 234.

⁴⁶ 2 Bac. Abr. 442.

⁴⁷ Mayor, etc. of Carlisle v. Blamire, 8 East. 487.

⁴⁸ 26 H. VIII. 1 b; 1 Kyd. Cor. 283; Northumberland County Bank, 60 Pa. St. 436; Gilbert v. Nantucket Bank, 5 Mass. 97; Lake Superior Building Co. v. Thompson, 32 Mich. 293; s. c., 5 Amer. Cor. Cas. 468. If a mere partnership it must set up that fact by plea: French v. Donahue, 29 Minn. 111; s. c., 9 Amer. Cor. Cas. 479.

⁴⁹ Galveston, etc. R. R. Co. v. Donahoe, 56 Tex. 163; s. c., 9 Am. & Eng. R. R. Cas. 287; Newport Mechanics Mf. Co. v. Starbird, 10 N. H. 123.

⁵⁰ Pittsburg, etc. R. R. Co. v. Rohrman, 12 Amer. & Eng., R. R. Cas. 176.

⁵¹ Burnham v. Savings Bank, 5 N. H. 573; Hoboken, etc. v. Martin, 2 Beav. 427; Sherman v. Connecticut River Bridge Co., 11 Mass. 338; Georgetown v. Beatty,

1 Cranch C. C. 234; Bullard v. Nantucket Bank, 5 Mass. 99; Lone v. Seaboard, etc., 5 Jones L. 25.

⁵² Sams v. Toronto, 9 U. C. Q. B. 181.

⁵³ Talbott v. Hale, 72 Ind. 1.

⁵⁴ Brown v. T. H. & I. R. R. R. Co., 72 Mo. 567; s. c., 8 Amer. Cor. Cas. 270.

⁵⁵ Lehman, Durr & Co. v. Warner, 61 Ala. 455; s. c., 6 Amer. Cor. Cas. 155; Wilson & Co. v. Baker, 53, Iowa, 423; s. c., 6 Amer. Cor. Cas. 563; Lafayette Ins. Co. v. French, 18 How. 304.

⁵⁶ Wilson & Co. v. Baker, *supra*; Lafayette Ins. Co. v. French, *supra*.

⁵⁷ Burnham v. Savings Bank, 5 N. H. 466.

the bill.⁶⁰ So in an action of replevin the property was described in the writ as belonging to A, B and C, of H, the trustees of the ministerial fund in the north parish of H." In the subsequent portions of the writ the plaintiffs were referred to as "the said trustees," and "the said plaintiffs." The replevin bond described them as first described in the writ, and they were referred to in the condition thereof as "the above bounden A, B and C, trustees aforesaid," and the bond was signed by them individually, with separate seals. Other papers in the case referred to them by their individual names as plaintiffs. It appeared that there was a corporation named "the trustees of the ministerial fund in the north parish of H," and the plaintiffs claimed title as such corporation. It was held that the action was not brought in the name of the corporation, and could not be mentioned.⁶¹

Misnomer in Deeds, Grants and Wills.—It is no uncommon thing for corporations to be misnamed in a deed, grant or will. In such a case what is the result?

Deeds or Grants.—And first of deeds and grants, and the old authorities bearing on the question. Less strictness is required in the use of a name in a deed, grant or will than in a writ or court process of any kind; for there the latter may be amended, while the former cannot. Or, as Coke says, "for if a writ abates one might of common right have a new writ, but he cannot of common right have a new bond or a new case."⁶² In the case from which this quotation has been made, a special verdict found that the defendant's testator made, sealed, and as his deed delivered, a writing obligatory to the plaintiffs, whose true style was the mayor and burgesses of the borough of the Lord and King of Lynne Regis, commonly called King's Lynne in the county of Norfolk. Upon this verdict judgment was given for the plaintiff. In the notes to this case Coke cites the case of the abbot of York who was incorporated by the name, "The Abbot of the Monastery of the Blessed Mary of York," and a bond was made to the abbot by the name "The Abbot of the Monastery of the

Blessed Mary, without the walls of the city of York." The abbot brought an action in his true name which implied that the abbey was within York; and although the abbey was without the walls, yet because it was in truth within the city of York the bond and writ were adjudged good.⁶³ And in these cases are involved the proposition that if enough be said to show that there is such an artificial being, and to distinguish it from all others the corporation is well named, though the words and syllables of the actual name are varied from; and the same is true if the words used are synonymous with the actual words of the corporate name.⁶⁴ So a misdescription of a corporation in a conveyance of a part of their estate for the redemption of the land tax was held immaterial.⁶⁵ And in case of a corporation by prescription, where the name had been changed by usage a number of times, a deed to it by one of its earlier names was held valid.⁶⁶ So when the king grants lands to a corporation by a name not its own, the lands pass, and the letters patent, it is said, shall be to them as a new corporation.⁶⁷ In an old case,⁶⁸ Coke says; "It was observed that till this generation of late times, it was never read in any of our books that any body, politic or corporate, endeavored or attempted, by any suit, to avoid any of their leases, grants, conveyances, or other of their own deeds, for the misnomer of their true name of corporation; but after that a window was opened to give them light to avoid their own grants for the misnomer of themselves, what suits and troubles (to avoid grants, etc., as well made to them or by them) have followed thereupon, everybody knows; but it was said, for every curious or nice misnomer, God forbid that their leases or grants, etc., should be defeated, for there will be found a difference between writs and grants; and in all cases this is true, *quod apices juris non sunt jura.*"

⁶¹ See *Master, etc. of Sussex and Sidney College v. Davenport*, 1 Wills. 184.

⁶² 2 Bac. Abr. 441, 442. See *Ayray's Case*, 11 Co. 20, 21; Hob. 124; Cro. Eliz. 816; Poph. 59.

⁶³ *Craydon Hospital v. Farley*, 3 Marsh. 174; 6 Taunt. 467.

⁶⁴ *Mayor, etc. of Carlisle v. Blamire*, 8 East. 487.

⁶⁵ *Dean & Chapter of Christ Church, and Parot's Case*, 4 Leon. 190.

⁶⁶ *Sir Moyle Finch's Case*, 6 Rep. 65.

⁶⁰ *Binney's Case*, 2 Bland. 90.

⁶¹ *Bartlett v. Brickett*, 14 Allen 62. See *Burnham v. President, etc.*, 5 N. H. 446.

⁶² *Mayor & Burgesses*, 10 Rep. 125.

Same Continued.—What has been said of the English cases is equally true of the American. Because of a misnomer of the corporation a deed is not void, if it can be collected from the face of the deed what corporation is intended, aided by extrinsic evidence, to apply its language to external objects.⁶⁷ Thus, where the word "academy" was used for "seminary," there being no academy of the name (Kentucky) used, a deed was admitted in evidence, notwithstanding the variance.⁶⁸ So a deed by an old corporation in its new name will bind it.⁶⁹

Chancellor Kent upon this question has said: "An immaterial variation in the name of the corporation does not avoid its grant, though it is not settled, with the requisite precision, what variations in the name are or are not deemed substantial. The general rule to be collected from the cases is, that a variation from the precise name of the corporation, when the true name is necessarily to be collected from the instrument, or is shown by proper averments, will not invalidate a grant by or to a corporation, or a contract with it; and the modern cases show an increased liberality on this subject."⁷⁰

Devises to Corporations by Wrong Name.—The rule applicable to deeds and grants is also applicable to devises to a corporation, where the name of the corporation is inaccurately used; and perhaps there is more leniency in cases of wills than in any other instrument. Thus, it is said, a devise to George, Bishop of Norwich, is sufficient,

although his name is John;⁷¹ but one to the Abbott of St. Peter, where it is really the Abbot of St. Paul, was said to be void, "for here the saint name is the only specification of the party in the devise, which is mistaken."⁷²

The general rule applicable to devises has been stated by an eminent author, as follows: "Where the intention of the testator is clear, a mistake in the name or description of the object of his bounty will not make the devise void. This general principle is applicable to all corporations, public or private. But the intention must be so clear as to remove all reasonable doubt as to the corporations meant."⁷³ Thus, a devise to "The South Parish in Sutton" was held a good devise to "The First Parish in Sutton," that being its true name.⁷⁴ So a devise to "the right worshipful, the mayor, jurats and town council of the town of Rye," was held a good devise to the "mayor, jurats and commonalty of the town of Rye," although there was no town council in the town, and although the court admitted the proposition of council against the will, that if the "intent appears to give to a part of the corporation, although that intent fails of effect, the whole corporation cannot take."⁷⁵ Likewise, a devise to the mayor, chamberlain and governors is valid to a corporation whose true name is mayor, citizens and commonalty.⁷⁶

It is not always necessary that an attempt should be made by the testator to use the name of the corporation; it is enough if the corporation is described so as to identify it with sufficient certainty.⁷⁷ Thus, in the case just cited, a bequest to "the trustees of the institute for the maintenance and instruction of the indigent blind in the city of New York" was held a good devise to the New York institution for the blind. The court said, by Denio, J.: "The question arises upon the description. It is a question of identity, and the point is, whether the legatee

⁶⁷ Chapin v. School District, 35 N. H. 445; Northwestern Distilling Co. v. Brandt, 69 Ill. 658; s. c., 5 Amer. Cor. Cas. 249; Donglass v. Branch Bank of Mobile, 19 Ala. 659; Eastern R. R. Co. v. Benedict, 5 Gray, 561; Berks & Dauphin Turnpike Road v. Myers, 6 S. & R. 12; s. c., 9 Amer. Dec., 402, (a written contract); Hagerstown Turnpike Road Co. v. Creeger, 5 H. & Johns. 122; s. c., 9 Amer. Dec. 495 (a written contract) Oler v. Baltimore, etc. R. R. Co., 41 Md. 591 (a written contract); Culpeper Agricultural & Mfg., Soc. v. Digges, 6 Rend., 165; s. c., 18 Am., Dec. 708 (a written contract); Union Bank of Florida v. Call, 5 Fla. 409; Brittan v. Newland, 2 Dev. & Bat. 363; Insane Asylum v. Higgins, 15 Ill. 185; Clark v. Potter Co., 1 Barr 163; Porter v. Blakely 1 Root, 440; Romeo v. Chapman, 2 Mich. 179; County Court v. Griswold, 58 Mo. 175; Corder v. Commrs. 16 Ohio St. 363; Trustees v. Campbell, 16 Ohio St. 11.

⁶⁸ Kentucky Seminary v. Wallace, 15 B. Mon. 35.

⁶⁹ Mount Palatine Academy v. Kleinschnitz, 28 Ill. 133.

⁷⁰ 2 Kent. Conn. 392.

⁷¹ 2 Bac. Abr. 442, citing Leon. 307; Dyer, 106; 11 Co. 21; Perk. 8; Owen, 85, Dalls. 78.

⁷² Id.; citing Hob. 38; and 19 H. 8, 8.

⁷³ 1 Dill Municipal Cor., sec. 179.

⁷⁴ First Parish in Sutton v. Cole, 3 Pick. 232.

⁷⁵ Attorney-General v. Mayor of Rye, 7 Taunt. 546; s. c., 2 E. C. L. R. 213.

⁷⁶ Owen, 85.

⁷⁷ New York, etc. v. How's Exr., 6, Selden, 84.

can be found and certainly identified by the description contained in the will. The description is not shown to be erroneous, though there be a different class of persons also to be relieved, or if some are to be instructed merely and not supported, I do not upon the whole see how a description, complied in a brief sentence, could more accurately have but the leading particulars which go to define this corporation and to distinguish it from all others." So a devise to the "Home of the Friendless in New York," was held a good devise to "The American Female Guardian Society" in New York.⁷⁸ So a devise to "The Society for the Relief of Indigent Aged Females," was a good devise to "An Association for the Relief of Respectable Aged Indigent Females in the city of New York," in preference to "St. Luke's Home for Indigent Christian Females;" and in the same case it was said, that if it was impossible to tell which of the two corporations was meant by the testator the court would hold the devise void, in place of dividing it equally between the claimants, in accordance with the English rule.⁷⁹ A gift to the Presbyterian Orphan Asylum of Louisville was adjudged to the Louisville Orphan Home Society, on proof that it was generally known by the name of the Presbyterian Orphan Asylum. And in the same case "The House of Mercy, New York," was held intended as a gift to "The House of Mercy of the city of New York," as against "The Institution of Mercy," located in the same city.⁸⁰

If the name used applies equally well to either of two claimant corporations, then extrinsic evidence must be resorted to; and in one case, the fact that the testator was a subscriber and life director of one corporation turned the scale in favor of that corporation.⁸¹ If one corporation was reasonably described, another could not claim the legacy, for that would vary the terms of the will.⁸²

⁷⁸ *Lefevre v. Lefevre*, 2 T. & C. 330; on appeal 59 N. Y., 434.

⁷⁹ *St. Luke's, etc. v. Association etc.*, 52 N. Y. 191; see *Holmer v. Mead*, 52 N. Y., 332.

⁸⁰ *Cromie's Heirs v. Louisville Orphan Home, etc.*, 3 Bush, 365.

⁸¹ *In re Briscoe's Trusts*, 20 Weekly Reporter, 355; See *Button v. The Amer. Tract Society*, 23 Vt. 336.

⁸² *Id.*; *Delmar v. Robello*, 1 Ves. 412.

Further illustrations will be found in the note below.⁸³

Name Used in Suits Importing a Corporation.—If the name of a corporation suing is stated in the complaint or declaration, and the name is such that it implies that the plaintiff is a corporation, an express averment to that effect is unnecessary.⁸⁴ And if the person objecting to the complaint because

⁸³ *Grimes v. Harmon*, 35 Ind. 198; *Cruse v. Axtell*, 50 Ind. 49; *Craig v. Secrist*, 54 Ind. 419; *Sayers v. First National Bank*, 89 Ind. 230; *Chapin v. School District*, 35 N. H. 445; *New York Society, etc. v. Clarkson*, 21 Halst. 541; *Goodell v. Union Association*, 29 N. J. Eq. 32; *Kilvert's Tr.* 12 L. R. Eq. 183; *Alchin's Tr.* 14 L. R. Eq. 230; *McAllister v. McAllister*, 46 Vt. 272; *Frierson v. Gen. Ass. Pres. Ch.* 7 Helsk. 683; *Newall's Appeal*, 24 Pa. St. 197; *Hornbeck v. Amer. Bible Soc.*, 2 Sandf. Ch. 183; *DeCamp v. Dobbins*, 2 Stew. (N. J.) 36; *Minot v. Boston Asylum*, 7 Met. 416; *Smith v. Smith*, 11 C. E. Gr. 139; *Baldwin v. Baldwin*, 2 Halst. Ch. 211; *McBride v. Elmer*, 2 Halst. 107; *Dickson v. Montgomery*, 1 Swan. 348; *Banks v. Phelan*, 4 Barb. 80; *Wright v. Methodist Epis. Ch.*, *Hoffman's Ch.* 202; *Parker v. Cowell*, 16 N. H. 149; *Tucker v. Laman's Aid. Soc.*, 7 Met. 188; *Howard v. Amer. Peace Soc.*, 49 Me. 288; *Preacher's Aid. Soc.*, v. *Rich.* 45 Me. 552; *Amer. Bible Society v. Wetmore*, 17 Conn. 181; *Ayres v. Mead*, 16 Conn. 291; *Brewster v. McCall*, 15 Conn. 274; *Bodman v. Amer. Tract Soc.*, 9 Allen, 447.

⁸⁴ *Richardson v. St. Joseph Co.*, 5 Blackf. 146; *Harris v. Muskingum Mf. Co.*, 4 Blackf. 146; *Norris v. Staps*, *Hobart* 211; *O'Donald v. Evansville, etc.* R. R. Co., 14 Ind. 259; *Jones v. Cincinnati Type Foundry*, 14 Ind. 89; *Hubbard v. Chappel*, 14 Ind. 601; *Dunning v. New Albany & Salem R. R. Co.* 2 Ind. 437; *Cleero Hygiene Draining Co. v. Craighead*, 28 Ind. 274; *Emery v. Evansville, etc. R. R. Co.*, 13 Ind. 143; *Heaston v. Cincinnati, etc. R. R. Co.*, 16 Ind. 275; *Adams' Express Co. v. Hill*, 43 Ind. 157; *Indianapolis Sun Co. v. Harrell*, 53 Ind. 527; *Light v. Everett Fire Ins. Co.*, 5 Bosw. 716; *Cole v. Merchants Bank, etc.*, 60 Ind. 350; *Walker v. Shelbyville, etc. Co.*, 80 Ind. 452; *Beatty v. Bartholomew, etc.*, 76 Ind. 91; *McKeil v. Real Estate Bank*, 4 Ark. 592; *Agnew v. Bank of Gettysburg*, 2 H. & G. 478; *Shoe & Leather Bank v. Brown*, 9 Abb. Pr. 218; s. c. 18 How Pr. 308; *Acorne v. American Mineral Co.*, 11 How Pr. 24; *Kennedy v. Cotton*, 28 Barb. 59; *Lafayette Ins. Co. v. Rogers*, 30 Barb. 491; *Phenix Bank v. Donnell*, 41 Barb. 571; *Union Mutual Ins. Co. v. Osgood*, 1 Duer, 707; *Zion Church v. St. Peter's Church*, 5 W. & S. 215; *Birmingham Iron Co. v. Rutherford*, 18 N. J. L. 105; *Litchfield Bank v. Church*, 29 Conn. 148; *U. S. v. Ins. Cos.* 22, Wall. 99; *Pullman v. Upton*, 96 U. S. 328; *Monumol Great Beach v. Rogers*, 1 Mass. 159; *Plymouth Christian Society v. Macomber*, 3 Met. 235; *School District v. Blaisdell*, 6 N. H. 197; *Concord v. McIntire* 6 N. H. 527; *Brown v. Illinois*, 27 Conn. 84; *West Minsted Saving Bank v. Ford*, 27 Conn. 282; *Taylor v. Illinois Bank*, 7 T. B. Mon. 584; *Methodist Church v. Cincinnati*, 5 Ohio. 286; *Woodson v. Gallipolis Bank*, 4 B. Mon. 206; *Jones v. Tennessee Bank*, 8 B. Mon. 122; *Roxbury v. Huston*, 37 Me. 42; *Orono v. Wedgewood*, 44 Me. 49; *Grays v. Turnpike*, 4 Rand. 578.

it is not so expressly alleged has contracted with the corporation by a name implying that it is a corporation, he is estopped to assert that it is not,⁸⁵ although in some jurisdictions it is held that a statement to that effect must be inserted in the written contract sued upon to work an estoppel.⁸⁶ And the general rule, admitting in the contract the capacity of the corporation to sue by the name used in it, either expressly or impliedly, applies where the corporation assigns the instrument sued upon or called in question.⁸⁷ The general issue in such cases admits the capacity in which the plaintiff sues.⁸⁸ So where the property of a corporation was burned, in a charge of arson, it was held not necessary to allege that the corporation was duly incorporated, because the name used implied that it was a duly incorporated company.⁸⁹ If the corporation is one foreign to the jurisdiction in which the suit is brought, it has been held in some of the States following the above rules, that the existence of the corporation must be proven.⁹⁰

In England and some of the States, under the general issue, the fact of incorporation must be proven, even though the name imports that it is such;⁹¹ but even in these States it is admitted that if the corporation is a public one, such as the courts are bound to judicially notice, it need not be averred or proven that they are incorporations.⁹² This

distinction between public and private corporations will account for the seeming conflict in the citation of cases from the same State to different propositions.⁹³

Crawfordsville, Ind. W. W. THORNTON.

⁸⁵ There is a subject akin to the one treated in the above article, viz: The Doctrine of *Descriptio Personae* as applied to written instruments. This subject, so far as it applies to bills and notes is fully set forth by W. F. Elliott Esq., of Indianapolis, Indiana, in 16 Cent. L. J. 342.

AGENCY—RATIFICATION—STATEMENT OF AGENT, WHEN BINDING ON PRINCIPAL—PRACTICE IN APPELLATE COURT.

UNITED STATES, ETC. CO., V. RAWSON.

Supreme Court of Indiana, April, 13, 1886.

1. A principal is bound by the acts of his agent if, after knowledge he ratifies them, and such ratification relates back to the time the acts were performed, and is equivalent to an antecedent absolute authority to perform those acts.

2. A principal is bound by the statements of his agent, made in the discharge of his duty as such agent, provided such statements constitute part of the *res gestæ*.

3. When a complaint is assailed for the first time in the appellate court, and one paragraph (or count) is good and the other defective, the assignment of error for such defect cannot be sustained. And this is the rule, even if the verdict and judgment rest upon the insufficient paragraph. *Aliter*, however, if there had been a separate demurrer to each paragraph overruled in the trial court.

The facts appear sufficiently in the opinion of the court.

ZOLLARS, J., delivered the opinion of the court:

The jury returned a special verdict, in which found the following among other facts:

"The express company was doing business over a line extending from Michigan City to and beyond Arcadia, in Hamilton county. Its business consisted partly in forwarding and collecting bills of exchange, etc., for its customers and patrons. In August, 1883, it received from appellees, at Michigan City, a bill of exchange for \$167, drawn by them upon one Dickover at Arcadia. This bill was indorsed to and received by the company for collection, and for that purpose was forwarded to its agent at Arcadia, he being in charge of all its business at that place. On the twenty-fifth day of August, 1883, Dickover paid to the agent at Arcadia \$100 upon the bill. At the time the money was thus paid that agent, under a rule of the com-

⁸⁵ Jones v. Cincinnati Type Foundry, 14 Ind. 89; Hubbard v. Chappel, 14 Ind. 601; Stein v. Indianapolis, etc., 18 Ind. 237; Mackenzie v. Board, etc., 72 Ind. 139; Northwestern Conference, etc. v. Myers, 36 Ind. 375; Den v. Von Houten, 5 Hals. 270.

⁸⁶ Williams v. Bank of Michigan, 7 Wend. 540; Welland Canal Co. v. Hathaway, 8 Wend. 480.

⁸⁷ Hubbard v. Chappel, 14 Ind. 601.

⁸⁸ Railsback v. Liberty, etc., 2 Ind. 656; Cicero Hygiene Draining Co. v. Craighead, 28 Ind. 274.

⁸⁹ Johnson v. State, 65 Ind. 204.

⁹⁰ Gospel Society v. Young, 2 N. H. 310; School District v. Blaisdell, 6 N. H. 198; Lord v. Bigelow, 8 Vt. 445; Lewis v. Kentucky Bank, 12 Ohio, 132; U. S. Bank v. Stearne, 15 Wend. 314; Michigan Bank v. Williams, 5 Wend. 478; Marine Ins. Co. v. Jauncey, 1 Barb. 436.

⁹¹ Henriques v. Dutch West India. Co., 2 Ld. Raym. 1535; Peters v. Mills, Buller N. P. 107; Norris v. Staps, Hob. 210b; Jackson v. Marietta Bank, 9 Leigh. 240; Rees v. Conococheague, 5 Rand. 326; Taylor v. Alexander Bank, 5 Leigh. 471; Farmer's Bank v. Troy City Bank, 1 Doug. (Mich.) 457.

⁹² Agnew v. Gettysburg Bank, 2 H. & G. 478; Carmichael v. School Lands, 3 How (Miss.) 84; Hays v. N. W. Bank, Gratt. 127; Durham v. Daniels, 2 Gr. (La.) 518.

pany, had no authority to receive partial payments upon such bills, but appellees had no knowledge of the existence of the rule. The agent of the company at Michigan City obtained the consent of appellees 'to receive the said one hundred dollars,' informed the agent at Arcadia of such consent, and directed him to transmit said money, which he failed to do, but afterwards converted it to his own use, and fled."

Upon the return of this verdict, appellant, by counsel, moved for a *venire de novo*. This motion was overruled, and, over a motion for a new trial, judgment was rendered in favor of appellees upon the verdict for the \$100, and interest thereon from the time of payment by Dickover.

The only objection made to the verdict—and that not well founded in fact—is that it is not found therein whether authority to receive the partial payment was given to the agent at Arcadia before or after he received the \$100. It is not stated in the verdict, in so many words, but it clearly appears from the whole verdict, that the special directions to the agent at Arcadia to forward the money were given after it had been paid over by Dickover, and after that fact was known to the agent at Michigan City. The finding, as will be observed, is that, under a rule of the company, the agent at Arcadia had no authority to receive partial payments upon such bills. The company, of course, had authority to receive partial payments, unless restricted by appellees. No such restrictions seem to have been imposed. It is not shown whether the agent at Michigan City was a general agent of the company, or one with limited authority. The case, however, was conducted below upon the theory that his directions, whatever they were, were authoritative and binding upon the company, and so the case is treated here. We assume, therefore, that he had authority to direct the agent at Arcadia, and to authorize him to receive a partial payment upon the bill. If, possessing that authority, he had given such directions before the money was paid by Dickover, there could be no question as to the liability of the company for the money so received. And, having authority to thus direct the agent at Arcadia in advance, he had authority to ratify the acts of that agent in receiving the payment as it was made. The ratification of an agent's acts, with knowledge of the circumstances, relates back to the time when such acts were performed, and binds the principal the same as if authority had been given in advance. *Bronson's Ex'r v. Chappell*, 12 Wall. 681; *Story, Ag. (8th ed.) §§ 239-242*; *Lawrence v. Taylor*, 5 Hill, 107; *Lowry v. Harris*, 12 Minn. 255, (Gil. 166); *Hankins v. Baker*, 46 N. Y. 666; *Hammond v. Hannin*, 21 Mich. 374; *McIntyre v. Park*, 11 Gray, 102; *Louisville, E. & St. L. Ry. Co. v. McVay*, 98 Ind. 391, and cases there cited. In this case, the verdict shows that, after the money had been paid, the agent at Michigan City, with knowledge of the fact, directed its transmission by the agent at Ar-

cadia. This amounted to a ratification of the act of that agent in receiving the money. *Story, Ag. (8th ed.) § 252*.

It is claimed, however, that the verdict is not sustained by the evidence, and that, therefore, the motion for a new trial should have been sustained. The contention is that, at the time Dickover paid the money to the agent, he knew that he had no authority to receive a partial payment, and that hence there was no payment upon the bill held by the agent for collection; and, further, that whatever may be said of the balance, as to \$30 of the amount it was a loan by Dickover to the agent, and not a payment upon the bill. The evidence shows that, after being notified, Dickover went to the office on Saturday to pay \$100 upon the bill. On his way to the office he received a note from the agent, asking a loan of \$30. After reaching the office the agent renewed the request. Dickover told him that he had nothing but the \$100 bill, and wanted to pay that upon the bill of exchange, and that, so far as he was concerned, he, the agent, could use \$30 of the amount until the following Monday. The agent said that he could not indorse the \$100 upon the bill by reason of its being a partial payment. Dickover told him to notify the parties, and ask them to receive it. He promised to do so. On the following Tuesday the agent told Dickover that he was expecting a letter on that day. On the following Thursday he said that he had received a letter, and had forwarded the \$100, and asked how soon the balance would be paid. The evidence is vague, and not very satisfactory; but, over the finding of the jury, and the repeated statements of Dickover that he paid the full amount upon the bill, we cannot say that \$30 of it was a loan to the agent. The evidence also shows that the agent at Michigan City asked appellees if they would receive a payment of \$100 upon the bill, and was answered in the affirmative. This evidence tends to show that the agent knew that that amount had been paid upon the bill, and ratified the act of the agent at Arcadia in receiving it. It is not shown at what particular time that agent converted the money to his own use, but that cannot be material here, as between the company and appellees. He remained in the employ of the company for some time after the payment, and left without transmitting the money.

The evidence, at least, tends to show that he received the money for the company and as a payment upon the bill, upon the single condition that if appellees would accept it the amount should be indorsed upon the bill. That act was ratified by the company through its agent at Michigan City. It is a general rule that an agent cannot bind his principal by statements in relation to a past transaction, but that rule can have no application to the statements of the agent at Arcadia in relation to the letters and the transmission of the money, because they were a part of the *res gesta*. They were statements, in effect, that the restriction had been removed, and that the amount could be and would be indorsed upon the bill.

The complaint, consisting of two paragraphs, is assailed for the first time in this court by an assignment that it does not state facts sufficient to constitute a cause of action. It is conceded that one paragraph is good; but it is contended that as the record shows that the verdict and judgment rest upon the other paragraph, which, as claimed, is not good, and the judgment should be reversed. Such an assignment calls in question the sufficiency of the complaint as a whole, and hence, if there is one good paragraph, the assignment cannot be maintained. *Louisville, etc., Ry. Co. v. Peck*, 99 Ind. 68, and cases there cited. This rule is not varied by the fact that the verdict and judgment may rest upon an insufficient paragraph. Had a separate demurrer to each paragraph been overruled below, the result would be different. *Pennsylvania Co. v. Holderman*, 69 Ind. 18.

There being no valuable error in the record, the judgment is affirmed at appellant's costs.

NOTE.—A ratification is an agreement to adopt an act performed by another for us.¹ Express ratifications are those made in express and direct terms of assent. Implied ratifications are such as the law presumes from the acts of the principal; as, if Peter buy goods for James, and the latter, knowing the fact, receive them and apply them to his own use. Ratification is equivalent to original authority to act in the matter ratified. The ratifier adopts the unauthorized act and is bound by it.

By ratifying a contract a man adopts the agency altogether, as well what is detrimental as that which is for his benefit.² The act of an agent cannot be affirmed as to part, and avoided as to the rest.³ A ratification of part of an unauthorized transaction of an agent, or one who assumes to act as such, is a confirmation of the whole; and the act of a public officer, exceeding the authority conferred on him by law, may be adopted by the party for whose benefit it is done.⁴ One who ratifies an act done in his name ratifies it as done, and the principal cannot make such an agent responsible for not doing the ratified act in the manner he would have been bound to perform it if he had been an authorized agent.⁵ An assumed agent is not responsible for his acts, even though they turn out to be injurious, provided the principal has once adopted them.⁶

A ratification once deliberately made, upon full knowledge of all the material circumstances, becomes, *eo instanti*, obligatory, and cannot afterwards be revoked or recalled.⁷ And the ratification will in general relieve the agent from all responsibility on the contract, although without such ratification he would be liable to the other contracting party for his misrepresentation or mistake.⁸ The contrary doctrine seems to

have been held in New York,⁹ but in a carefully considered Minnesota case the courts say, that if the question were now a new one in New York it would probably be differently decided.¹⁰ A ratification does not in general depend on its being communicated.¹¹ And it can only be effectual when the act is done by the agent avowedly for, or on account of, the principal, and not for himself or some other party.¹² A parol ratification of a contract entered into by another as his agent by writing under seal, will not render the contract obligatory on the principal, unless the agent's authority was under seal.¹³ But a partner may ratify by parol a contract made by a partner, under seal, in the name and for the use of the firm, in the course of the partnership business.¹⁴ Where a contract is signed by one who proposes to be signing "as agent," but who has no principal existing at the time, it cannot be ratified by a principal who subsequently comes into existence. This principle applies chiefly to the promoters of proposed joint stock companies.¹⁵ The principal must be *capax negotii* when ratifying.¹⁶ He also must know all the essential facts,¹⁷ but if the facts are open to him he will be presumed to be duly informed, unless suppression of the facts is proven.¹⁸ If the material facts are suppressed the ratification is invalid, because founded on mistake or fraud.¹⁹

As between the principal and the agent, an assumption of the agent's unauthorized act is not always necessarily a ratification as against the agent.²⁰ No new consideration is required to support a ratification.²¹ If an agent has no right to appoint a substitute, yet, if the principal adopt the acts of the sub-agent, that will validate the sub-agency.²² In England, it is held that a forgery cannot be ratified,²³ and generally any illegal or universal contract cannot be ratified, yet in this country the courts hold that a principal may ratify a forgery of his name.²⁴ The maxim *omnis ratihabito retrotrahitur et mandato equiparatur*, applies to corporations as well as to natural persons.²⁵ A corporation may ratify an unauthorized contract, provided it could, in the first instance, have been entered into by the corporate authorities.²⁶

Both the principal and his agent may ratify the acts in their behalf of an unauthorized person; and the principal is bound by the ratification of his agent, if the agent had authority to do the thing he ratified.²⁷

⁹ *Rositer v. Rositer*, 8 Wend. 494; *Palmer v. Stephens*, 1 Denio, 471.

¹⁰ *Sheffield v. Ladue*, 16 Minn. 388.

¹¹ *Bayley v. Bryant*, 24 Pick. 203.

¹² *Wilson v. Tummam*, 6 Mann. & Gr. 236; *Watson v. Swan*, 11 O. B. (N. S.) 750; *Ancona v. Marks*, 7 H. & N. 686.

¹³ *Blood v. Goodrich*, 9 Wend. 68; *Hanford v. McNair*, 9 Wend. 55.

¹⁴ *Cady v. Shepherd*, 11 Pick. 400; *McNaughten v. Harper*, 11 Ohio, 228.

¹⁵ *Stainsby v. Fraser's Co.*, 3 Daly, 98; *Kelner v. Baxter*, L. R. 2 C. P. 174; *Gunn v. London & L. F. Ins. Co.*, 12 C. B. (N. S.) 694.

¹⁶ *McCracken v. San Francisco*, 16 Cal. 581.

¹⁷ *Lester v. Kinnle*, 37 Conn. 8; *Tedrick v. Rice*, 13 Ia. 214; *Billing v. Morrow*, 7 Cal. 171; *Mannings v. Gaaharie*, 27 Ind. 399; *Maxey v. Heckthorn*, 44 Ill. 437.

¹⁸ *Meehan v. Forrester*, 52 N. Y. 277.

¹⁹ *Owings v. Hull*, 9 Peters, 608.

²⁰ *Walker v. Walker*, 5 Heisk. 425.

²¹ *Drakely v. Gregg*, 8 Wall. 24.

²² *Soames v. Spencer*, 1 Dowl. & Ry. 32.

²³ *Brook v. Hook*, L. R., 6 Ex. 89.

²⁴ *Forsyth v. Day*, 46 Me. 178; *Greenfield B'k v. Crafts*, 4 Allen, 447.

²⁵ *Kelsey v. The Nat. B'k of Crawford Co.*, 60 Penn. St. 426; *City of Detroit v. Jackson*, 1 Doug. 106.

²⁶ *Taymouth v. Koehler*, 35 Mich. 26.

²⁷ *Mound City Mut. Life Ins. Co. v. Huth*, 49 Ala. 538.

¹ *Bouvier's Law Dict.*; *Sentell v. Kennedy*, 29 La. 679; *Bray v. Gunn*, 53 Ga. 144.

² *Smith v. Hodson*, 4 T. R. 211; *Newall v. Hurlbert*, 2 Vt. 361; *Crane v. Hunter*, 28 N. Y. 389.

³ *Wilson v. Poulter*, 2 Strange, 859; *Benedict v. Smith*, 10 Paige, 126; *Krider v. Trustees*, 31 Iowa, 547.

⁴ *The Farmers' L. & T. Co. v. Walworth*, 1 Coms. (N. Y.) 433.

⁵ *Menkens v. Watson*, 27 Mo. 163.

⁶ *Corning v. Southerland*, 3 Hill, 553.

⁷ *Smith v. Cologan*, 2 T. R. 186; *Clarke's Ex. v. Van Beldsdyk*, 9 Oranch, 153.

⁸ *Spittle v. Lavender*, 2 Brod. & Bing. 452.

An infant cannot ratify a contract made by an assumed agent, but he may ratify his own contract.²⁸ The facts which the court is authorized to declare as conclusive of the intention of a party to ratify unauthorized acts done in his behalf by another, are such as must be inconsistent with a different intention. When the intention with which the act is done is not clear, the presumption of ratification is far less strong where no relation of agency existed. When the evidence is doubtful the question must be determined by the jury.²⁹ When a policy of marine insurance is made by one person without authority on behalf of another, it may be ratified after the loss of the thing insured, even where the party knows of the loss at the time of his ratification.³⁰ The question whether silence amounts to a ratification is for the jury.³¹

THOMAS D. HAWLEY.

DETROIT, MICH.

²⁸ *Arnitage v. Widoe*, 86 Mich. 124; *Holmes v. Rice*, 45 Mich. 142.

²⁹ *Abbott v. May*, 50 Ala. 97.

³⁰ *Williams v. North China Ins. Co.*, 1 C. P. Div. 757.

³¹ *First Nat. B'k of Sturgis v. Reed*, 85 Mich. 263.

EMINENT DOMAIN—CORPORATION—RAILROAD—FUTURE USE—REASONABLE TIME.

IN RE STATEN ISLAND, ETC. CO.

Court of Appeals of New York, October 5, 1886.

1. A railroad corporation, empowered by law to exercise the right of eminent domain, may cause the condemnation of private property to its use, although the need for such property is not immediate, provided the property in question is certainly to be brought into use within a reasonable time after its condemnation.

2. The same principle applies although the property sought to be condemned is to be primarily devoted to the use of a foreign railroad corporation, whose line is to be thereby connected with the domestic corporation that makes the application, provided such use shall tend to subserve the same public use to which the domestic corporation is devoted.

Appeal from an order condemning lands for the purpose of connecting the petitioning railroad company with the line of a foreign railroad.

The facts sufficiently appear in the opinion.

RUGER, C. J., delivered the opinion of the court.

Many of the questions discussed in the learned brief of the appellant's counsel do not seem to be open for consideration here, as they were neither raised in the court below nor authorized by the order under which they were permitted to defend. Aside from a request to dismiss the proceedings upon the ground of indefiniteness in the description of the land proposed to be taken, and which is not now raised by counsel, we find no objection in the record to the adjudication under consideration, except that the alleged insufficiency of the evidence to show that the property proposed to be taken was required for the purposes of the petitioning corporation. A motion was made to dismiss the petition for that reason, which was

denied, and the appellant excepted to this decision. This exception presents the only material question exhibited by the record before us. The appellant was restricted to this ground of objection by the terms of an order vacating *pro tanto* an adjudication already made in the proceedings, and was therefore precluded from raising any other ground of defense. Questions as to the corporate organization of the petitioning company, its action in authorizing these proceedings, the right of a railroad company to acquire its lands under navigable water as against the State, and the rights and interests of littoral owners in such lands, are therefore all excluded from the controversy by the terms of the order opening the appellant's default.

The original order of condemnation appointing commissioners to appraise the value of the land proposed to be taken, constituted an adjudication in favor of the respondent upon the questions involved, disposing of every question which might have been raised in opposition thereto, except that allowed to be litigated by the order referred to. It was conceded by the petitioners upon the hearing that the lands in question were not required for its present uses, and it is strenuously contended therefrom by the appellant that the petitioner has not made a case for condemnation, or such a case as establishes a reasonable probability that such lands will be required for its uses in the future. It is quite obvious that the beneficial exercise of the power of acquiring property for public uses cannot be enjoyed unless allowed in anticipation of the contemplated improvement; and it is therefore well settled in this State that the mere fact that the land proposed to be taken for a public use is not needed for the present and immediate purpose of the petitioning party, is not necessarily a defense to a proceeding to condemn it.

The statute authorizing the formation of railroad corporations confers power upon such as are organized under its provisions to acquire lands by the exercise of the right of eminent domain, not only from individuals, but also from the State, for its prospective as well as present uses, provided its necessities for such use in the immediate future are established beyond reasonable doubt. *Lansing v. Smith*, 8 Cow. 146; s. c., 4 Wend. 9; section 21, Laws 1850, c. 140; *Rennselaer & S. R. R. v. Davis*, 43 N. Y. 137; *In re New York Cent. & H. R. R. Co.*, 77 N. Y. 249. The exercise of this power is in derogation of individual rights, and is always burdensome and often injurious to the owner, beyond the power of pecuniary compensation to wholly redress, and should be allowed only when the necessity for the land clearly appears, and its proposed use is clearly embraced within the legitimate objects of the power.

The only question, *ther fore*, in the case is, whether the evidence shows such a case as renders it probable that these lands will be required within a reasonable period for the uses of the petitioning corporation. No evidence was offered by the appellant upon the question at the trial, and

relies wholly for its defense upon the insufficiency of the proof given by the petitioner to establish a case for condemnation. The special term found, as a fact, that "the land was required by the petitioner for the purposes of its incorporation, to-wit, for tracks, switches, sidings, and depot grounds, whereon cars may be moved, loaded and unloaded, stored, received, and dispatched; for freight-sheds wherein freight may be received and stored, and then loaded into cars and delivered to consignees; and for necessary terminal grounds for the purpose of the incorporation of said company, and for the purpose of constructing and operating its railroad." It was further found that such use was not required for the purpose of its local traffic, but for the purpose of enabling it to fulfill the obligations of a contract made between it and the Baltimore & Ohio Railroad Co., whereby it had bound itself to furnish to such company accommodations over its road for transporting freight, passengers, express and mail matter between the proposed termini of such Baltimore & Ohio road, at Elizabethport, in New Jersey, to and from the city of New York. We think the evidence fully supported these findings.

The proof shows that the petitioner is a domestic railroad corporation, operating a line of road on Staten Island, which has been mainly used heretofore for local purposes, but which is now proposed to utilize as a connecting link between the system of railroads known as that of the Baltimore & Ohio and the Port & City of New York.

The vast increase of business which such a connection will occasion to the petitioner's railroad, and the necessity of increased facilities for handling it, is too obvious to be disputed. The benefit to be derived from such a connection, not only to the public, but also to the petitioner, is clearly apparent from the evidence, and renders the object for which the appropriation of the land in question is sought a public use within the meaning ascribed to that term by the decisions of this court. *In re New York & H. R. R. Co. v. Kip*, 46 N. Y. 547; *In re New York Cent. & H. R. R. Co.*, 77 N. Y. 263.

The fact that the condemnation of the land in question is also earnestly desired by a foreign railroad corporation, and will inure largely to its benefit, furnishes no reason for denying the relief asked for by the petitioner, provided it has brought itself within the language of the statute authorizing such a proceeding. *In re New York, L. & W. R. R. Co.*, 99 N. Y. 21; s. c., 1 N. E. Rep. 27.

It is claimed that because certain structures which are required to be built in order to form the connection between the two systems of railroads are not yet begun or completed, that their construction is conjectural and uncertain, and does not afford a sufficient degree of probability of their ultimate construction as authorizes the court to condemn the property in question for its proposed uses. The principal structures referred to are the extension of the petitioner's railroad over

a bridge or viaduct to be erected across Arthur's kill, which divides Staten Island and New Jersey, and the building of a railroad track by the Baltimore & Ohio Railroad Company from Bond Brook to Elizabethport, in New Jersey, a distance of about sixteen miles, connecting the roads of the contracting parties. The evidence shows that the petitioner is bound by its contract with the Baltimore & Ohio Railroad Company to construct such bridge, and perfect its facilities for accommodating the increased traffic, within one year from the date of the contract, viz., October 28, 1885, unless obstructed and delayed by hostile legal proceedings or want of lawful authority to do so; and, in case of delay from such causes, then with all reasonable diligence after such obstacles have been removed and authority obtained. The same contract provides that the Baltimore & Ohio Railroad Company shall, within one year from the date thereof, or, if delayed by hostile legal proceedings, with all reasonable diligence, perfect its connection at Elizabethport with the railroad of the petitioners. It thus appears that the contemplated connection between the petitioner's railroad and the vast system of railroads controlled by the Baltimore & Ohio Company is assured by contract obligations between parties interested in making such connection, and presumptively able to comply with their obligations if no legal obstacles prevent. It also appears that the contracting parties have already built and leased lines stretching over several hundred miles for the purpose of carrying out the purpose in view, and that the Baltimore & Ohio Railroad Company has already, in the performance of its contract, assumed liabilities for the Staten Island Rapid Transit Railroad Company, to the amount of two and one-half millions of dollars, and has advanced and expended money in the purchase of property on Staten Island and elsewhere, and in extending its tracks for the purpose of the traffic contemplated to be carried on over the petitioner's road, of upwards of a million of dollars. The pecuniary expenditures made, and the liabilities assumed by both of the contracting parties, as well as the manifest interest which both of them have in carrying into effect the projected enterprise, afford the most conclusive assurance that this application is made in good faith, and for the sole purpose of acquiring property for the use of the petitioning railroad company. All of the testimony taken on the hearing concurs as to the necessity of the appropriation of all of the property described for the proposed use, and we have been referred to no circumstance appearing in the case which seems to cast any suspicion upon the motives of the petitioner in preferring the application.

While the limitations under which the respondent is permitted to defend this proceeding do not permit it to raise any questions as to the authority of the court to entertain the proceeding and grant the relief sought, it may be proper to

say that it seems to be fully authorized by sections 21 and 25 of the general railroad act, and the cases of *Lansing v. Smith*, 8 Cow. 143; s. o. on appeal, 4 Wend. 9; *Gould v. Hudson River R. Co.*, 6 N. Y. 524; and *In re New York Cent. & H. R. R. Co.*, 77 N. Y. 248.

It is also proper to say that the enactment of congress, during its last session, of a bill authorizing the contracting parties hereinbefore referred to to build a railroad bridge or viaduct across Arthur's kill, has apparently removed any legal objection to such a structure, and rendered it quite certain that the connections contracted for between such parties will be made, and the property sought to be obtained by this proceeding devoted to the purposes alleged in the petition.

The order should be affirmed, with costs.

All concur except MILLER, J., absent.

NOTE.—It will be observed that, in the principal case, the court excluded from its consideration, as not within the scope of the orders made in the case, a number of interesting questions, and confined itself to the question whether, under the right of eminent domain, a railroad company could take land not required for present use, but supposed to be essential to the prospective future exercise of its franchise.

It is very fully settled that, neither the State nor any corporation under its authority, can, by virtue of the right of eminent domain, take private property for any other than a public use.¹ The question naturally arises: What is a public use? In California, it was held last April, that to take water to supply "farming neighborhoods" (for irrigation purposes) was a public use, for which the right of eminent domain might well be exercised.² This ruling, it will be remembered, agitated the Pacific slope all last summer with the vehemence of an average earthquake. It would hardly seem to be within the rule to invade the property of private persons, in order that other private persons might raise crops on their private property, but the peculiar climate of the country will probably justify the ruling. In an earlier case, in the same State, it is held, upon better reason, that private property may be taken under the right of eminent domain to supply with water the inhabitants of an incorporated city.³

In Illinois, it is held that the right of eminent domain cannot be exercised for a branch railroad to the works of a private company, although the road is intended as a feeder to the public railroad. The court says that the right to condemn lands for public purposes is legislative, and the only judicial function which the courts can exercise in the matter, where the power has been delegated to a corporation, is to prevent its abuse, and regards it as a manifest abuse of the power to condemn lands in order to build railroads to private industrial establishments, and this, although the interests of the corporation would be subserved thereby and the volume of its business increased.⁴ That fact will not authorize a railroad thus

to deviate from its present bed line, to subserve private interests, as well as its own.⁵

The Supreme Court of the United States has held that a steam grist mill is not a work of internal improvement, within the statute of Nebraska, so as to authorize the issuance of county bonds in its aid,⁶ nor *a fortiori* the condemnation of private property to subserve its interest. A wagon bridge across a river is held by the Supreme Court of the United States to be so far a public work as to authorize, under the Nebraska statute, the levy of a tax for its construction.⁷ And it may safely be added that the right of eminent domain can only be exercised in cases in which the purpose is so manifestly for the public benefit that, under appropriate circumstances, a tax might be levied or county or municipal bonds issued in aid of the enterprise.—[ED. CENT. L. J.]

Chicago, etc. Co. v. Town of Lake, 71 Ill. 233; South Chicago, etc. Co. v. Dix, 109 Ill. 237; Dunlap v. Mount Sterling, 14 Ill. 261; St. Louis, etc. Co. v. Trustees, 43 Ill. 306; Chicago, etc. Co. v. Dunbar, 100 Ill. 129; Smith v. Chicago, etc. Co., 105 Ill. 511; *In re New York Cent., etc. Co.*, 77 N. Y. 248; *Eldridge v. Smith*, 84 Vt. 284; *Bradley v. New York, etc. Co.*, 21 Conn. 305.

⁵ *Currier v. Marietta, etc. Co.*, 11 Ohio St. 223; *Young v. McKenzie*, 3 Ga. 44; *Buffalo v. Brainard*, 9 N. Y. 103.

⁶ *Osborne v. County of Adams*, 106 U. S. 181; s. c. 1 Sup. Ct. Rep. 168; s. c. (on rehearing), 3 S. C. Rep. 150. See also *Township of Burlington v. Beasley*, 94 U. S. 310.

⁷ *United States v. County of Dodge*, 3 S. Rep. 590.

TORT—ACTION FOR ASSAULT—EVIDENCE —AGGRAVATION — EXEMPLARY DAMAGES.

ROOT V. STURDEVANT.

Supreme Court of Iowa, October 27, 1886.

1. In a civil action for damages for an assault, the record of the conviction of the defendant for the same assault, upon criminal process, is admissible to prove the fact of the assault.

2. The explanation of the defendant upon pleading "guilty" before the justice is not part of the justice's record nor of the *res gestæ*, and is inadmissible.

3. In such a case matters in aggravation, as of the mode, place, time, or severity of the assault, may be given in evidence by the plaintiff.

4. A jury may be properly instructed that, in addition to compensatory damages, they may, if they find that the defendant was actuated by malice, award to the plaintiff vindictive damages.

Action for damages for assault and battery.

The facts appear sufficiently in the opinion of the court.

REED, J., delivered the opinion of the court:

1. Defendant was prosecuted criminally for the assault and battery charged in the petition. He pleaded guilty, and judgment imposing a fine was entered against him. On the trial of this cause in the district court plaintiff offered in evidence the records of defendant's plea in the criminal case. Defendant objected to the introduction of

¹ *Cole v. City of La Grange*, 5 S. C. Rep. 416; *St. Louis Co. Ct. v. Griswold*, 58 Mo. 175, 198; *Agawam v. Hampden*, 130 Mass. 523, 534; *City of Los Angeles v. Waldron*, 3 Pac. Rep. 890.

² *Lux v. Haggin*, 10 Pac. Rep. 674.

³ *Lake Pleasant, etc. Co. v. Contra Costa, etc. Co.*, 3 Pac. Rep. 501.

⁴ *Chicago, etc. Co. v. Wiltse*, 6 N. E. Rep. 49. See also

the record, on the ground of irrelevancy and incompetency; and on the cross-examination of the justice of the peace, who was sworn for the purpose of identifying the record, he sought to prove an explanatory statement made by him when he entered the plea. His objection to the record was overruled, and on plaintiff's objection the evidence of said statement was excluded. We think these rulings are correct. Defendant's plea of guilty was an admission by him that he had committed the assault and battery charged in the information. That such admission was admissible against him on the trial of this cause cannot be doubted. The entry in the docket of the justice was the judicial record of the plea made at the time it was entered, and was competent evidence to prove the plea. Defendant was not entitled to prove his statement with reference to the transaction made when he entered his plea. The plea was an unqualified admission that he was guilty of the offense charged. No accompanying statement or explanation could change its character in that respect. If there were any circumstances of mitigation in the transaction, his statement at that time, with reference to them, would no more be competent than his statement at other times would have been. The case in this respect does not fall within the rule prescribed by section 3650 of the Code, which provides that "when part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by the other." The statement in question was no part of the plea of guilty, and was clearly not admissible as explanatory of it.

2. The transaction in question took place in the lower hall of the court house. Plaintiff was permitted, against defendant's objection, to prove that the circuit court was in session at the time, in the court-room, which is in the second story of the building, and that a great number of people from different parts of the country were in the court-room. The parties were entitled to prove all the circumstances surrounding and attending the transaction. The assault was not committed in the immediate presence of the court, and it does not appear that either the court, or the people in the court-room, were disturbed by it. The fact, however, that it was committed in a public place, and under such circumstances that the officers of the court and the people in the room would soon hear of the transaction, tended to aggravate the offense. An insult or indignity which is suffered in the presence of others is more humiliating than the same wrong would be if perpetrated in private. If it is perpetrated under such circumstances that it must soon become known to many, it may not be as degrading as it would have been if perpetrated in their immediate presence; but it is certainly more so than a like offense committed under circumstances of greater privacy would be. The evidence was properly admitted.

3. The district court instructed the jury, in ef-

fect, that if they found for plaintiff they should award him such sum as compensatory damages as they believed, from the evidence, would be a just compensation to him for the physical and mental pain he had suffered in consequence of the assault, and for the insult and indignity he had been subjected to, and the shame and humiliation he had suffered; and that, if the assault was maliciously committed, they might, in addition to the compensatory damages, award a sum as vindictive or punitive damages. And the instructions told the jury that damages of the latter class were awarded by way of punishment for the wrongful act committed, and for the purpose of restraining wrong-doers from a repetition of like wrongs; and that the amount which should be awarded for those purposes was left very largely to their sound discretion. Counsel for appellant takes exception to these instructions. It seems to us, however, that his argument is in the nature of a criticism of the language of the charge, rather than an attempt to refute the real doctrine expressed in it. It may be that the district court used a redundancy of words to express the thoughts intended to be expressed; but, when fairly considered, the instructions expressed no more than is stated above as their effect. The doctrines embodied in them were approved by this court in *Hendrickson v. Hingsburg*, 21 Iowa, 379, and *Ward v. Ward*, 41 Iowa, 686. Affirmed.

NOTE.—This case presents two questions, one of which is so clear that it can hardly be called a question at all. It is manifest that if a defendant in pleading guilty can add to his plea, and make part of the record, statements tending to exculpate him, and which would be admissible in a subsequent proceeding between him and the prosecutor, he can make evidence for himself to an indefinite extent. The ruling of the court that the plea of guilty was a full response to the charge made in the information, and that nothing further was admissible as part of the record in the criminal case is manifestly correct.

The other question relates to the measure of damages. It is well established law that in all actions for torts exemplary damages may be awarded, and to that end matters of aggravation may be given in evidence.¹ "They are given in enhancement *** of the ordinary damages on account of the bad spirit and wrong intention of the defendant."² In Illinois, the causes justifying such damages are held to be malice, wilfulness, wantonness or corrupt motives.³ And there need not be shown actual malice. Such damages may be awarded when there is violence, oppression and wanton recklessness.⁴ "Criminal indifference" has been held sufficient cause for such damages.⁵ There must be some wrong motive inducing the act complained

¹ *Hawes v. Knowles*, 114 Mass., Mass. 518.

² *Headley v. Watson*, 45 Vt. 289; *McWilliams v. Bragg*, 8 Wis. 424.

³ *Clevenger v. Dunaway* 84 Ill. 367; *Stillwell v. Barrett*, 60 Ill. 210; *Outler v. Smith*, 57 Ill. 252; *Smalley v. Smalley*, 81 Ill. 70.

⁴ *Graham v. Pacific R. R. Co.*, 66 Mo. 536; *Raynor v. Nims*, 57 Mich. 84.

⁵ *Baltimore, etc. Co. v. Boone*, 45 Md. 844.

of.⁶ But it has been held in numerous cases that gross negligence will authorize a verdict for exemplary damages.⁷ They will not be given, however, when the act complained of was the result of a mutual mistake.⁸ Nor will such damages in any case be awarded by a court of equity.⁹ And if a plaintiff applies to such a court he waives all claim to exemplary damages.¹⁰—[ED. CENT. L. J.]

⁶ Scott v. Bryson, 74 Ind. 420; Becker v. Dupree, 76 Ill. 167.

⁷ Taylor v. Grand Trunk, etc. Co., 48 N.H. 304; Memphis, etc. Co. v. Whitfield, 44 Miss. 466; Kalb v. Bankhead, 18 Tex. 228; Byram v. McGuire, 8 Head (Tenn.), 580; Cochran v. Miller 13 Iowa, 128.

⁸ Walker v. Fuller, 29 Ark. 448; Jackson v. Schmidt, 14 La Ann. 818.

⁹ Sanders v. Anderson, 10 Rich. Eq. (S. C.) 232.

¹⁰ Bird v. W. & M. etc. Co., 8 Rich. Eq. (S. C.) 46.

WEEKLY DIGEST OF RECENT CASES.

ARKANSAS	3, 29, 32
INDIANA	11, 18
IOWA	4, 13, 28, 31, 36, 39
KENTUCKY	17, 25, 34, 38
MARYLAND	23
MASSACHUSETTS	24
MICHIGAN	30, 33, 35, 37
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NEBRASKA	19
NEW YORK	7, 16, 26, 27
OHIO	6
PENNSYLVANIA	8, 20
TENNESSEE	9, 18
TEXAS	5, 21
VERMONT	22
WISCONSIN	2, 10

1. **ASSIGNEE—Assignee's Allowance of Claims Res Adjudicata—Recovery of Judgment Against Estate no Bar to Right to Dividend.**—1 When the assignee of an insolvent passed upon a claim against the estate and allows it, the question involved therein becomes *res adjudicata*, the decision is final, such judgment having all the force, effect or conclusive attributes of any other judgment. Where, after the assignee has allowed a claim against the estate, the claimant recovers judgment in the courts for the amount of his claim against the estate, and then attempts to collect it by legal process, he is not estopped from demanding his dividend of the assignee. *Epwright v. Kaufman*. S. C., Mo. Nov. 15, 1886.

2. **ASSIGNMENT FOR BENEFIT OF CREDITORS—Actions by Assignees—Fraudulent Mortgages—Laws Wis., 1882, Ch. 170—Fraudulent Transfers—Equitable Remedy.**—An assignee under an assignment for the benefit of creditors cannot bring an action at law to recover the value of goods, the title to which had passed from his assignor prior to the date of his assignment, no matter how fraudulent the transfer may have been. Chapter 170, Laws Wis., 1882, has in no way changed the effect of an assignment for the benefit of creditors under the statute so as to give any title or right of possession to the assignee in property fraudulently transferred by his assignor prior to the date of the assignment to him. The proper

remedy of an assignee under an assignment for benefit of creditors for fraudulent transfers, made prior to the date of his assignment, is an action in equity to avoid the same, and subject the property fraudulently transferred, so far as may be necessary, to the execution of the trusts of the assignment, and his rights are limited to that necessity. *Kloeckner v. Bergstrom*, S. C. Wis., Nov. 3, 1886, 30 N. W. Rep. 118.

3. ——— **Validity—Accession to Conditions of Deed—Discharge of Claims—Time of Acceptance of Provisions—Surrender of Debts—Closure of Trust—Supervision of Assenting Creditors.**—A deed of assignment for the benefit of creditors of all the debtor's goods not exempt from execution, and containing no directions for the disposition of any surplus after satisfying the creditors who acceded to the terms, but containing the condition that no creditor should participate in the assets unless he will accept his share in full satisfaction of his claims, is vitiated by such a condition. A deed of assignment for the benefit of creditors which specifies no time within which creditors are to accept the provision made for them and surrender their debts, is void. A provision in a deed of assignment for the benefit of creditors that the trust shall be administered and closed up under the supervision of the creditors who assent to it, is fatal to its validity. *Collier v. Davis*, S. C. Ark., Oct. 16, 1886; 1 S. W. 684.

4. **CARRIER—Of Passengers—Injuries to Passenger—Degree of Care and Skill—Negligence—Several Injuries—One Not Caused by Accident—Instructions.**—In an action for damages against a railway company for injuries received while riding in one of its cars, an instruction to the jury that the company must show that it used all reasonably practical care and precaution to prevent the injury, is erroneous. A carrier is bound to exercise the highest degree of care and skill to preserve the safety of its passengers. Where, in an action for damages against a railway company, the plaintiff alleged several specified injuries, and the court instructed the jury to the effect that, if they found that one specified injury was not caused or aggravated by the accident, then they should find for the defendant, held an erroneous instruction, although in other instructions the jury were told that if they found for the plaintiff they should award damages sufficient to compensate him for all the injuries received. *Moore v. Des Moines, etc. Co.*, S. C. Iowa, Oct. 11, 1886; 30 N. W. Rep. 51.

5. ——— **Luggage—Agent—Negligence—Contributory—Crossing Trestle with Muddy Feet.**—Where a passenger attempts to board a passenger car with a gun, and, on being directed to place the gun in the baggage car, delivers it to a person there, who demands and receives 25 cents for the service, the passenger may recover damages for the carriage of the gun beyond his destination, though the person to whom the gun was actually delivered might have been the agent of an express company. A passenger who was carried beyond his station, and put off at one end of the trestle, his gun, which he had placed as directed in the baggage car, being put off at the other end, cannot recover damages for personal injuries received by him by falling on the trestle while crossing with his gun, which he had gone to get, when he attempted to make the passage back

with muddy and slippery feet. *International, etc. Co. v. Folliard*, S. Ct. Texas, Oct. 22, 1886; 1 S. W. Rep. 624.

6. **COMMERCIAL LAW—Bill of Exchange—Acceptance by Agent of Corporation.**—The drawee of a bill of exchange, drawn by the "Kanawha & Ohio Coal Co.," was described in the bills as "John A. Robinson, Agt.," and it was accepted by him as "John A. Robinson, Agent K. & O. C. Co." *Held*, that the acceptance so made was the personal obligation of John A. Robinson, and that in a suit upon the acceptance by an indorsee against him parol evidence was not admissible, in the absence of fraud, accident, or mistake, to show that the defendant so accepted the bill intending to bind the drawer as his principal, and that this fact was known to the plaintiff at the time it became the owner and holder of it. *Robinson v. Kanawha, etc. Bk.*, S. C. Ohio, Oct. 19, 1886; 8 N. E. Rep. 583.

7. **CONTRACT—Executory Sale—Use of Material in Specified Place—Rescission.**—Where the owners of a tract of land, who are also interested in a tannery, enter into a contract with the firm owning the tannery for the sale of all the bark growing upon the tract of land, the bark to be used in the tannery in carrying on the same to be paid for before removal from the land, and to remain the property of the vendors until paid for, the provision in the contract in regard to the use of the bark in the tannery is not such a condition or limitation as will entitle the vendors to insist upon the use of the bark within the tannery alone, and to rescind or terminate the contract, in the event of its destruction by fire. *Lyon v. Hersey*, N. Y. Ct. App., Oct. 5, 1886; 8 N. E. Rep. 516.

8. — **Restraint of Trade—Contract Divisible and Reasonable.**—A, by a contract, for a valuable consideration, agreed with B, that he would not hereafter engage in the business of manufacturing ocher "in the county of Lehigh or elsewhere." He subsequently went into the business of manufacturing ocher in Lehigh county, and upon a bill for injunction to restrain him from continuing the same being filed by B, he answered that his contract was in restraint of trade, and therefore contrary to public policy. *Held*, that the contract was divisible as to place; that, while it was void outside of Lehigh county, it was good within the county; that it was competent for A to make the contract; and that it was reasonable and not oppressive. *Smith's Appeal*, S. C. Penn., Oct. 4, 1886; 6 Atl. Rep. 251.

9. **CORPORATION—Municipal Corporations—Damages from Surface Water, Etc.**—A person who has occupied and improved property outside of a city has a right to be reimbursed in damages, where the city has subsequently extended its limits, and, in grading a street made necessary by such extension, has knocked down his fences, and caused surface water to overflow his property, and injure his cellar, walls, and shrubbery. *Gray v. Knoxville*, S. C. Tenn., Sept. 1886; 1 S. W. Rep. 622.

10. **COVENANT—Deed—Covenant of Warranty—Covenant Against Incumbrances—Effect of Exception—Restriction in One Covenant Affecting Another—Estoppel—By Matter of Record—Judgment—Subsequent Appeal.**—The fact that, in a deed with full covenants of warranty, the covenant against incumbrances contains an

exception of an existing mortgage, will not bar the grantee from interposing any defense to the mortgage that the mortgagee might have interposed. A restriction in one covenant of a deed has by reason of that fact, no effect on an independent covenant in the same deed. Questions determined on a former appeal will not be re-examined on a subsequent one. *Bennett v. Keehan*, S. C. Wis., Nov. 3, 1886; 30 N. W. Rep. 112.

11. — **Warranty—Pleading—Necessary Averments of Complaint—Effect of Judgment and Eviction—Evidence—Parol Testimony to Show Consideration of Deed—Assumption by Purchaser of Widow's Outstanding Estate—Deed—Acknowledgment Necessary for Record, but Not as Between Parties—Pleading—Filing Cross-Complaint After Issues Closed—Discretion of Trial Judge.**—A complaint in an action for breach of covenants of warranty need not aver that the covenantor was required to defend; it is sufficient if it shows a judgment and an eviction under it. Where an action to recover possession of land is brought by one claiming to be the owner, and the grantee duly notifies his grantor of the fact, the latter will be bound by the judgment in which the action results; and where the grantor does not appear and defend, the grantee, after judgment rendered, may yield possession without taking an appeal. Under the statutes of Indiana the interest of a wife in her husband's lands is more than an incumbrance; it is an estate in the land itself. In an action for breach of covenant of warranty the grantor cannot introduce parol evidence to show that a deed with full covenants of warranty was taken by the grantee with the knowledge of a widow's outstanding rights in the land conveyed, and that the grantee assumed and agreed to pay off the "incumbrance" created by her estate. An acknowledgment is essential to entitle a deed to go upon record, but it is not essential to give effect to the deed as between the parties. After the issues are closed, and the cause set for trial, permission to file a cross-complaint is in the sound discretion of the trial court, and an order refusing permission to do so will not be set aside, unless it is shown that that discretion has been abused. *Bever v. North*, S. C. Ind., October 5, 1886; 8 N. E. Rep. 576.

12. **CRIMINAL LAW—Defendant's Presence—Sheriff Disqualified, Coroner Must Summon the Jury—When—Defendant Absent when Jury Impannelled—Out on Bail—Defendant to be Present at Each Step, Except Voluntarily Absent at Time of Receiving Verdict.**—When the sheriff of the county is disqualified from acting in summoning the jury by reason of his prejudice against defendant, the court errs in selecting another person, other than the coroner, to summon the jury, where it is not suggested that the latter is disqualified. Upon a trial for a felony, it is error to permit the jury to be selected in absence of defendant, although his counsel was present, and although the defendant was voluntarily absent, being out on bail, and although when the trial was called the court gave defendant an opportunity to further examine the jurors. Under § 1891, R. S. Mo., in all cases of felony, it is necessary that the defendant should be personally present in court at each and every material step taken during the trial, up to the time the verdict is to be received, when the verdict may be received and entered in his absence if it is willful and voluntary. *State v. Crockett*, S. C. Mo., Nov. 15, 1886.

13. ———— *Indictment -- Number of Case -- Nuisance -- Duplicity -- Negating Exceptions -- Trial -- Evidence -- Limiting Number of Witnesses -- New Trial -- Misconduct of Juror -- Presumption -- Knowledge of Party -- Failure of City to Provide Drainage.*—When the record shows that an indictment was returned by the grand jury, and the proceedings appear to be founded on such indictment, it is immaterial that the number of the case as stated on the indictment is different from that stated elsewhere in the record. An indictment which charges that the accused create a nuisance by doing all of the acts prohibited by the single section of the statute defining a nuisance is not bad for duplicity. An indictment for creating a nuisance is not bad for failing to aver that the acts done by the accused were not authorized by a city ordinance passed under the proviso in section 2068, Rev. St. Ind. Where it is not shown what facts a question propounded to a witness is expected to elicit, no available error is committed in refusing to permit the question to be answered. A reasonable limitation of witnesses is within the discretion of the court, and a limitation to seven is not an abuse of discretion in a prosecution for nuisance, in a case where the court gives notice in advance of the limitation. Where a new trial is sought upon the ground of misconduct on the part of a juror, it must be made to affirmatively appear that there was actual misconduct, and that it was not known to the party until after verdict. It is no defense to a prosecution for creating a nuisance by discharging offensive substance into an artificial water-course, that a municipal corporation has failed to provide adequate drainage. *Mergentheim v. State*, S. C. Ind. Oct. 7, 1886; 8 N. E. Rep. 568.

14. ———— *Obtaining Money by Cheat -- Form of Indictment under § 1561, R. S. 1879 of Mo. -- Common Law Form -- Where Names of Victims Unknown.*—Under the provisions of § 1561, R. S. 1879, of Missouri, an indictment is not in sufficient form, if it fails to state the name of the person or corporation upon whom the fraud was committed in obtaining, etc., the money or property by means and use of cheat, or where it does not aver that the name or names of such person or persons are not given because they are unknown to the grand jury, but only avers that a more particular description of said persons, firms, and corporations is unknown. Thus, where the indictment charges that the defendant did obtain by means of a trick, etc., money or property "from certain persons, firms and corporations then and there composing a voluntary association, known as the 'Brewers' Association of St. Louis and East St. Louis,' a more particular description of which said persons, firms and corporations and of said association, is to the jurors unknown," it does not comply with the statutory form and is insufficient. *State v. Fansher*, 71 Mo. 461; *Morton v. People*, 47 Ill. 468. Under the ruling of *State v. Fansher*, 71 Mo. 361, where the name of the person or persons from whom money or property is sought to be obtained by the device named in the statute is unknown, the statutory form cannot be resorted to in preferring the indictment, but it must be drawn according to the rules of the common law. Under the principles of the common law, the indictment must set forth with particularity "the trick or deception or false or fraudulent representations," etc., as well as the name of the person sought to be de-

frauded, if known, and if unknown to the grand jury that fact should be averred as a reason for not setting it forth. In such case the accused would be informed sufficiently of the cause and nature of the accusation, by the particular description of the trick, device or false pretense contained in the indictment. *State v. McChesney*, S. C. Mo. Nov. 15, 1886;

15. DOWER—*Assignment -- Distributive Share -- Creditors' Petition to Set Aside.*—Whether a court of equity would, at the instance of a creditor of a widow, cause her distributive share in her husband's estate, under the Iowa Code, to be set aside, so that an execution could be levied upon it, *quære*; but, in any event, the petition in such an action should show that the real estate sought to be distributed is all the real estate of which the husband died seized, and the court must have before it all the parties in interest. *Getchell v. McGuire*, S. C. Iowa, Oct. 27, 1886; 30 N. W. Rep. 7.

16. ESTOPPEL—*Statements to Third Party -- Subsequent Employment by Defendant.*—In an action to recover the amount of a bond and mortgage, statements by the plaintiff to a third party, not made to be communicated to the defendant, to the effect that a certain party was authorized to act as her agent, do not, in a question with the defendant, estop the plaintiff from denying the authority of such alleged agent, even though the person to whom the statements were made came into the defendant's employ afterwards. *McGuire v. Selden*, N. Y. Ct. Appls., Oct. 5, 1886; 8 N. E. Rep. 516.

17. FRAUDULENT CONVEYANCES—*Husband and Wife--Part Payment by Husband--Creditor's Claim Paid Out of the Property.*—Property bought and put in a wife's name should not be subjected to the claim of creditors of the husband, on the ground that it was partly paid for by the husband, there being no actual, as distinguished from constructive, fraud, if money was afterwards raised by mortgage on the property, and as much of the creditors' claim as was owing when the property was bought was paid therefrom; especially if part of the money paid by the husband on the purchase price went to one of the firm of creditors seeking to subject the property. *McChord v. Noe*, Ky. Ct. Appls., Oct. 19, 1886; 1 S. W. Rep. 644.

18. INJUNCTION—*Damages -- Party Enjoined in Contempt by Disregarding Injunction--Rights of Innocent Stockholder.*—Where an injunction has been granted against the treasurer of a corporation, restraining him from collecting any royalties or dividends of stock due the corporation, and such royalties and dividends are afterwards paid into its treasury, the treasurer and corporation are alike guilty of contempt, and, upon a dissolution of the injunction are not entitled to recover damages for detention of the fund. Where a corporation has been restrained by injunction from collecting the dividends due to its stockholders, and the injunction is afterwards dissolved, the stockholders may recover simple interest thereon from the time the dividends were declared, pending the injunction, up to the period of the dissolution thereof. *Heck v. Bulkeley*, S. C. Tenn., Sept. 21, 1886.

19. JUDGMENT—*Revival--Presumption of Payment --Burden of Proof--Jurisdiction of County Court*

Where Transcript has been Filed in District Court.—In a proceeding to revive a judgment in the county court, where the judgment debtor, on an order to show cause why the judgment shall not be revived, for such cause shows, by affidavit, that the judgment has been paid and satisfied, it is error for the county court to render final order of revivor without hearing testimony as to such payment or satisfaction. There being a presumption in favor of such payment and satisfaction, the burden and proof is on the judgment plaintiff to show that the judgment is unsatisfied. When the transcript of a judgment rendered in a county court is filed in the district court of the same county, all proceedings should thereafter be had in such district court; but, in the absence of a statute prohibiting the court in which the judgment was rendered from proceeding further in the case, a judgment of revivor rendered in such court will be valid. The county court possessing such jurisdiction, it is not error to exercise it. *Garrison v. Aultman*, S. C. Neb., Nov. 4, 1886; 30 N. W. Rep. 61.

20. **LANDLORD AND TENANT—Lease—Construction—Steam Furnished by Landlord.**—A demised to B certain premises known as the foundry building yard space for necessary stock and materials, the joint use of a pattern-shop, and the engine-room adjoining the foundry, for the annual rent of \$500. It was further provided by the lease that B "shall pay fifteen cents per hour for the steam furnished to his engine" by A, "and he shall have the right to use the tools in the pattern-shop; but, in consideration thereof," A "shall have the use without charge of the power of the engine" of A whenever required in the pattern-shop. *Held*, that this was not a covenant on the part of A that he would furnish the steam necessary to carry on the business of B, nor that B should take any steam. *Penn Iron Co. v. Diller*, S. C. Penn., Oct. 4, 1886; 6 Atl. Rep. 272.

21. **Rent—Joint Tenants—Amendment—Liability of Landlord for Failure to Repair—Custom.**—One joint tenant of real estate can not maintain in his own name an action for rent of premises leased in the name of both; but after a plea in abatement for non-jolinder, a justice's court may make the other joint tenant a party to the suit, and permit the case to proceed to judgment on its merits. A landlord is not bound to repair, unless there is a covenant or agreement on his part to do so, and in an action for rent a tenant cannot recover for damages to his goods caused by a leaky roof, of which the landlord had notice; nor is it admissible, in such an action, to show a general custom of the place for landlords to repair. *Weinstein v. Harrison*, S. C. Texas, Oct. 26, 1886; 1 S. W. Rep., 626.

22. **LEGACIES—Decree—Action—Pleading—Debts, Charges and Expenses—Action at Law—Statute.**—In an action against an executor to recover a legacy on the decree of the probate court, where the statute provides that after the payment of debts, funeral charges, and expenses of administration, the legatees shall be ascertained and their gifts fixed, the complaint need not allege the payment of these debts, charges and expenses. In an action against an executor to recover a legacy, it need not be alleged that the legacy is in the possession of the executor. An action at law against an executor to recover the amount of a legacy, can be maintained without the aid of a statute. *Weeks v. Sowles*, S. C. Vt., Sept. 8, 1886; 22 Reporter, 639.

23. **LESSOR AND LESSEE—Renewal Lease—Waste.**—A court of equity will interfere to restrain a tenant holding under a perpetual renewable lease from removing buildings on the leased premises when it appears that such removal would greatly impair and endanger the security for the rent reserved, so long, however, as the rent reserved is not rendered insecure by the acts of the tenant holding under such a lease, his right to manage the property in his own way cannot be interfered with. *Crowe v. Wilson*, Md. Ct. App., June 23, 1886; 7 East. Rep. 314.

24. **MORTGAGE—Future Advances—Validity—Bill to Redeem—Interest—Payment for Services—Demand.**—A mortgage given to the defendant to secure him for advances which he had made, and which he might make thereafter, for the benefit of the mortgagee in the settlement of the latter's affairs, and for the services rendered by the defendant in such settlement, is valid, though first given to a person for the benefit of the defendant, and afterwards assigned to the latter; and upon a bill brought to redeem, by the holder of a second mortgage on the same property, who took with knowledge of the origin and character of the first mortgage, the latter, before he can redeem, must pay the debt intended to be secured by the first mortgage. One who holds a mortgage to secure payment for services rendered to the mortgagee cannot recover interest on the sum due for services, for which no demand of payment has been made. Upon a bill brought by the holder of a second mortgage, where it appears that the defendant held the first mortgage to secure him against liability upon an indenture, the purposes of which have been fully executed, the latter will not be permitted to continue to hold the mortgage as security for an alleged liability which does not exist. *Taft v. Stoddard*, S. J. Ct. Mass., Oct. 22, 1886; 8 N. E. Rep. 586.

25. **—Priorities—Promissory Notes—Interest—Foreclosure—Sale—Civil Code Ky.**—W executed his note to J for money borrowed, payable in a limited time, with interest from maturity at 8 per cent. per annum. At the time he executed to her six other notes, with F & B as sureties, for a certain sum each, which became due, respectively, during the time, as semi-annual installments of interest. W, to secure the payment of seven notes, executed to her a mortgage on land, in which it was stipulated that, if F & B were compelled to pay any of the interest notes, they were to be substituted to her rights, but subject to her superior lien. Afterwards, W borrowed of F & B a sum of money, for which he gave his note, bearing a certain rate of interest until paid, and payable in a given time, and to secure the payment of this note he executed to them a mortgage on the same land. F & B also paid to J for W the interest notes. Subsequent to this loan by F & B to W, and at the maturity of the principal note, J agreed with W in writing to extend the time of payment of the notes three years further, and to reduce the rate of interest payable thereon to 7½ per cent. In proceedings to foreclose the mortgages, *held*, that no part of the proceeds of the property should be applied to pay interest on the semi-annual installments of interest on the principal debt in favor of J until the debts of F & B were satisfied. Where, in an action to foreclose a

mortgage, the sum of money to be raised amounts to upwards of \$20,000, and the court directs that \$2,000 of this amount shall be paid in cash, and the balance in six and twelve months, a sale on these terms is not a sale on reasonable credit, within the meaning of Civil Code Ky. *Willett v. Johnson*, Ky. Ct. Appls, Nov. 6, 1886; 1 S. W. Rep. 674.

26. NEGLIGENCE.—*Proximate Cause—Defects not Causing Injury—Railroads.*—Plaintiff, in uncoupling defendant's cars, caught his foot in a brake-beam. He signaled the engineer, but his signal was not at once seen. When perceived, the engine was reversed, and the train stopped immediately, but too late to prevent injury to plaintiff. The engine was defective, and hard to reverse, which is plaintiff's ground of action. *Held*, that the defect in the engine was not the cause of the injury, and defendant was not liable. *Bajuse v. Syracuse, etc. Co.*, N. Y. Ct. Appls., Oct. 12, 1886; 8 N. E. Rep. 529.

27. NUISANCE — *Railroad Company — Engine-House Next to Dwelling — Justification Under Legislative Authority—Legislative Sanction Not Inferred.*—The erection by a railroad company of an engine-house and coal-bins in the city of New York, on a lot adjoining property used as a residence, and their maintenance in such a manner as to render such property unhealthy and unfit for a residence, and to depreciate it in value, creates a private nuisance for which, as between individuals, an action would lie for damages, and for which a court of equity would grant a remedy by injunction; and the company cannot, in such proceedings, justify under an act of the legislature giving the company a right which they had not had at the time of the erection of such engine-house, to enter the city on the tracks of another railroad "on such terms, and to such point, as might be agreed upon between the companies." A statutory sanction cannot be pleaded in justification of acts which by the general rules of law, constitute a nuisance to private property, unless they are expressly authorized by the statute under which the justification is made, or by the plainest and most necessary implication from the powers expressly conferred. *Cogswell v. New York, etc. Co.*, N. Y., Ct. Appls., Oct. 5, 1886; 8 N. E. Rep. 537.

28. PARTNERSHIP—*Dissolution—Parol Proof of What Figures, Used as Basis for Dissolution Mean—Estoppel—Evidence—Settlement—Set-Off and Counter-Claim—Depreciation in Stocks Taken by One Partner—Interest—Mistake—Demand—Costs—Appeal—Unnecessary Abstract—Printing.*—In an action by one partner to recover a balance due him by the other on a settlement and division between them when the partnership was dissolved, the plaintiff may be asked if there was anything in certain figures which had been made between the parties at the time of the dissolution intended to show the difference in value between the property he got and the property the defendant got on the division; it not appearing from the figures themselves what they were intended for. When partners who are about to dissolve partnership agree as to how the figures should be ascertained, or the value of the firm property determined, and the course agreed upon is pursued, and the property divided on that

basis, one partner cannot, in a subsequent suit by the other for a balance due him under the settlement, set up the fact that the property transferred by him to the other did not amount to as much as he supposed it would. One partner who, at a settlement on a dissolution of the partnership, transfers to the other certain stock of two manufacturing corporations, in which both partners were interested, the stock being then at par, is not liable to have set-off against a judgment subsequently recovered by him against the other partner for a sum due him on the settlement, but omitted by mistake, a depreciation in the stock of one of the companies, caused by the failure to collect a note executed to it by the other corporation subsequent to the settlement, although at the time the transfer was made the partner making it agreed to pay the other a certain proportion of the accounts of such company as should prove uncollectible. The fact that, upon a dissolution of partnership, it was agreed between the partners that each should give the other demand notes, without interest, for the balances found due between them, does not deprive one partner, who subsequently recovers a judgment against the other, for a sum not paid him on the settlement by mistake, of interest on his claim; and interest runs, not from the discovery of the mistake and demand, but from the date of settlement. An abstract setting out, among other things, what is called the decision of the court below, showing detailed findings of facts, and the opinion of the court thereon, is not properly a part of the record, and the costs of printing should be taxed to the appellee, who filed it. *Donahue v. McCosh*, S. C. Iowa, Oct., 27, 1886; 30 N. W. Rep. 14.

29. PAYMENT—*Presumption—Possession of Note and Contract.*—Plaintiff sold a piano to defendant on a contract, taking her promissory notes for the unpaid purchase price, stipulating that the title was to remain in him until the notes were paid. The defendant's husband obtained the notes and contract from the attorney who held them for collection, and delivered them to his wife, informing her he had paid them, and receiving in consideration the release of a debt he owed her. The plaintiff, not having received the proceeds of the notes, brought this action of replevin. *Held*, the production of the notes and contract by the defendant raised the presumption of their release and discharge according to their tenor, and was a good defense; and proof that they were received from the attorney, and the proceeds not received by plaintiff, did not rebut the presumption or amount to proof of non-payment. *Hollenburg v. Lane*, S. C. Ark., Oct. 23, 1886; 1 S. W. Rep. 687.

30. REPLEVIN—*Damages—Suit on Bond—How St. Mich. § 8375.*—Where the plaintiff fails, after replevying and obtaining the property—beasts which had been impounded for destroying defendant's corn—the defendant may have an assessment covering every claim arising out of the distress and damages done him by the beasts. The defendant is not restricted to his suit on the bond for assessment of damages. *Sterner v. Hodgson*, S. C. Mich., Oct., 28, 1886; 30 N. W. Rep. 77.

31. — *Goods Sold—Authority of Purchaser's Agent—Verdict—Objection to Evidence—Waiver—Motion for Verdict.*—In an action of replevin to recover property seized under an attachment,

where the defendants, having pleaded a general denial, rely upon an alleged sale and delivery thereunder to defeat the plaintiff's claim, and there is evidence tending to show that the agent of the vendee by whom the alleged purchase was made had no authority to make such a contract, it is not error for the court to overrule a motion by the defendants to direct the jury to return a verdict for them, and, if the defendants elect to stand upon their motion, to direct the jury to return a verdict for the plaintiff. Where the court overrules a motion by the defendants to direct the jury to return a verdict for them, and the defendants elect to stand upon their motion, they thereby waive any errors in the admission of evidence that had previously occurred. *Battis v. McCord*, S. C. Iowa, Oct. 26, 1886; 30 N. W. Rep. 11.

32. SALE—*Bona Fide Purchaser—Conditional Sale—Notice—Possession.*—Where the vendee takes possession under a conditional sale, in which the title remains in the vendor until payment, and mortgages the goods to one ignorant of the condition and of the right of the vendor, and the vendor is never paid, the possession gives no right to pass title, the vendor is not estopped from asserting title, and the mortgagee gets no title which he can assert against the vendor. *McIntosh v. Hill*, S. C. Ark., Oct. 16, 1886; 1 S. W. Rep. 680.

33. ——— *Reaping Machine—Delivery in Parts—Rescission—Delay in Delivery.*—Under a contract for the purchase of a reaping machine, the delivery will not be complete until the different parts, which none but an expert can put together, have been set up so as to form a machine. Where the testimony for the defendant tended to show that he purchased a reaping machine, with the understanding that it should be delivered to him, fit for use, on or before a certain day, when it was necessary for him to begin his harvest, and the machine was only delivered in parts, boxed up, on that day, the vendor's expert not offering to set it up until three days later, the defendant's right to refuse the machine should go to the jury upon the theory presented by him. *Wood Moving-Machine Co. v. Gaertner*, S. C. Mich., Nov. 4, 1886; 30 N. W. Rep. 106.

34. SETTLEMENT—*Descent—Wife's Property—Claim of Next of Kin—Agreement Between Husband and Wife.*—Where husband and wife, natives of Germany, by their equal labor and thrift accumulated property in real estate, and the husband deeded it to his wife, and, on her death, never having had children, her lands go to her next of kin, who live in Germany, and who, upon demanding the lands of the husband, are met by his statement that there was an agreement between him and his wife that the property should go to the survivor of them, to be by said survivor devised equally among the relatives of each, and the parties finally settled by mutually deeding a moiety to each other, this settlement, in the absence of any overreaching by the husband, will be upheld as eminently fair and equitable. *Seife v. Steinreide*, Ky. Ct. Appls., Oct. 30, 1886; 1 S. W. Rep. 672.

35. ——— *Evidence—Deed—Consideration—Promissory Note.*—Where, in an action on a promissory

note, defendant pleads that it was without consideration, as given for an alleged balance of old transactions, which included two notes actually paid in a settlement, in which a farm was deeded to plaintiff in full liquidation of all debts, leaving a balance coming to defendant of any excess obtained on sale, it is competent for defendants to introduce the deed in evidence, not as conclusive proof of the consideration for the farm, but as an element of the settlement relied upon in determining the question whether the notes which were the consideration of the note sued on were included in the settlement made when the deed was given. *Dufo v. Juif*, S. C. Mich., Nov. 4, 1886; 30 N. W. Rep. 106.

36. SURETY—*Principal and Surety—Liability of Surety—Receiver—Settlement of Partnership Affairs.*—In an action for a settlement of partnership affairs and the appointment of a receiver, the defendant was allowed by the court to remain in possession, on giving his bond, with a surety, to "abide by the future orders of the district court in the case." Held, that such bond will hold the surety for the amount of the final order of settlement, and his liability under it will not be restricted to the duties of the defendant as receiver merely. *Stull v. Lee*, S. C. Iowa, Oct. 25, 1886; 30 N. W. Rep. 6.

37. TRESPASS—*When may be Maintained—Vendor and Vendee—Timber—License.*—A agreed in writing to sell to B the timber standing on certain land, and provided that the same should be cut and removed in two years. Afterwards he agreed verbally with B to extend the time for cutting and removing the same, but before the time had expired A made a sale of the land to C, who had actual notice of the parol agreement with B, and who forbade his cutting any more of the timber. In an action of trespass on the case, brought by B against C for the value of the timber, held, that the agreement for extension was a license to B, which C had a right to revoke; that B had a right only to remove the timber which he had cut until forbidden by C to cut any more; and that he could maintain no action against C for the value of the standing timber. *Williams v. Flood*, S. C. Mich., Nov. 4, 1886; 30 N. W. Rep. 93.

38. WILLS—*Construction—Contingent Remainder—Distribution Based on Contingency.*—A testator having provided in his will: "If, at my death, there shall be any surplus stock or personal property, or any cash or cash notes, on hands, it is my will and desire that the stock and personal property may be sold, the money collected and loaned out during the life of my wife, and, at her death, I desire that it may be divided between my said daughter and granddaughter;" Held, that the words created a contingent estate, dependent upon the death of the wife, in the daughter and granddaughter, both as to the principal and interest of the "money collected and loaned out" after the sale mentioned. When the gift is created simply by directing the payment or distribution of the legacy at some future period of time after the decease of the testator, or upon the happening of a contingent event, and there is no provision in the will for vesting the legacy immediately, then the future time fixed, or the happening of the contingency, is of the essence of the gift. *Willett v. Rutter*, Ky. Ct. Appls., Oct. 5, 1886; 1 S. W. Rep. 640.

39. **WITNESS—Discrediting—Refusal to Answer—Interrogation as to Crime.**—Where the issue is whether notes have been paid, the refusal of the former clerk of plaintiffs, on being examined as to business transactions concerning the notes in suit, to answer interrogatories as to whether he had embezzled the funds of plaintiffs, falsified their books to cover his embezzlement, and used one of the notes, which was a renewal of the original note, for that purpose, cannot go to the jury to discredit the witness; the issue not being his embezzlement. *Slocum v. Knosby*, S. C. Iowa, Oct. 27, 1886; 80 N. W. Rep. 18.

QUERIES AND ANSWERS.*

[Correspondents are requested to draw up their answers in the form in which we print them, and not in the form of letters to the editor. They are also admonished to make their answers as brief as may be.—Ed.]

QUERIES.

Query 32. A sells to B, at public sale, a pure bred Hereford cow, and states that she is in calf by a certain famous Hereford bull, owned by A. In order to get a representative from such a noted sire, B bids to \$1,000, and gets the cow. The calf comes in due season, and proves to be a male. B uses this calf as a yearling, breeding him to some twenty or thirty cows, among them a number of pure bred cows. The distinctive outward features of the Hereford cattle are a white face, red body and quite prominent horns, and the exception to this rule is very scarce. When the calves come that are sired by this yearling, they prove to be of all colors—red, white, black, yellow, etc., some horned and some hornless, and this out of pure bred Hereford cows, as well as out of ordinary cows. These same cows, to a different Hereford sire, brought calves properly marked. A insists that the pedigree of the young sire is all right, and declines to take any steps in the matter, claiming that he could not be held responsible for the second generation from animals sold by him. B claims, however, that he paid a high price for the cow in the hope of getting a male, and having him hand down in his turn the distinctive features of the Hereford cattle, and that the failure to do so is a damage that A should make good. In other words, A sells B a cow in calf for breeding purposes in a Hereford herd. The calf breeds all right, except his calves lack the color and formation of Herefords, as established in their herd book, and consequently are of but little more value than common stock. Who should stand the loss?

ARBITRATOR.

RECENT PUBLICATIONS.

OHIO CORPORATIONS, other than Municipal, as Authorized by the Old and New Constitutions, and Regulated by Statute, with Notes of Decisions, and a Complete Manual of Forms for Organizing and Managing all Kinds of Companies and Associations. By A. T. Brewer and G. A. Laubscher of the Cleveland Bar. Second Edition, enlarged. Cincinnati: Robert Clark & Co., 1886.

This is a local book which seems to have been favorably received by the profession in its appropriate habitat, and from the examination which we have given it, deserves well of the lawyers of Ohio, and all

other lawyers who may have any professional connection with the corporation law of that State.

That such a compilation cannot fail to be highly useful is abundantly clear from the consideration, that of late years nearly every variety of useful and profitable enterprises is prosecuted by corporations which in fact, are fast absorbing, in one form or another, all the business of the country, except such as from its very nature is incapable of aggregation and co-operation. In every State, therefore, there should be a judicious and carefully prepared system of corporation law, and it is equally important that it should be given to the profession and the public in as complete a form as possible, well arranged and carefully annotated. This has been very well done in the work before us, and we have no doubt that the second edition will be received with increased favor by the profession in Ohio.

JETSAM AND FLOTSAM.

PATTERN CROSS-EXAMINERS — THE CORKSCREW PATTERN.—This great cross-examiner, like a few other great men, proceeds upon a theory. He has observed that the situation of truth, in modern times at least, is best described, not as at the bottom of a well, but rather as in a tightly corked bottle. He regards a witness much as he does a bottle of Apollinaris water; and the object of cross-examination is to get the cork out. The art of doing this is to do it without an explosion and waste of the contents.

Since he discovered this principle he rarely has any difficulty with the process of cross-examining. He appreciates the importance of not shaking the bottle before the cork is drawn. So he disarms the witness entirely. His suave and plausible manner puts the witness at his ease. You would think they were great friends; or that he was ingratiating himself with a great man or an admired woman preparatory to asking some considerable favor.

He believes in a good long course of introductory questions to be continued until he finds the stream of testimony running freely. So he takes whatever comes.

From the reserved or taciturn witness he accepts short answers, and follows graciously with a question just enough different from the one unsatisfactorily answered to invite a better answer. From the voluble witness he allows long answers, hoping in this way to get at the bottom of it.

But as soon as he has got the first flow fairly going he claps in the cork again with an objection—Wait a minute; one thing at a time; then he rummages with his papers as if in search of something else, or confers with his associate, as if he had no desire to stop his friend the witness, but only wished to prepare to understand him.

From this time on his task consists in alternately uncorking the witness and corking him up again. Each of these meddling processes he accomplishes with the utmost urbanity; and sometimes, almost at the same instant, so that only a single gurgle of testimony may escape between two interrogatories and the witness hardly knows whether he has said anything or not.

In this our friend, the cross-examiner, prides himself, particularly in the art of "getting it out of the fellow;" but it must be admitted that he often gets out just what he doesn't want to. Spectators in the profession are more inclined to admire his tact in "stopping it in," which he generally succeeds in doing.—*N. Y. Daily Register.*

The Central Law Journal.

ST. LOUIS, DECEMBER 10, 1886.

CURRENT EVENTS.

PRISONERS AS WITNESSES.—We return to this subject because we find in a recent number of the *Albany Law Journal* an article beginning thus: "The CENTRAL LAW JOURNAL has a long and strong editorial against the practice of allowing prisoners to testify in their own behalf, lest they should hurt themselves. This is too sentimental."

The gist of our editorial was simply that logic, justice, and common sense demand that a party who affirms a proposition shall be required to prove it; that a State charging a person with crime is subject to the same rule, and should be held to establish its accusation by its own witnesses; and that the prisoner shall not be compelled, either directly, or under the disguise of a permission to testify, to accuse himself or furnish testimony in aid of the charges brought against him. These ideas may be "too sentimental," worthy, in fact, of a place in *The Sorrows of Werter*. If so, we are very sorry—we regret extremely to have so shocked the feelings of our prosaic contemporary.

The *Journal* seems to consider the supposed utterances of counsel for the defense, under one state of the law or under another, as having some bearing on the question. Of course, under any state of the law on the subject of evidence, counsel for prisoners will say whatever they may think will best serve the interests of their clients, and the inferences which the *Journal* draws from their supposed views of the matter are unworthy of serious consideration.

Equally futile is the *Journal's* parallel between the exclusion of prisoners from the witness stand, and that of circumstantial evidence, created by the prisoner himself, which, the *Journal* supposes to stand on the same footing. It says: "But it would be just as logical to censure the use of circumstantial evidence which the prisoner has created against himself." Surely our contemporary has sufficient perspicacity to see the difference between proving, by competent and

credible witnesses, acts and declarations, facts pertinent to the issue, and, having failed to make out a case in the ordinary manner, striving to extort by the insidious devices of cross-examination from a prisoner, always presumed to be innocent, either an actual confession or damaging admissions.

The fallacy, however, which most gravely afflicts the *Albany Law Journal* on this subject is the idea that the prisoner is a witness because he wants to be. It is very manifest to us that whether he is made, as Mr. Justice Stephen proposes in his *Nineteenth Century* article, "a compellable witness at very stage of the inquiry," or whether he is nominally free to elect whether he will testify or not, he is in neither case a free agent. The new system places the average prisoner in this dilemma; if he declines to testify he knows that his reticence will operate very severely to his prejudice with the jury, if he does testify he knows that very little of his testimony which might tend to exculpate him will be believed, and that every syllable adverse to him, which can be wrung from him by cross-examination will be received as "confirmation strong as proof from holy writ." To speak of free will in such a connection is certainly very unreasonable. This result follows from the law of human nature, higher than any statute of any State, more potent than the orders of any court. By this law, in spite of any thing that legislatures may enact or judges charge, juries will be governed.

The *Journal* has made a very notable discovery in moral science. It says: "At all events, it is bad logic and bad morals to say that a man, presumed to be innocent, shall not be a witness if he desires to be." We must say that we cannot see where the turpitude comes in. It may be illogical, and it may be even absurd, to say, that which the common law of England has said for a thousand years, and which the law of most of the States of this union still says. It may be that there is a fresh revelation of the laws of logic, which can only be seen under the new juridical light which flashes over the placid waters of the Hudson, and that by that revelation the long accepted views of the sages of the law on this subject have been abrogated. Still, the question remains, where is the au-

thority that condemns as immoral an opinion which in most of the States is simply acquiescence in the laws of the land? Is the fatal anathema to be found in the decalogue, or the sermon on the mount? Has one of the prophets spoken, or which of the apostles? The deliverance of the *Journal* on this subject, like most other oracular utterances, is all too brief. It leaves a harrowing uncertainty whether the newly found immorality is a mortal or a venial sin, and how it can be best atoned for. We tremble to think of the myriads of lawyers who in past ages have gone to their account with this sin standing against them, as unconscious of its existence as we are of Wiggins' dark moon, and all because they lived and died before the fourth quarter of the nineteenth century, in which was promulgated the new conjoint system of law, logic and morality.

The solicitude of the *Albany Law Journal* for the welfare of St. Louis is positively touching. It says: "At our last accounts there was no community in this country more in need of strict and severe criminal justice than St. Louis. A score of alleged murderers were in her jail awaiting trial or under sentence. We are sorry to hear a voice from St. Louis against any measure tending to ascertain truth and effect justice." So should we be, from St. Louis, or from anywhere else. Let the *Journal* be comforted, some of these prisoners are under sentence, in the course of time, perhaps, others may be, and at all events people who are in jail are for the time being out of mischief. Of the precise population of the St. Louis jail we cannot speak with any confidence, never having visited that institution, nor, we may add, have we ever entered a criminal court room in this city. If the jail is very full, as the *Journal* intimates, it seems, to our unassisted reason, a very favorable indication, for the more people there are in jail the fewer, by that precise number, are those outside who ought to be inside.

TACT OUT OF COURT.—"Why don't you write us something of tact out of court, as well as in court?" asked a bright young attorney, recently, and here it is: Just before the court battle both sides are too confident

to learn much. After the conflict they listen better. Only a few men take advice kindly, most of them prefer to give counsel rather than receive it; still, if it comes in the form of a story or incident, as by surprise, it compels attention. To illustrate: Take the case that you took a retainer in lately, and omitted to enter the residence of your client on the file cover, and the other one where you trusted to the client to prepare the testimony, will trouble you all the more for the omissions. The witness whose whole story you relied upon for evidence will prove a large delusion on trial day. The busy little fellow who knows less law than practice is using his tact to be ready in the court room. He has sent out a carpenter to measure every part of the building, and add up the extra work done to the last fraction. He has had the open book account admitted, and noted when, where, and under what circumstances — all filed away for ready reference. He has agreed with his client in advance about what the fees shall be, and made a safe contract. He has tested the temper of his witnesses and told them that anger "only rests in the bosom of fools" and law suits are not won by ever so many people coming to swear of the adversary, that "he is one of the hardest cases in the whole country!" or of how many men he has swindled in business, or how many failures he has settled up and compromised. All this is old-fashioned foreign matter that clients are foolish about, and don't win law suits any longer.

What does win them? Different men win by different methods, assuming the case is nearly evenly balanced as to the merits, the best plea on the most reasonable theory will win oftenest. Some men are actually indifferent of facts and win by wearing out an adversary. Other rely entirely on the fact and save legal questions for higher courts, and still another class get a good ready all around. One of the best advocates considers it of vital importance that the order of testimony, and the measure of its reason are consistent, and likely to be believed. He wins his case within his own heart first, and mixing his powerful belief with the magnetism of his nature, throws it to the jury with relentless force like a charge of Napoleon's cavalry. He sometimes finds a sunken road, and meets a Wellington but

wins almost every battle. Measured by the standard of any other undertaking, like the case in tempering steel, the highest speed of sail yachts, the greatest skill of base ball playing, or the fine training and endurance of racers, very few law suits are brought to court with the real issue as firmly fixed, and perfectly realized, as these lesser matters in business of less importance.

J. W. DONOVAN.

NOTES OF RECENT DECISIONS.

CONTEMPT OF COURT—POWER OF COURTS TO PUNISH — PROCEDURE. — The Supreme Court of New Jersey has recently had under consideration a case,¹ involving the right of *nisi prius* courts in that State to punish for contempt of court. The facts were, that John Cheesman was indicted, it does not appear for what offense, and tried; that there was a mistrial in January, 1885; that, on the 30th of that month, being rash, imprudent and, presumably, very angry, he published in his newspaper an article intended to cast discredit upon the members of the grand jury that had indicted him, the sheriff who had summoned the jury, and the judge who had tried, and would again try him. For this article the court fined him a hundred dollars and he appealed.

The supreme court held, that the superior courts of New Jersey, being modelled upon the English common law courts, have the same power possessed by their prototypes to punish, by fine and imprisonment, publications designed to bring into contempt the administration of the law. That the English courts had, and very freely exercised this power, the court demonstrates by along and, we conceive, superfluous array of authorities.²

The court proceeds to insist that the usual platitudes concerning the liberty of the press cannot be permitted to justify unbridled tongues or unbridled pens, and sanctify slander and libel. It holds that the power to

maintain the dignity of the court and the majesty of the law is inherent in the very nature of courts, and that the exercise of that power on those who offend by publications, designed to bring in contempt the officers of the law and the administration of justice, is not inconsistent with the spirit of our institutions. So far as the reports indicate this case is the first that has occurred in the State, but, as the court remarks, the power has no doubt been frequently exercised by courts, the decisions of which have not been reported, and from which, until 1884, no appeal in cases of this character was permitted.

The court holds that the proceedings should be initiated by a rule to show cause, but that no antecedent affidavit is essential. If no sufficient cause be shown to the contrary an attachment issues, and the accused is held to bail or committed to answer, and upon his answer and a full hearing he is either punished or discharged. The forms of the procedure seem to be immaterial, the indispensable part is that the accused should have his "day in court" and be allowed full facilities to purge his contempt.

LIABILITIES OF RAILROAD COMPANIES FOR INJURIES TO THEIR EMPLOYEES.

1. Introduction.
2. Risks.
3. Obligations of Railroad Companies.
4. Introduction of New Machinery.
5. Unusual Risks.
6. Who Are Fellow-Servants.
7. Fellow-Servants Distinguished.
8. Negligence of Fellow-Servants.
9. Superior Servants.
10. Discovery of Defective Machinery.
11. Contributory Negligence.
12. Burden of Proof.
13. Who are Fellow-Servants is a Question for the Jury.
14. Negligence—Question for the Jury.

1. *Introduction.*—It is the object of this article to state briefly the general principles of law which are applicable to railroad corporations and their employees, as regards liability of the former for injuries to the latter. To attempt an analysis of the numerous and often conflicting cases would be impracticable in a magazine article.

¹ *In re Cheesman*, 6 Atl. Rep. 513.

² *Rex v. Jones*, Strange, 185; *Rex v. Unitt*, Strange, 567; *North v. Wiggins*, Strange, 1068; *Pool v. Sacheverell*, 1 Peere Wms. 675; *Rex v. University of Cambridge*, Strange, 557, 565; *Roach v. Garvan*, 3 Atk. 60.

2. *Risks*.—The servant when he engages to the master undertakes, as between himself and employer, to run all the ordinary risks of the service, including the risks of negligence upon the part of a fellow-servant when he is working as a servant of him who is a common master. The employee cannot be excepted from the risks arising from the carelessness and negligence of those who are in the same service. These hazards the servant must know, and, hence, can effectually guard against them. The dangers incident to the employment are known by the employee and are provided for in the rate of compensation like any other arrangement.

The running of trains on railroads is a dangerous business, and the employees, when they engage with the railroad corporations to do service, know the hazard incident to such employment, and take upon themselves the ordinary dangers found in this business.¹

3. *Railroad Companies' Obligations*.—While the employee assumes to run the ordinary risks of his employment, the railroad company, on the other hand, undertakes and agrees to exercise reasonable and ordinary care and diligence in furnishing reasonably safe machinery and instrumentalities for operating its railroad. It must use ordinary care and diligence in selecting its servants who must be possessed of ordinary skill and care. The machinery is not required to be of the most improved kind nor absolutely safe.²

4. *Introduction of New Machinery*.—Railroad corporations are not required to discard their machinery in use, in order to introduce new inventions which are supposed to be an improvement over the old.³ A late

decision on this point has been rendered by the Illinois supreme court.⁴ In this case the plaintiff averred that he was injured by his foot being caught in a switch joint, because said joint was not blocked. It appears that a new device for blocking a switch joint had been used by some of the railroads. The invention is new, and is used by less than one-half of the railroads. It was held that before the defendant could be made liable, it must be shown that the switch or turn-out, "as constructed and used, was not reasonably safe, or that it was not constructed with the usual care and skill;" that the company was not obliged to introduce a new invention, and especially when the device was as yet an experiment.

It is required that the machinery and appliances be suitable and reasonably safe; that the railroad company use due diligence to keep its machinery in good repair by frequent inspections.⁵

5. *Unusual Risks*.—It must be understood that the employee, when he engages with the railroad company does not take upon himself extraordinary hazards. And if the employee is ignorant of the risks incident to his work, the employer is obliged to inform him of all the facts concerned in operating the machinery, concerning the safety of the servant, and especially when the service is hazardous to a degree beyond what appears to the ordinary intelligence of an employee.⁶

The employer must also give all the facts if the employee is young and his judgment does not comprehend the dangers, or if the employee is inexperienced, and cannot therefore be fully cognizant of the dangers.⁷

The employer must never expose his servant to any unreasonable or extraordinary danger or peril in the course of his employment, and against which, the employee, for want of knowledge or skill, cannot, by using reasonable care and diligence, protect himself.⁸

⁴ Railroad Co. v. Loudergan, *supra*.

⁵ Railroad Co. v. Jackson, 55 Ill. 493; Condon v. Railroad Co., *supra*.

⁶ Barton v. Roberts, 44 Cal. 187; Browne's Dom. Rel. 128; Strahlendorf v. Rosenthal, 30 Wis. 675.

⁷ Dowling v. Allen, 74 Mo. 18; Sullivan v. India Co., *supra*.

⁸ Wonder v. Railroad Co., *supra*; Hutchinson v. York, etc., *supra*; Hough v. Railroad Co., 100 U. S. 218.

¹ Morgan v. Vale, L. R. 1 Q. B. 149; Railroad Co. v. Wagner (Kans.), 21 Cent. L. J. 51; Railroad Co. v. Loudergan (Ill.), 7 N. E. Rep. 55; Coombs v. Cordage Co., 102 Mass. 572; Sullivan v. India Co., 113 Mass. 396; Madden v. Railroad Co., 20 N. W. Rep. 317; Wood's Master and Servant, § 332.

² Hutchinson v. York, etc., 5 Exch. 343; Priestley v. Fowler, 3 M. W. 1; Payne v. Reese, 100 Pa. St. 306; Simons v. Railroad Co. 110 Ill. 340; Railroad Co. v. McCormick, 74 Ind. 445; Smith v. Railroad Co., 69 Mo. 32; McGinniss v. Bridge Co., 49 Mich. 466; Railroad Co. v. Holt, 29 Kans. 149; Condon v. Railroad Co. 78 Mo. 567; Kirkpatrick v. Railroad Co., 79 N. Y. 240; Dana v. Railroad Co., 92 N. Y. 642; Smith v. Railroad Co., 42 Wis. 526; Johnson v. Tow Boat, 135 Mass. 209; Rodgers v. Railroad Co. 8 Pac. Rep. 377; Gravelle v. Railroad Co., 11 Fed. Rep. 509.

³ Whart. Neg., 213; Wonder v. Railroad Co., 32 Md. 411.

6. *Who Are Fellow-Servants or Consociates?*

—FIRST: Fellow-servants or consociates must be servants of the same master, employed in doing parts of the same work, and shall be at the time of the injury directly co-operating with each other in that particular business in hand; or their duties shall bring them into habitual consociation, so that they influence each other promotive of proper caution.⁹

SECOND: Are all who are controlled by the same master, engaged in the same general employment, and who derive authority and compensation from the same source, though it may be in different departments, and who habitually consociate in the performance of their customary duties, so that their safety depends upon the care of each other, and who can report negligence of duty to a common master, and who take the risks of each other's negligence, are fellow-servants or consociates?¹⁰

THIRD: Other authority, however, makes a broader distinction in defining fellow-servant. It is held by some courts that fellow-servants include all who are engaged in accomplishing one and the same object, under the same master, deriving authority and compensation from the same source; all employees from the highest to the lowest are fellow-servants, no matter how remote from each other they may be usually engaged, or how distinct in character and nature may be their respective duties and employment, and without any difference in rank or authority, it not being necessary, it would seem, to be engaged in the same common service, under the same general control.¹¹

7. *Fellow-Servants Distinguished.* — Employees of railroad companies, though of different grades, when working in a common service are fellow-servants. An engineer on a moving passenger train and a brakeman on a freight train of the same company, at a station, who is ordered by the conductor of his train to go along the line of the road to

display a signal to the passenger train, are fellow-servants for the purpose of bringing the train safely to the station.¹² A brakeman making a switch for his train on a track in a railroad yard, is a fellow-servant with an engine-man of another train of the same corporation upon an adjacent track.¹³ Inspectors of cars in the yard of the company and a brakeman on its trains are fellow-servants in the same employment.¹⁴ A foreman who directs the moving of cars to be repaired is a fellow-servant with the brakeman.¹⁵ So is a conductor a fellow-servant with a brakeman.¹⁶ It has been decided that a conductor and an engineer are not fellow-servants.¹⁷ Conductors of constructive trains and laborers on same trains are not fellow-servants.¹⁸ Boss of car repairers and laborers under his supervision are not fellow-servants.¹⁹ Roadmasters and laborers are not.²⁰

When a company has several shops, and used for the same general purpose, and employ several gangs of laborers in and about the shops, a workman employed in taking material in and out of the shop, is a fellow-servant with a gas-fitter in the employ of the same company running a pipe into one of the shops at an improper height. Otherwise, however, if the master mechanic had ordered the placing of the pipe in such a place.²¹

A railroad company is bound to inspect foreign cars that it hauls over its road, just as it is obligated to inspect its own cars. Its employees take only the same risks in handling these cars as they do in those belonging to the company. Where a brakeman was injured in coupling by reason of a defective bumper on a foreign car, a defect that could have been seen by ordinary inspection, the company for whom he was working, was held liable.²² A general manager who makes

¹² Railroad Co. v. Rush, (Tenn.) 21 Cent. L. J. 369.

¹³ Randall v. Railroad Co., 3 Sup. Ct. Rep. 322.

¹⁴ Railroad Co. v. Webb, 12 Ohio St. 475; Mackin v. Railroad Co., 135 Mass. 201; Smith v. Potter, 9 N. W. Rep. 273.

¹⁵ Fraker v. Railroad Co., 19 N. W. Rep. 349.

¹⁶ Pease v. Railroad Co., 20 N. W. Rep. 908.

¹⁷ Ross v. Railroad Co., 8 Fed. Rep. 544. See Railroad Co. v. Ross, 5 Sup. Ct. Rep. 184; s. c., 112 U. S. 377.

¹⁸ Railroad Co. v. Lundstrum, 20 N. W. Rep. 198.

¹⁹ Railroad Co. v. Fox, 3 Pac. Rep. 320.

²⁰ Railroad Co. v. Moore, 1 Pac. Rep. 644. For general discussion, see Pierce's Railroad Law, 299.

²¹ Railroad Co. v. Bell, 21 Reporter, 698.

²² Railroad Co. v. Gottlieb, (N. Y.) 3 N. E. 344.

⁹ Railroad Co. v. Moranda, 108 Ill. 576.

¹⁰ Thomp. Neg. 969, note 2 and 1026, § 81; Wood's Master and Servant, 837; Addison on Torts, § 565, note; Moak's Underhill on Torts (ed. 1880), 52; Morgan v. Railroad Co., L. R. 1 Q. B. 149; Railroad Co. v. Ranney, 37 Ohio St. 665; Howland v. Railroad Co., 54 Wis. 226; Granelle v. Railroad Co., 10 Fed. Rep. 711; Railroad Co. v. Rider, 4 Texas L. R. 293.

¹¹ Railroad Co. v. Fort, 17 Wall. 553; Blake v. Railroad Co., 70 Me. 60; Gillshannon v. Railroad Co., 10 Cush. 228.

rules, and a train dispatcher who gives special orders for the running of trains, and a head brakeman on a freight train, are not fellow-servants.²³ A railroad laborer engaged in distributing rails along the track, under the control of a boss, is not in the same employment as a man controlling and managing a switch engine not used in carrying those rails, and in moving cars not used in laying the rails along the track.²⁴ If a railroad company draws over its road foreign cars, and an accident occurs from their not being reasonably safe, under any circumstances, for the business for which they are used, and there is no negligence on the part of the employee, the company is liable.²⁵ The Kentucky Court of Appeals have decided in a recent case, that if a conductor causes injury to a brakeman by gross negligence the company is liable, the conductor and the brakeman not being fellow-servants.²⁶

8. *Negligence of Fellow-Servants.*—The employer is not liable to the employee for any injury resulting from the negligence of a fellow-servant in the same department of service, provided the master has exercised due care and diligence in the selection and retention of co-servants. When the employee engaged in the service he took upon himself the risk of injury from his fellow-servant.²⁷

The weight of authority is, that if the employer is not negligent in hiring and retaining workmen who will use ordinary care and prudence, and furnishes them suitable tools and appliances to perform the work for which the servants are engaged, he is not liable for injuries resulting from negligence of fellow-servants in the same service.²⁸

It has been held, however, that if a fellow-servant is injured by the negligence of his

consociate, and said injury could have been avoided by ordinary care on the part of the co-servant, the common employer will be liable.²⁹

A railroad company is liable to a father for injury to a minor son, who is engaged as brakeman or in other dangerous capacity, without the consent of his father, in the course of his employment, though the injury is caused by the minor's own negligence. When the minor was injured he was voluntarily acting as brakeman with the consent of the train conductor.³⁰

9. *Superior Servants.*—Some authorities hold that the employee assumes all the risks growing out of the negligence of superior servants even in different departments of service so long as both are in the same general employment, and the negligence of one contributes to the danger of the other.³¹ But this is not the general doctrine on this point. The employer is liable for the negligence of the superior servant, whose orders the injured employee is bound to obey, even though he is in the same general line of employment. If the inferior servant, in obeying the superior's orders, causes other injury to employees or himself, the master is liable.³²

10. *Discovery of Defective Machinery by Employee.*—The general doctrine is, that when the employee discovers that the service has become more dangerous than usual by reason of defective machinery, or that the employer is retaining unfaithful servants, or from any cause, he must at once cease to work and leave the service. But in case the employee notifies the master of the defects that render the service more hazardous, and then the master promises to make the needed repairs, or remove the defect, the employee may continue a reasonable time thereafter in order to

²³ Phillips v. Railroad Co., (Wis.) N. W. Rep. Dec. 12, 1886.

²⁴ Garraby v. Railroad Co., (Kans. U. S. Cir. Ct.) 18 Chi. Legal News, 81, Nov. 14, 1886.

²⁵ O'Neill v. Railroad Co., 9 Fed. Rep. 387..

²⁶ Railroad Co. v. Moore, Ky. L. Rep., April, 1886.

²⁷ Railroad Co. v. Moranda, 93 Ill. 302; Railroad Co. v. Geary, 110 Ill. 383; Railroad Co. v. Fitzpatrick, 2 Am. L. J. 60; Crew v. Railroad Co., 20 Fed. Rep. 87; Luce v. Railroad Co., 24 N. W. Rep. 600.

²⁸ Hugh v. Railroad Co., 6 La. Ann. 496; Railroad Co. v. Dolan, 92 Mich. 510; Howd v. Railroad Co., 50 Miss. 178; Railroad Co. v. Thomas, 51 Miss. 687; Carle v. Railroad Co. 43 Me. 269; Weger v. Railroad Co., 23 Wis. 668; Laler v. Railroad Co., 52 Ill. 401; Hogan v. Railroad Co., 49 Cal. 129; Warner v. Railroad Co., 39 N. Y. 468; Laning v. Railroad Co., 49 N. Y. 521; Sumnerhays v. Railroad Co., 2 Colo. 484.

²⁹ Railroad Co. v. Robinson, 4 Bush. 507; Railroad Co. v. O'Connor, 77 Ill. 391.

³⁰ Railroad Co. v. Willis, 6 Ky. L. Rep. 754.

³¹ Laning v. Railroad Co., *supra*; Railroad Co. v. Murphy, 53 Ill. 336; Browne's Dom. Rel. 121; Lawler v. Railroad Co., 62 Me. 463; Lewis v. Railroad Co., 50 Mo. 495.

³² Whart. Neg. 232; Mullen v. Philadelphia Co., 78 Pa. St. 25; Gunter v. Graniteville, 18 S. C. 233; Brothers v. Carter, 52 Mo. 372; Railroad Co. v. Stevens, 20 Ohio St. 415; Cowles v. Railroad Co., 84 N. C. 309; Railroad Co. v. Delahunty, 53 Texas, 206; Patterson v. Railroad Co., 76 Pa. St. 339; Ford v. Railroad Co., 110 Mass. 240.

give reasonable time to make said repairs. If he is injured under these circumstances, the master is liable. If the danger is imminent, so much so that no prudent employee would undertake to perform the work, the servant must quit the employment without delay.³⁵

11. *Contributory Negligence.*—If the employer does not expressly promise to repair after notified, and the employee remains in the service, the servant is then not relieved from the charge of contributory negligence in case of injury.³⁴

A railroad employee was sent on a wrecking train to assist in clearing the track. He entered the locomotive and took a seat there, instead of going into the car provided for the gang of workmen, which he knew was against the rules of the company. A collision occurred and he was killed. Held, that he was guilty of such negligence in thus exposing himself to extra danger, and his representative was barred the right to recovery, notwithstanding the negligence of the employee in charge of the train. "A person who voluntarily and unnecessarily places himself in a well known place of danger to life and body, but for which position he would not have been injured, and he is injured or killed in consequence of such exposure, even through gross negligence of the defendant, if the act of the latter is not wanton or willful, is guilty of such contributory negligence as to preclude any recovery by him or his personal representative."³⁵

If an employee in the faithful discharge of his duty should be suddenly called upon by his master to do an act, and be told to "hurry up," it cannot be expected that he will remember particular dangers that he previously knew of. It would not be reasonable to expect the same amount of care that would be required of him if he had reasonable time for deliberation, and in his haste cannot be taken as concurrent negligence.³⁶

12. *Burden of Proof.* — If the master is charged with negligence in keeping unfaithful employees, the burden is on the injured servant to prove it.³⁷

13. *Who Are Fellow-Servants is a Question for the Jury.*—Who are fellow-servants within the rule is a question of fact and not of law, and is for the jury to decide. It is error for the court to instruct the jury as to who are fellow-servants under a given state of facts. Whether employees are operating in a line of business and consociating as fellow-servants is a question of fact for the jury, and not one of law.³⁸

14. *Negligence.* — The question of negligence is a fact for the decision of the jury, under the instructions of the court. Whether the defendant has been negligent to a degree to subject him to liability, or whether the plaintiff has been so negligent as to exempt the defendant from liability, must be passed on by the jury, instructed by the court as to the principles pertaining thereto.³⁹ Though in Connecticut it is held a question of fact for the jury exclusively, without the instruction of the court as to the law applicable to the case.⁴⁰

There is no relation of privity between the railroad corporation and its employees. The obligations of the railroad company to provide its servants reasonably safe machinery and instrumentalities, and to secure co-servants who are careful and competent, are the first principles of the common law.

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³⁷ Railroad Co. v. Burrough, 15 Conn. 133; Railroad Co. v. Troesch, 68 Ill. 545; Railroad Co. v. Geary, *supra*; Cook v. Trans. Co., 1 Denio, 91.

³⁸ Railroad Co. v. Moranda, *supra*; Railroad Co. v. Morgenstern, 106 Ill. 216.

³⁹ Bradley v. Railroad Co., 2 Cush. 543; Huyett v. Railroad Co., 23 Pa. St. 373.

⁴⁰ Beers v. Railroad Co., 19 Conn. 566; Park v. O'Brien, 23 Conn. 347.

³⁴ Wharton & Redfield on Neg., § 96; Cooley on Torts, 559; Wharton Neg. 220; Patterson v. Railroad Co., *supra*; Hough v. Railroad Co., 100 U. S. 213; Conrad v. Iron Works, 62 Mo. 35; Clark v. Holmes, 7 H. & N. 848; Parody v. Railroad Co., 15 Fed. Rep. 205; Greene v. Railroad Co., 17 N. W. Rep. (Minn.) 378; Manufacturing Co. v. Morrissey, 40 Ohio St. 148.

³⁵ Railroad Co. v. Drew, 59 Texas, 10; Simmons v. Railroad Co., 11 Brad. (Ill.) 147; Railroad Co. v. Lynch, 90 Ill. 334.

³⁶ Abend v. Railroad Co., 111 Ill. 202.

³⁷ Lee v. Woolsey, 16 Weekly Notes of Cases, (Phila.) 337; Whart. Neg., § 219.

NEGLIGENCE OF RAILWAY PASSENGERS IN IMMINENT PERIL.

"If I place a man in such a position that he must adopt a perilous alternative, I am responsible for the consequences." This is the rule laid down by Lord Ellenborough, in the

leading English case of *Jones v. Boyce*,¹ where it appeared that the plaintiff had been on the top of a coach when, in consequence of the horses becoming unruly and unmanageable, there was a real danger that the coach might be upset, and the plaintiff, therefore, jumped off and was thereby injured. And so, in the leading American case of *Stokes v. Salstonall*,² where it appeared that a passenger had jumped from a stage-coach, fearing that it would overturn, it was laid down that "it is sufficient, if he was placed, by the misconduct of the defendant, in such a situation as obliged him to adopt one alternative, leap or remain in peril."³ We find Chief Baron Kelly laying down a like doctrine in *Siner v. G. W. Ry. Co.*;⁴ and so, in the Admiralty case of *The Bywell Castle*,⁵ where in a collision the libelled vessel changed her course when "in her very agony," as James, L. J., put it, it was held that, if a ship, by wrong manœuvres, has placed another ship in a position of extreme peril, that other ship will not be held to blame, if in that moment of extreme peril and difficulty she happens to do something wrong, and is not manœuvred with perfect presence of mind, accurate judgment and promptitude, "although," observed Cotton, L. J., those before whom the case comes to be adjudicated, with knowledge of all the facts, are able to see that the course adopted was in fact not the best." As it is put in the American case of *Wesley City Coal Company v. Healer*,⁶ where a party has given another reasonable cause for alarm, he cannot complain that the person so alarmed has not exercised cool presence of mind, and thereby find protection from responsibility resulting from the alarm. So, in *Collins v. Davidson*,⁷ it was said by McCrary, J. (Amer.): "In the case of sudden and unexpected peril, endangering human life, and causing unnecessary excitement, the law makes allowances for the circumstance that there is but little time for deliberation, and holds a party accountable only for such care as an ordinarily prudent man would have exercised under similar circumstances." But,

in a recent case,⁷ *Bramwell, L. J.*, objected with much force to such a phrase as "What would a prudent man do?" saying that a prudent man might jump out of a fast train, if he saw imminent danger to his wife or child;⁸ and the phrase should be taken to mean, "What would a prudent man do under ordinary circumstances?" The general rule, indeed, seems to be best formulated by Field, J., thus:

"If a person, by a negligent breach of duty, expose a person towards whom the duty is contracted to obvious peril, the act of the latter, in endeavoring to escape peril, although it may be immediate cause of the injury, is not the less to be regarded as the wrongful act of the wrong doer;⁹ and this doctrine has we think, been rightly extended in more recent time to 'a grave inconvenience' when the danger to which the passenger is exposed is not in itself obvious."¹⁰

In such a case, said Lord Ellenborough in *Jones v. Boyce*,¹¹ "the proprietor will be responsible, though the coach was not actually overturned." But an able writer in the October number of the *American Law Register* is perfectly justified in stating that the rule is subject to this limitation,—that it is necessary that the situation of peril in which the plaintiff is placed, in order to make his act while there an excusable error of judgment, must be the result of the negligence of the defendant;¹² and where, therefore, the plaintiff has, by his own negligence, placed himself in a position of known peril, or where the act of the plaintiff causing his injury resulted from a rash apprehension of danger which did not exist, then, although in the excitement and confusion he makes a mistake in his attempt to escape from impending peril, and is exposed to greater danger, the consequences of such mistake cannot be visited upon the defendant, for no degree of presence of mind nor want of it has anything to do with the case, as it was negligence to be there. On this subject no better illustration could be presented than the Irish case of *Kearney v. The Great Southern and Western Railway*

¹ 1 Stark. 402.

² 13 Pet. 181.

³ L. R. 3 Ex. 150.

⁴ 4 Pro. D. 219.

⁵ 84 Ill. 126.

⁶ 19 Fed. Rep. 88.

⁷ *Lax v. Mayor of Darlington*, 5 Ex. D. 28.

⁸ See *Lloyd v. Hannibal, etc., Ry.*, 53 Mo. 509.

⁹ *Jones v. Boyce, supra*.

¹⁰ *Robson v. The North Eastern Ry. Co.*, L. R. 10 Q. B. 271.

¹¹ *Jones v. Boyce, supra*.

¹² See the *Elizabeth Jones*, 112 U. S. 514, 526.

Co., decided in June last by the Queen's Bench Division.

The plaintiff there was a passenger on the defendants' railway from Lismore. At six o'clock, when the train was approaching Castletownroche station, the plaintiff felt a shock, and some pebbles struck the windows of the carriage, and the carriage, as the plaintiff thought, became filled with smoke. A man in the same compartment as the plaintiff looked out of the window, and cried out that the train was on fire. The train was moving very slowly at the time; the plaintiff was greatly frightened, and jumped out of the carriage, and was in consequence injured. It appeared that the coupling rod of the engine had broken, which caused water and steam to issue from the engine, which, it would seem, the plaintiff mistook for smoke. In fact, the carriage was not on fire, nor was the plaintiff, in fact, in any danger, when the accident happened. A brake was put on, and the train had nearly stopped when the plaintiff jumped out. O'Brien J., who tried the case, was of opinion that there was no evidence that the injury to the plaintiff was caused by any negligence or default of the defendants, and directed a verdict and judgment to be entered for the defendants. The plaintiff, thereupon, moved to set aside this verdict and judgment, and the question for the Court was, whether the judge was right in the direction he gave. May, C. J., and O'Brien, J., held that the injury to the plaintiff was not the result of any negligence by the defendants, and that the direction of the trial judge was right; though, of course, as regards the negligence of the defendants, the case would have assumed a different aspect had the railway carriage been in fact overturned in consequence of the defect in the machinery, or the plaintiff injured by the direct consequence of that defect, instead of by reason of rashly jumping out, without inquiry, immediately on hearing the cry of "fire." Johnson, J., agreed in the decision, but without deciding whether there was evidence of negligence on the defendants' part for the jury. But, on the question whether, assuming negligence on the defendants' part, it was by reason thereof the plaintiff sustained the injuries, he thought there was not evidence for the jury of a peril justifying the

plaintiff's dangerous act of jumping out of the carriage. And after citing *Jones v. Boyce*¹³ and *Robson v. North Eastern Ry.*,¹⁴ he said: "In the present case there was not, in my opinion, evidence of peril or grave inconvenience within these authorities which ought to have gone to the jury. The coupling-rod of the engine broke; one end pierced the boiler; steam escaped thence, and smoke from the furnace; the train yielded at once to the action of the vacuum brake—was slowly and shortly came to a standstill. It does not appear how the engine-driver and stoker came by the serious injuries they sustained; but no passenger in the train was injured, or (except the plaintiff and the girl O'Connor) even alarmed. These two seem to have been terrified by the cry—a statement of some men being passengers in the same compartment—that the train was on fire. The defendants are not responsible for this cry or statement; it was unfounded, in fact; but the plaintiff, in panic, jumped through the carriage door, which the girl O'Connor had opened, and she was injured. The injuries, however, were, in my opinion, the result of unfortunate rashness, and not of the defendants' negligence. On this ground, therefore, I think the case was rightly withdrawn from the jury."—*The Irish Law Times*.

¹³ *Supra*.

¹⁴ *Supra*.

CONSTITUTIONAL LAW—COMMON CARRIER—INTER-STATE COMMERCE—STATE CONTROL OF CARRIER'S CHARGES.

WABASH, ETC. CO. V. STATE OF ILLINOIS.

Supreme Court of the United States, October 25, 1886.

1. It is competent for a State to prescribe rates of charges by common carriers, and to prohibit discrimination in such charges between different places within the State.

2. A State having enacted a law of this character, and the supreme court of that State having held that such law was applicable to contracts for carriage of goods, to be performed partly within the State and in part in other States, such construction of the statute must be accepted by the Supreme Court of the United States as correct and that construction confers upon the Supreme Court of the United States jurisdiction

to inquire and determine whether that statute, so construed, is in conflict with that clause of the constitution of the United States which confides to congress the regulation of commerce among the States.

3. Such a statute, having been enacted by the State of Illinois, and so construed by its supreme court, it is held that transportation of goods from points within the State of Illinois to the city of New York, is commerce among the States, and as such is subject only to the regulation of congress, under the clause of the constitution of the United States, which confers on that body exclusive authority to regulate commerce among the States.

4. The transportation of goods under the contract in question from points within a State to points beyond its limits, being commerce among the States in the strictest sense, an enactment controlling it is not one of that class of commercial regulations which a State may establish and keep in operation until congress shall have exercised its power on that subject.

Writ of error to the Supreme Court of the State of Illinois.

MILLER, J., delivered the opinion of the court:

This is a writ of error to the Supreme Court of Illinois. It was argued here at the last term of this court. The case was tried in the court of original jurisdiction on an agreed statement of facts. This agreement is short, and is here inserted in full: "For the purposes of the trial of said cause, and to save the making of proof therein, it is hereby agreed on the part of the defendant that the allegations in the first count of the declaration are true, except that part of said count which avers that the same proportionate discrimination was made in the transportation of said property—oil-cake and eorn—in the State of Illinois that was made between Peoria and the city of New York, and Gilman and New York city, which averment is not admitted, because defendant claims that it is an inference, from the fact that the rates charged in each case of said transportation of oil-cake and corn were through rates, but it is admitted that said averment is a proper one."

The first count in the declaration, which is referred to in this memorandum of agreement, charged that the Wabash, St. Louis & Pacific Railway Company had, in violation of a statute of the State of Illinois, been guilty of an unjust discrimination in its rates or charges of toll and compensation for the transportation of freight. The specific allegation is that the railroad company charged Elder & McKinney for transporting 26,000 pounds of goods and chattels from Peoria, in the State of Illinois, to New York city, the sum of \$39, being at the rate of fifteen cents per hundred pounds for said car-load; and that on the same day they agreed to carry and transport for Isaac Bailey and F. O. Swannell another car-load of goods and chattels from Gilman, in the State of Illinois, to said city of New York, for which they charged the sum of \$65, being at the rate of twenty-five cents per hundred pounds.

And it is alleged that the car-load transported for Elder & McKinney was carried eighty-six miles further in the State of Illinois than the other car-load of the same weight. This freight, being of the same class in both instances, and carried over the same road, except as to the difference in the distance, it is obvious that a discrimination against Bailey & Swannell was made in the charges against them, as compared with those against Elder & McKinney; and this is true, whether we regard the charge for the whole distance from the terminal points in Illinois to New York city, or the proportionate charge for the haul within the State of Illinois.

The language of the statute which is supposed to be violated by this transaction is to be found in chapter 114 of the Revised Statutes of Illinois, § 112. It is there enacted, that if any railroad corporation shall charge, collect, or receive, for the transportation of any passenger or freight of any description upon its railroad, for any distance within the State, the same or a greater amount of toll or compensation than is at the same time charged, collected, or received for the transportation in the same direction of any passenger or like quantity of freight of the same class over a greater distance of the same road, all such discriminating rates, charges, collections, or receipts, whether made directly or by means of rebate, drawback, or other shift or evasion, shall be deemed and taken against any such railroad corporation as *prima facie* evidence of unjust discrimination prohibited by the provisions of this act. The statute further provides a penalty of not over \$5,000 for that offense, and also that the party aggrieved shall have a right to recover three times the amount of damages sustained, with costs and attorney's fees.

To this declaration the railroad company demurred. The demurrer was sustained by the lower court in Illinois, and judgment rendered for the defendant. This, however, was reversed by the supreme court of that State, and on the case being remanded the demurrer was overruled, and the defendant pleaded, among other things, that the rates of toll charged in the declaration were charged and collected for services rendered under an agreement and undertaking to transport freight from Gilman, in the State of Illinois, to New York city, in the State of New York, and that in such undertaking and agreement the portion of the services rendered, or to be rendered, within the State of Illinois, was not apportioned separate from such entire service; that the action is founded solely upon the supposed authority of an act of the legislature of the State of Illinois, approved April 7, 1871; and that said act does not control or affect or relate to undertakings to transport freight from the State of Illinois to the State of New York, which falls within the operation, and is wholly controlled by the terms of the third clause of section 8 of article 1 of the constitution of the United States, which the defendant sets up and relies upon as a

complete defense and protection in said action.

This question of whether the statute of Illinois, as applied to the case in hand, is in violation of the constitution of the United States, as set forth in the plea, was also raised on the trial by a request of the defendant, the railroad company, that the court should hold certain propositions of law on the same subject, which propositions are as follows: "The court holds as law that, as the tolls or rates of compensation charged and collected by the defendant in the instance in question were for transportation service rendered in transporting freight from a point in the State of Illinois to a point in the State of New York, under an entire contract or undertaking to transport such freight the whole distance between such points, that the act of the general assembly of the State of Illinois, approved May 2, 1873, entitled 'An act to prevent extortion and unjust discrimination in the rates charged for the transportation of passengers and freight on railroads in this State, and to punish the same, and prescribe a mode of procedure and rules of evidence in relation thereto, and to repeal an act entitled 'An act to prevent unjust discrimination and extortion in the rates to be charged by the different railroads in the State for the transportation of freight on said roads,' approved April 7, 1871," does not apply to or control such tolls and charges, nor can the defendant be held liable in this action for the penalties prescribed by said act. The court further holds as law that said act in relation to extortion and unjust discrimination cannot apply to transportation service rendered partly without the State, and consisting of the transportation of freight from within the State of Illinois to the State of New York, and that said act cannot operate beyond the limits of the State of Illinois. The court further holds as a matter of law that the transportation in question falls within the proper description of 'commerce among the States,' and as such can only be regulated by the congress of the United States, under the terms of the third clause of section 8 of article 1 of the constitution of the United States."

All of these propositions were denied by the court and judgment rendered against the defendant, which judgment was affirmed by the supreme court on appeal.

The matter thus presented as to the controlling influence of the constitution of the United States over this legislation of the State of Illinois raises the question which confers jurisdiction on this court. Although the precise point presented by this case may not have been heretofore decided by this court, the general subject of the power of the State legislatures to regulate taxes, fares, and tolls for passengers and transportation of freight over railroads within their limits has been very much considered recently (*State Freight Tax Case*, 15 Wall. 232; *Munn v. Illinois*, 94 U. S. 133; *Chicago, etc. R. Co. v. Iowa*, *Id.* 155; *Peik v. Chicago, etc. R. Co.*, *Id.* 164; *Stone v. Farmers' Loan & Trust Co.*, 116 U. S. 307; s. c., 6 Sup. Ct.

Rep. 334, 388, 1191; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 204; s. c., 5 Sup. Ct. Rep. 826; *Pickard v. Pullman Southern Car Co.*, 117 U. S. 34; s. c., 6 Sup. Ct. Rep. 635); and the question how far such regulations, made by the States and under State authority, are valid or void, as they may affect the transportation of goods through more than one State, in one voyage, is not entirely new here. The Supreme Court of Illinois, in the case now before us, conceding that each of these contracts was in itself a unit, and that the pay received by the Illinois railroad company was the compensation for the entire transportation from the point of departure in the State of Illinois to the city of New York, holds that, while the statute of Illinois is inoperative upon that part of the contract which has reference to the transportation outside of the State, it is binding and effectual as to so much of the transportation as was within the limits of the State of Illinois (*People v. Wabash, etc. R. Co.*, 104 Ill. 476), and, undertaking for itself to apportion the rates charged over the whole route, decides that the contract and the receipt of the money, for so much of it as was performed within the State of Illinois, violate the statute of the State on that subject.

If the Illinois statute could be construed to apply exclusively to contracts for a carriage which begins and ends within the State, disconnected from a continuous transportation through or into other States, there does not seem to be any difficulty in holding it to be valid. For instance, a contract might be made to carry goods for a certain price from Cairo to Chicago, or from Chicago to Alton. The charges for these might be within the competency of the Illinois legislature to regulate. The reason for this is that both the charge and the actual transportation in such cases are exclusively confined to the limits of the territory of the State, and is not commerce among the States, or inter-State commerce, but is exclusively commerce within the State. So far, therefore, as this class of transportation, as an element of commerce, is affected by the statute under consideration, it is not subject to the constitutional provision concerning commerce among the States. It has often been held in this court, and there can be no doubt about it, that there is a commerce wholly within the State which is not subject to the constitutional provision; and the distinction between commerce among the States and the other class of commerce between the citizens of a single State, and conducted within its limits exclusively, is one which has been fully recognized in this court, although it may not be always easy, where the lines of these classes approach each other, to distinguish between the one and the other. *The Daniel Ball*, 10 Wall. 557; *Hall v. De Cuir*, 95 U. S. 485; *Telegraph Co. v. Texas*, 105 U. S. 460.

It might admit of question whether the statute of Illinois now under consideration was designed by its framers to affect any other class of trans-

portation than that which begins and ends within the limits of the State. The Supreme Court of Illinois having in this case given an interpretation which makes it apply to what we understand to be commerce among the States, although the contract was made within the State of Illinois, and a part of its performance was within the same State, we are bound, in this court, to accept that construction. It becomes, therefore, necessary to inquire whether the charge exacted from the shippers in this case was a charge for inter-State transportation, or was susceptible of a division which would allow so much of it to attach to commerce strictly within the State, and so much more to commerce in other States. The transportation, which is the subject-matter, being the point on which the decision of the case must rest, was it a transportation limited to the State of Illinois, or was it a transportation covering all the lines between Gilman in the one case and Peoria in the other, in the State of Illinois, and the city of New York, in the State of New York?

The Supreme Court of Illinois does not place its judgment in the present case on the ground that the transportation and the charge are exclusively State commerce; but, conceding that it may be a case of commerce among the States, or inter-State commerce, which congress would have the right to regulate if it had attempted to do so, argues that this statute of Illinois belongs to that class of commercial regulations which may be established by the laws of a State until congress shall have exercised its powers on that subject; and to this proposition a large part of the argument of the attorney-general of the State before us is devoted, although he earnestly insists that the statute of Illinois, which is the foundation of this action, is not a regulation of commerce, within the meaning of the constitution of the United States. In support of its view of the subject the Supreme Court of Illinois cites the cases of *Munn v. Illinois*, *Chicago, etc. R. Co. v. Iowa*, and *Pelk v. Chicago, etc. R. Co.*, above referred to. It cannot be denied that the general language of the court in these cases, upon the power of congress to regulate commerce, may be susceptible of the meaning which the Illinois court places upon it.

In *Munn v. Illinois*, 94 U. S. 133, the language of this court upon that subject is as follows: "We come now to consider the effect upon this statute of the power of congress to regulate commerce. It was very properly said in *Case of State Tax on Railway Gross Receipts*, 15 Wall. 293, that 'it is not everything that affects commerce that amounts to a regulation of it, within the meaning of the constitution.' The warehouses of these plaintiffs in error are situated, and their business carried on exclusively, within the limits of the State of Illinois. They are used as instrument by those engaged in State, as well as those engaged in inter-State commerce, but they are no more necessarily a part of commerce itself than the dray or cart by which, but for them, grain would be transferred

from one railroad station to another. Incidentally they may become connected with inter-State commerce, but not necessarily so. Their regulation is a thing of domestic concern, and, certainly, until congress acts in reference to their inter-State relations, the State may exercise all the powers of government over them, even though in so doing it may indirectly operate upon commerce outside its immediate jurisdiction. We do not say that a case may not arise in which it will be found that a State, under the form of regulating its own affairs, has encroached upon the exclusive domain of congress, in respect to inter-State commerce; but we do say that upon the facts, as they are represented to us in this record, that has not been done."

In the case of *Chicago, etc. R. Co. v. Iowa*, 94 U. S. 155, which directly related to railroad transportation, the language is as follows: "The objection that the statute complained of is void, because it amounts to a regulation of commerce among the States, has been sufficiently considered in the case of *Munn v. Illinois*. This road, like the warehouse in that case, is situated within the limits of a single State. Its business is carried on there, and its regulation is a matter of domestic concern. It is employed in State, as well as in inter-State commerce, and, until congress acts, the State must be permitted to adopt such rules and regulations as may be necessary for the promotion of the general welfare of the people within its own jurisdiction, even though in doing so those without may be indirectly affected."

But the strongest language used by this court in these cases is to be found in *Pelk v. Chicago, etc. R. Co.*, 94 U. S. 164, as follows: "As to the effect of the statute as a regulation of inter-State commerce. The law is confined to State commerce, or such inter-State commerce as directly affects the people of Wisconsin. Until congress acts in reference to the relations of this company to inter-State commerce, it is certainly within the power of Wisconsin to regulate its fares, etc., so far as they are of domestic concern. With the people of Wisconsin this company has domestic relations. Incidentally these may reach beyond the State. But certainly, until congress undertakes to legislate for those who are without the State, Wisconsin may provide for those within, even though it may indirectly affect those without."

These extracts show that the question of the right of the State to regulate the rates of fares and tolls on railroads, and how far that right was affected by the commerce clause of the constitution of the United States, was presented to the court in those cases. And it must be admitted that, in a general way, the court treated the cases then before it as belonging to that class of regulations of commerce which, like pilotage, bridging navigable rivers, and many others, could be acted upon by the States, in the absence of any legislation by congress on the same subject. By the slightest attention to the matter, it will be readily seen that the circumstances under which

a bridge may be authorized across a navigable stream within the limits of a State for the use of a public highway, and the local rules which shall govern the conduct of the pilots of each of the varying harbors of the coast of the United States, depend upon principles far more limited in their application and importance than those which should regulate the transportation of persons and property across the half or the whole of the continent, over the territories for half a dozen States, through which they are carried without change of car or breaking bulk.

Of the members of the court who concurred in those opinions, there being two dissentients, but three remain, and the writer of this opinion is one of the three. He is prepared to take his share of the responsibility for the language used in those opinions, including the extracts above presented. He does not feel called upon to say whether those extracts justify the decision of the Illinois court in the present case. It will be seen from the opinions themselves, and from the arguments of counsel presented in the reports, that the question did not receive any very elaborate consideration, either in the opinions of the court or in the arguments of counsel; and the question how far a charge made for a continuous transportation over several States, which included a State whose laws were in question, may be divided into separate charges for each State, in enforcing the power of the State to regulate the fares of its railroads, was evidently not fully considered. These three cases, with others concerning the same subject, were argued at the same time by able counsel and in relation to the different laws affecting the subject, of the States of Illinois, Iowa, Wisconsin, and Minnesota; the main question in all the cases being the right of the State to establish any limitation upon the power of the railroad companies to fix the price at which they would carry passengers and freight. It was strenuously denied, and very confidently, by all the railroad companies, that any legislative body whatever had a right to limit the tolls and charges to be made by the carrying companies for transportation. And the great question to be decided, and which was decided, and which was argued in all those cases, was the right of the State within which a railroad company did business to regulate or limit the amount of any of these traffic charges. The importance of that question overshadowed all others, and the case of *Munn v. Illinois*, was selected by the court as the most appropriate one in which to give its opinion on that subject; because that case presented the question of a private citizen, or unincorporated partnership, engaged in the warehousing business in Chicago, free from any claim of right or contract under an act of incorporation of any State whatever, and free from the question of continuous transportation through several States. And in that case the court was presented with the question, which it decided, whether any one engaged in a public business, in which all the

public had a right to require his service, could be regulated by acts of the legislature, in the exercise of this public function and public duty, so far as to limit the amount of charges that should be made for such services.

The railroad companies set up another defense, apart from denying the general right of the legislature to regulate transportation charges, namely, that in their charters from the States they each had a contract, express or implied, that they might regulate and establish their own fares and rates of transportation. These two questions were of primary importance, and though it is true that, as incidental or auxiliary to these, the question of the exclusive right of congress to make such regulations of charges as any legislative power had the right to make, to the exclusion of the States, was presented, it received but little attention at the hands of the court, and was passed over with the remarks in the opinions of the court which have been cited.

The Case of State Freight Tax, 15 Wall. 232, which was decided only four years before these cases, held an act of the legislature of Pennsylvania void, as being in conflict with the commerce clause of the constitution of the United States, which levied a tax upon all freight carried through the State by any railroad company, or into it from any other State, or out of it into any other State, and valid as to all freight, the carriage of which was begun and ended within the limits of the State, because the former was a regulation of interstate commerce, and the latter was a commerce solely within the State, which it had a right to regulate. And the question now under consideration—whether these statutes were of a class which the legislature of the States could enact in the absence of any act of congress on the subject—was considered and decided in the negative.

It is impossible to see any distinction, in its effect upon commerce of either class, between a statute which regulates the charges for transportation and a statute which levies a tax for the benefit of the State upon the same transportation; and, in fact, the judgment of the court in the State Freight Tax Case rested upon the ground that the tax was always added to the cost of transportation, and thus was a tax, in effect, upon the privilege of carrying the goods through the State. It is also very difficult to believe that the court consciously intended to overrule the first of these cases without any reference to it in the opinion.

At the very next term of the court, after the delivery of these opinions, the case of *Hall v. DeCuir*, 95 U. S. 485, was decided, in which the same point was considered, in reference to a statute of the State of Louisiana, which attempted to regulate the carriage of passengers upon railroads, steamboats and other public conveyances, and which provided that no regulations of any companies engaged in that business should make any discrimination on account of race or color. This statute, by its terms, was limited to persons en-

gaged in that class of business within the State, as is the one now under consideration; and the case presented in the statute was that of a person of color who took passage from New Orleans for Hermitage, both places being within the limits of the State of Louisiana, and was refused accommodations in the general cabin on account of her color. In regard to this the court declared that, "for the purposes of this case, we must treat the act of Louisiana of February 23, 1869, as requiring those engaged in inter-State commerce to give all persons traveling in that State, upon the public conveyances employed in such business equal rights and privileges in all parts of the conveyance, without distinction or discrimination on account of race or color. * * * We have nothing whatever to do with it as a regulation of internal commerce, or as affecting anything else than commerce among the States." And, speaking in reference to the right of the States in certain classes of interstate commerce to pass laws regulating them, the opinion says: "The line which separates the powers of the States from this exclusive power of congress is not always distinctly marked, and oftentimes it is not easy to determine on which side a particular case belongs. Judges not unfrequently differ in their reasons for a decision in which they concur. Under such circumstances, it would be a useless task to undertake to fix an arbitrary rule by which the line must, in all cases, be located. It is far better to leave a matter of such delicacy to be settled in each case upon a view of the particular rights involved; but we think it may safely be said that State legislation which seeks to impose a direct burden upon interstate commerce, or to interfere directly with its freedom, does encroach upon the exclusive power of congress. The statute now under consideration, in our opinion, occupies that position. It does not act upon the business through the local instruments to be employed after coming within the State, but directly upon the business as it comes into the State from without, or goes out from within. While it purports only to control the carrier when engaged within the State, it must necessarily influence his conduct to some extent intent in the management of his business throughout his entire voyage. * * * It was to meet just such a case that the commercial clause in the constitution was adopted. The river Mississippi passes through or along the borders of ten different States, and its tributaries reach many more. The commerce upon these waters is immense, and its regulation clearly a matter of national concern. If each State was at liberty to regulate the conduct of carriers while within its jurisdiction, the confusion likely to follow could not be but productive of great inconvenience and unnecessary hardship. Each State could provide for its own passengers, and regulate the transportation of its own freight, regardless of the interests of others. Nay, more, it could prescribe rules by which the carrier must be governed within the State in respect to pas-

sengers and property brought from without. On one side of the river or its tributaries he might be required to observe one set of rules, and on the other, another. Commerce cannot flourish in the midst of such embarrassments."

The applicability of this language to the case now under consideration, of a continuous transportation of goods from New York to central Illinois, or from the latter to New York, is obvious, and it is not easy to see how any distinction can be made. Whatever may be the instrumentalities by which the transportation from one point to the other is effected, it is but one voyage,—as much so as that of the steamboat on the Mississippi river. It is not the railroads themselves that are regulated by this act of the Illinois legislature so much as the charge for transportation; and, in language just cited, if each one of the States through whose territories these goods are transported can fix its own rules for prices, for modes of transit, for times and modes of delivery, and all the other incidents of transportation to which the word "regulation" can be applied, it is readily seen that the embarrassments upon interstate transportation, as an element of interstate commerce, might be too oppressive to be submitted to. "It was," in the language of the court cited above, "to meet just such a case that the commerce clause of the constitution was adopted." It cannot be too strongly insisted upon that the right of continuous transportation, from one end of the country to the other, is essential, in modern times, to that freedom of commerce, from the restraints which the States might choose to impose upon it, that the commerce clause was intended to secure. This clause, giving to congress the power to regulate commerce among the States, and with foreign nations, as this court has said before, was among the most important of the subjects which prompted the formation of the constitution. *Cook v. Pennsylvania*, 97 U. S. 574; *Brown v. Maryland*, 12 Wheat. 446. And it would be a very feeble and almost useless provision, but poorly adapted to secure the entire freedom of commerce among the States which was deemed essential to a more perfect union by the framers of the constitution, if, at every stage of the transportation of goods and chattels through the country, the State within whose limits a part of this transportation must be done could impose regulations concerning the price, compensation, or taxation, or any other restrictive regulation interfering with and seriously embarrassing this commerce.

The argument on this subject can never be better stated than it is by Chief Justice Marshall in *Gibbons v. Ogden*, 9 Wheat. 195, 196. He there demonstrates that commerce among the States, like commerce with foreign nations, is necessarily a commerce which crosses State lines, and extends into the States, and the power of congress to regulate it exists wherever that commerce is found. Speaking of navigation as an element of commerce, which it is only as a means of transporta-

tion, now largely superseded by railroads, he says: "The power of congress, then, comprehends navigation within the limits of every State in the union, so far as that navigation may be, in any manner, connected with 'commerce with foreign nations, or among the several States, or with the Indian tribes.' It may, of consequence, pass the jurisdictional line of New York, and act upon the very waters (the Hudson river) to which the prohibition now under consideration applies." Page 197. So the same power may pass the line of the State of Illinois, and act upon its restriction upon the right of transportation extending over several States, including that one.

In the case of *Telegraph Co. v. Texas*, 105 U. S. 460, the court held that "a telegraph company occupies the same relation to commerce as a carrier of messages that a railroad company does as a carrier of goods," and that "both companies are instruments of commerce, and their business is commerce itself." And relying upon *Case of State Freight Tax*, 15 Wall. 232, already referred to, the court said that a tax by the State of Texas upon all messages carried within its borders was forbidden by the commerce clause of the constitution, as being a tax upon commerce among the States; and observed that "the tax is the same on every message sent, and because it is sent, without regard to the distance carried or the price charged. * * * Clearly, if a fixed tax for every two thousand pounds of freight carried is a tax on the freight, or for every measured ton of a vessel a tax on tonnage, or for every passenger carried a tax on the passenger, or for the sale of goods a tax on the goods, this must be a tax on the messages. As such, so far as it operates on private messages sent out of the State, it is a regulation of foreign and interstate commerce, and beyond the power of the State. That is fully established in the cases already cited."

In the case of *Welton v. Missouri*, 91 U. S. 275, it was said: "It will not be denied that that portion of commerce with foreign countries and between the States which consists in the transportation and exchange of commodities is of a national importance, and admits and requires uniformity of regulation. The very object of investing this power in the general government was to insure this uniformity against discriminating State legislation."

The *County of Mobile v. Kimball*, 102 U. S. 691, the same idea is very clearly stated in the following language: "Commerce with foreign countries and among the States, strictly considered, consists in intercourse and traffic, including in these terms navigation, and the transportation and transit of persons and property, as well as the purchase, sale, and exchange of commodities. For the regulation of commerce, as thus defined, there can be only one system of rules, applicable alike to the whole country; and the authority which can act for the whole country can alone adopt such a system. Action upon it by separate States is not, therefore, permissible. Language affirming the

exclusiveness of the grant of power over commerce as thus defined may not be inaccurate, when it would be so if applied to legislation upon subjects which are merely auxiliary to commerce."

In the case of *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 204, s. C., 5 Sup. Ct. Rep. 826, decided two years ago, the court declared, without dissent, that "it needs no argument to show that the commerce with foreign nations and between the States, which consists in the transportation of persons and property between them, is a subject of national character, and requires uniformity of regulation." And still later, in the case of *Pickard v. Pullman Southern Car Co.*, 117 U. S. 34, s. C., 6 Sup. Ct. Rep. 635, the whole subject is very fully re-examined; and a tax of the State of Tennessee upon sleeping cars of that company, which were used in carrying passengers through the State, and into it and out of it, was held void as a regulation of commerce among the States.

The case of *Stone v. Farmers' Loan & Trust Co.*, 116 U. S. 307, s. C., 6 Sup. Ct. Rep. 334, 388, 1191, argued at the same term as the present, while it does not decide the latter, evidently does not support the construction placed by the Supreme Court of Illinois upon the case of *Munn v. Illinois*, and the other cases on which the court relies.

We must therefore hold that it is not, and never has been, the deliberate opinion of a majority of this court that a statute of a State which attempts to regulate the fares and charges by railroad companies within its limits, for a transportation which constitutes a part of commerce among the States, is a valid law.

Let us see precisely what is the degree of interference with transportation of property or persons from one State to another which this statute proposes. A citizen of New York has goods which he desires to have transported by the railroad companies from that city to the interior of the State of Illinois. A continuous line of rail over which a car loaded with goods can be carried, and is carried habitually, connects the place of shipment with the place of delivery. He undertakes to make a contract with a person engaged in the carrying business at the end of this route from whence the goods are to start, and he is told by the carrier: "I am free to make a fair and reasonable contract for this carriage to the line of the State of Illinois, but when the car which carries these goods is to cross the line of that State, pursuing at the same time this continuous track, I am met by a law of Illinois which forbids me to make a free contract concerning this transportation within that State, and subjects me to certain rules by which I am to be governed as to the charges which the same railroad company in Illinois may make, or has made, with reference to other persons and other places of delivery." So that while that carrier might be willing to carry these goods from the city of New York to the city of Peoria at the rate of 15 cents per hundred pounds, he is not permitted to do so, because the

Illinois railroad company has already charged at the rate of 25 cents per hundred pounds for carriage to Gilman, in Illinois, which is 86 miles shorter than the distance to Peoria. So, also, in the present case the owner of corn, the principal product of the country, desiring to transport it from Peoria, in Illinois, to New York, finds a railroad company willing to do this at the rate of 15 cents per hundred pounds for a car load, but is compelled to pay at the rate of 25 cents per hundred pounds, because the railroad company has received from a person residing at Gilman 25 cents per hundred pounds for the transportation of a car load of the same class of freight over the same line of road from Gilman to New York. This is the result of the statute of Illinois, in its endeavor to prevent unjust discrimination, as construed by the supreme court of that State. The effect of it is, that whatever may be the rate of transportation per mile charged by the railroad company from Gilman to Sheldon, a distance of 23 miles, in which the loading and the unloading of the freight is the largest expense incurred by the railroad company, the same rate per mile must be charged from Peoria to the city of New York. The obvious injustice of such a rule as this which railroad companies are by heavy penalties compelled to conform to, in regard to commerce among the States, when applied to transportation which includes Illinois in a long line of the carriage through several States, shows the value of the constitutional provision which confides the power of regulating interstate commerce to the congress of the United States, whose enlarged view of the interests of all the States, and of the railroads concerned, better fits it to establish just and equitable rules.

Of the justice or propriety of the principle which lies at the foundation of the Illinois statute it is not the province of this court to speak. As restricted to a transportation which begins and ends within the limits of the State, it may be very just and equitable, and it certainly is the province of the State Legislature, to determine that question; but when it is attempted to apply to transportation through an entire series of States a principle of this kind, and each one of the States shall attempt to establish its own rates of transportation, its own methods to prevent discrimination in rates, or to permit it, the deleterious influence upon the freedom of commerce among the States, and upon the transit of goods through those States, cannot be over-estimated. That this species of regulation is one which must be, if established at all, of a general and national character, and cannot be safely and wisely remitted to local rules and local regulations, we think is clear from what has already been said. And if it be a regulation of commerce, as we think we have demonstrated it is, and as the Illinois court concedes it to be, it must be of that national character; and the regulation can only appropriately exist by general rules and principles, which demand that it should be done by the congress of

the United States under the commerce clause of the constitution.

The judgment of the supreme court of Illinois is therefore reserved, and the case remanded to that court for further proceedings in conformity with this opinion.

NOTE.—To annotate a case in which Mr. Justice Miller delivers the opinion of the court is a work very difficult to perform, to the satisfaction of the annotator or of any body else. The learned judge usually exhausts the subject, citing every case that supports his conclusion and answering every *dictum* that contradicts it.

Nevertheless, we may remark, that the ruling in this case is a new departure in one important particular. It abrogates the doctrine heretofore fully received, and sanctioned by many decisions of the Supreme Court of the United States, that unless congress acts in reference to the relations of railroad companies to interstate commerce, it is certainly within the power of a State, to regulate its fares etc., so far as they are of domestic concern.¹ The principal case assuredly overrules the case in which this doctrine is held, for if there is anything purely of "domestic concern," it is a discrimination between the contracts made by the same railroad company with two citizens of the same State, for transportation to the same point without the State, the route outside the State being identical and the variation being in those portions of the carriage which lies within the State. It would be otherwise, as it seems to us, if the variation were in that part of the route which lay outside of the State in which the contract was made. That the contracts were units in each case seems to be immaterial, as the discrimination related only to those parts of the contracts which were to be performed within the State, and, under deep submission, it may be said the unity of the contract does not control, but the *locus* of the difference of performance does.

However, that may be, and we do not presume to controvert the conclusions of the Supreme Court of the United States, it may be of some interest to see to what extent the doctrine which this case establishes affects the prior decisions of the same court. In a leading and early case,² it was held, Chief Justice Marshall delivering the opinion of the court, that a State might dam up a navigable tide water creek wholly within its boundaries, as congress had not acted on the subject of small navigable creeks under its power to regulate commerce among the States. So, in a later case,³ a bridge was held to rightfully obstruct the navigation of the Schuylkill river, because congress had not spoken on the subject of commerce among the States. And in the case of the draw bridges over the Chicago river,⁴ it was held that though congress might well, under its commercial power, take charge of the whole matter, "to the extent necessary to protect, preserve, and improve the free navigation" of the river, and that until congress acts upon the subject the power of the State over bridges across its navigable streams is plenary.

There are other like decisions on this subject, one relating to wharves,⁵ another to pilotage⁶ and still others to various other subjects of like nature. All

¹ Peik v. Chicago etc. Co., 94 U. S. 164.

² Willson v. Blackbird, etc. Co., 3 Pet. 245.

³ Gilman v. Philadelphia, 3 Wall 713.

⁴ Escanaba v. Chicago, 107, U. S. 678.

⁵ Transportation Co. v. Parkersburg, 107 U. S. 691.

⁶ Cooley v. Portwardens, 12, How. 239.

these cases tend to establish the doctrine that a Sta.^o may regulate within its own jurisdiction any matter relating to commerce among the States, until congress shall see fit to exercise the power conferred upon it by the constitution to regulate commerce among the States. The court, however, in the principal case, makes a distinction between cases in which the power of the State is exercised over matters which in their nature are local, as the navigable creek, the river, the bridges, or the wharf, and cases in which the State law is general and purports to operate over the whole State, or to affect interests which are general and may well exist in any part of the State. On the former class of subjects, the State may well legislate, on the latter it cannot, even if congress has not itself, seen fit to exercise its constitutional authority over the subject.—[EDITOR CENT. L. J.]

WEEKLY DIGEST OF RECENT CASES.

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1. AGENCY—Principal and Agent—Commission Merchant—Consignor—Separate Accounts—Charges by Broker for Printing—Usage of Commission Merchants.—Where the plaintiff, a commission merchant, receives consignments from the defendant, a manufacturer, who is the owner of three different mills, run under three different names, one being carried on in the name of defendant, the plaintiff being ignorant that the three mills are owned by the defendant, and the accounts of the three concerns being kept separate, in an action brought by the plaintiff to recover the balance of an account with the mill run under the name of the defendant, where the answer is a general denial and payment, the defendant will not be allowed to show that a balance is due him upon the account between plaintiff and another of the mills, which should be credited him in this suit, and such balance can only be availed of by way of set-off; and defendant cannot show that there were in the plaintiff's hands goods from the mill run in defendant's name which were not included in the account sued on. In an action against the defendant, a manufacturer, by a commission merchant, to recover a balance due for advances on manufactured goods, the latter will be allowed to charge in his account for printing the goods, it appearing that this was done under the usage of commission merchants, and was a necessary charge. *Talcott v.*

Smith, S. J. C. Mass., Oct. 22, 1886; 8 N. E. Rep. 418.

2. ASSIGNMENT FOR BENEFIT OF CREDITORS—Validity—Evidence—Fraud—Effect and Construction—Rights and Liabilities of Assignee—New Trial—Matters Presented to Jury—Verdict Warranted by Evidence.—The employment of the assignor by the assignee, to act as clerk and assist in the sale of assigned property, is not conclusive evidence of fraud. Where an assignee of a stock of merchandise continued the business, and made additional purchases of goods, which were added to and intermingled with the assigned property with the assent of creditors, who, after notice of the assignment and his purpose so to continue and manage the business in the execution of his trust, continue to make sales to such assignee for such purpose, and to accept dividends from him on both old and new accounts, *held*, that such creditors, unless actually misled without fault or laches on their part, were bound by the assignment, and could not thereafter attach the assigned property for the individual indebtedness of the assignor or assignee. *Held*, also, that, subsequent to an attachment of the assigned property, the assignee might sell and transfer the title to the same, and that the vendees thereof might test the validity of the attachment in actions against the sheriff for the conversion of the property. Evidence held sufficient to support the finding, necessarily includes in the verdict that the possession of the assigned property was immediately delivered to and remained in the assignee. *Noyes v. Beaupre*, S. C. Minn., Oct. 13, 1886; 30 N. W. Rep. 126.

3. CARRIERS—Of Passengers—Connecting Railroads—Through Ticket—Liability of First Road—Liability of Each Road—Negligence—Evidence of Through Contract—Relation of Roads.—While a railroad company cannot be compelled to transport beyond its *termini*, it is well settled that it may lawfully contract to carry passengers and property over its own and other lines to a destination beyond its route, and when such a contract is made it assumes all the obligations of a carrier over the connecting lines as well as its own. The sale of a through ticket, for a single fare, by a railroad company, to a point on a connecting line, together with the checking of the baggage through to the destination, is evidence tending to show an undertaking to carry the passenger and baggage the whole distance, and which, in the absence of other conditions or limitations, and of all other circumstances, will make such carrier liable for faithful performance and for all loss on connecting lines, the same as on its own. Each carrier is liable for the result of its own negligence, and, although the first carrier may have assumed the responsibility for the transportation to a point beyond its own route, any of the subsequent or connecting lines to whose negligence the loss or injury can be traced, will also be liable to the owner. The sale of a through ticket over the route formed by the connecting lines of several railroad companies, and the checking of baggage to the end of the route, without other evidence of the relations between the companies, or the basis upon which through business was done by them, fails to show such a community of interest as would make them partners *inter sese*, or as to third persons; nor will such action alone make the last carrier liable for the negligence of the contracting carrier, or of

any other carrier in the combination. *Atchison, etc. Co. v. Roach*, S. C. Kas., Nov. 5, 1886; 12 Pac. Rep. 98.

4. ——— *Railroad—Negligence—Evidence—Trial—Interrogatories to Jury—Presumption—Degree of Care Required—New Trial—Excessive Damages.*—In an action by a passenger against a railroad company to recover for injuries resulting from the breaking down of a bridge, it is competent to prove the rate of speed at which the train ran upon the bridge. It is not error to reject interrogatories addressed to a jury which seek to elicit a conclusion of law. The presumption of negligence arising from an injury to a passenger by the falling of a bridge is not rebutted by evidence that the carrier was using the means and appliances ordinarily used, without also showing that they were sufficient for the purpose, were properly used, and were without known or discoverable defects. Carriers of passengers do not warrant the safety of passengers, but they are held to the highest degree of practical care. Where nothing appears to induce the belief that the jury must have acted from prejudice, partiality, or other improper motive, their verdict will not be disturbed. *Louisville, etc. Co. v. Pedigo*, S. C. Ind., Oct. 12, 1886; 8 N. E. Rep. 627.

5. *CONTRACT—Entire Contract—Subscription for Publication "in Ten Portfolios"—Part Performance—Mistake—Waiver of Defendant's Right—Evidence—Statements of Agent.*—A contract to "subscribe for one copy of the Art Treasures of America, in ten portfolios, at \$15 each, as published" is an entire contract; and where the defendant has accepted two of the portfolios, but refused to take the remainder, in an action against him for the breach of his contract, evidence offered by him for the purpose of avoiding the whole contract is inadmissible, unless he restores the portfolios already received, and rescinds the contract *in toto*. Where a contract is sought to be avoided on the ground of a mistake made in its performance, the defendant will be held to have waived his right to avail himself of such defense, where the mistake was known to him, but no notice was given to the plaintiff of the mistake, and the defendant did not indicate that he intended to rely upon such defense until the trial of an action brought for breach of the contract. Where the terms of a written contract provided that certain books, which the defendant agreed to purchase, should contain a special title bearing the name and address of the defendant, and the defendant, at the trial of an action brought for breach of the contract, offered evidence of the statements of the plaintiff's agent, with whom the contract was made, as to the place where the defendant's name would appear on the books, but did not offer evidence that the books, in respect to the title and printing, were not in conformity with the agent's statements, held, that the evidence was inadmissible. *Barrie v. Earle*, S. J. C. Mass., Oct. 23, 1886; 8 N. E. Rep. 641.

6. *CRIMINAL LAW—Banks and Banking—Receiving Deposits after Knowledge of Failing Condition of Bank—Statutory Penalty Not Incurred by Private Banker.*—The provisions of § 1860, R. S. Mo., 1879, to the effect that if certain enumerated officers of any banking institution, doing business in that State, shall receive deposits of money, or assent to the creation of debts of such bank, in consideration, etc., of which indebtedness, any money

shall be received in such bank, "after he shall have knowledge of the fact that it is insolvent or in failing circumstances, he shall be deemed guilty of larceny," etc., applies only to those engaged in conducting an incorporated bank, and not to a person engaged in conducting a private bank. *State v. Kelsey*, S. C. Mo., Nov. 15, 1886.

7. ——— *Homicide—Murder—Confession of Prisoner Formerly Convicted of Same Murder—Copy of Confession for Defense Not Necessary—Jury—Criminal Case—Challenging Jurymen after Passing List—Argument of District Attorney—Matters in Record.*—A prisoner, after conviction of murder and while under imprisonment, made a voluntary confession implicating another party in the murder: Held, upon the trial of the latter, that the district attorney was under no obligation to furnish the defense with a copy of the confession, and his refusal to do so was not error. After having made seven strikes, and expressed himself as willing to take the jury, the district attorney was allowed by the trial court to strike from the list the name of a jurymen upon the list when he so waived his strike, the district attorney being entitled to twelve peremptory challenges by § 4690, R. S. Wis. Held, that the order of challenging jurors was within the discretion of the trial court, in the absence of any statutory regulation or rule of court, and that there was no abuse of discretion in allowing the challenge. Upon the trial of a person implicated in a murder by the confession of a prisoner formerly convicted of the same murder, the district attorney, in his summing up referred to what had been testified to and found by the jury on the trial of the party who made the confession: Held, that the matters referred to were not outside of the record, some of the witnesses having been sworn on both trials, and some of the evidence taken upon the former trial having been used to impeach the testimony on the latter trial. *Santry v. State*, S. C. Wis., Nov. 3, 1886; 80 N. W. Rep. 226.
8. ——— *Manslaughter—Furor Brevis—Appeal—Discretion of Trial Judge—Request to Discharge an Accepted Juror.*—Where the prisoner's evidence shows that, after a conflict with the deceased, which left him paralyzed and unresisting, the prisoner "let go" of him, and went after and obtained his axe, neglecting to use a knife which lay at hand on the ground, and ended his helpless opponent's life therewith, such action cannot be held to be unpremeditated and prompted by the frenzy engendered in the struggle to reduce the crime to manslaughter, but shows such premeditation and design to kill as will amount to murder. A request to discharge a juror, made after he has been accepted and sworn, but before evidence has been given in a criminal case, is within the discretion of the trial judge, and the appellate court will not interfere, in the absence of evidence of abuse of such discretion. *People v. Beckwith*, N. Y. Ct. App., Oct. 26, 1886; 8 N. E. Rep. 662.

9. ——— *Obstructing Justice—Assault on Officer—Knowledge that Person Assaulted was an Officer.*—It is not erroneous for the court, at the trial of certain defendants for assault upon a police officer of a town, to instruct the jury that they might infer from the evidence that the officer was duly appointed, and in the lawful execution of his office, and that the defendants knew that he

was an officer, and acting as such, where the evidence shows that the latter was appointed a special police officer by the selectmen, among other things, for the surveillance of a certain house, known to be a place of common resort and frequented by the defendants, who had long lived in the town, knew the officer and were known by him, and that the defendants were watching for his appearance, and when he appeared accosted him, asking him if he had "business there," and then assaulted him, wresting away his "billy." *Commonwealth v. Sawyer*, S. J. C. Mass., Oct. 22, 1886; 8 N. E. Rep. 422.

10. — *Preliminary Examination — Police Court — Reading Testimony — Objections to Testimony.*—In taking evidence upon a preliminary examination in a police court, the testimony should be read over to the witnesses in defendant's presence, before being signed by them; but where this has not been done, and no objection has been made to the information thus taken until the examination of the witnesses in court, the prisoner cannot be heard to complain of it. *People v. Gleason*, S. C. Mich., Nov. 11, 1886; 80 N. W. Rep. 210.

11. — *Venue—Statement of—Continuance on Ground of Absence of Witnesses, When Erroneously Refused—Confidential Communications between Attorney and Client—Attorney Cannot State Kind of Money Client Paid as Retainer.*—Where the indictment omits to aver in what State the crime is committed, but the State is properly named in the caption, the venue is sufficiently alleged under § 1813, R. S. Mo., 1879. Where defendant made application for a continuance, and has a subpoena issued and directed to the sheriff for a witness in his behalf, and in his affidavit stating that he had issued it as soon as he ascertained where such witness was to be found, and also relating the facts he expected to prove by him, which, if true, would tend to establish defendant's innocence, and where the prosecuting attorney admits that the witness, if present, would testify to the facts alleged in the affidavit, the trial court errs in overruling the defendant's motion for a continuance. Where defendant is charged with stealing \$100 "of current silver coin of the United States," it is error to permit defendant's attorney to testify as to the kind of money defendant paid him as a retainer, viz.: "\$45 in silver and \$5 in gold," this fact being confidential between the attorney and client. The reason of the rule protects the client from a disclosure by his attorney, not only of what he has communicated to his attorney, orally or in writing, but of any information derived by the attorney from being employed as such, any information which he has derived from his client, "whether by words, signs or acts." *State v. Dawson*, S. C. Mo., Nov. 15, 1886.

12. *DEED—Description—General and Particular—Fixed Monuments.*—All parts of a description in a conveyance should be made to stand and harmonize, if possible; but if all parts do not harmonize the general description must give way to a particular one. A line described as running from a fixed monument, on the edge of a branch, up the same, by a single course, to another fixed monument on said branch, construed to follow a straight line called for from monument to monument, and not to follow the windings of the branch, unless the words "the several courses thereof," or "the general course being," or some such lan-

guage, be used. In such description, the words "up the branch," by a single course, means running in that direction on a straight line. *Wharton v. Brick*, S. C. N. J. Nov. 10, 1886; 6 Atl. Rep. 442.

13. *EQUITY — Removing Cloud of Title — Assessment for Township Drain.*—Where a bill is filed to remove a cloud on the title alleged to have been created by the return of unpaid assessments on the land, made for the expense of clearing out a township drain, and only avers that it was never done "according to any legal form or rule," without showing just what was done by the drain commissioner, to enable the court to determine the precise injury done and complained of, the bill will be dismissed. *Barker v. Vernon*, S. C. Mich., Nov. 1, 1886; 80 N. W. Rep. 175.

14. *ESTOPPEL—Appellate Courts—Re-Examination of Points Formerly Decided—Appeal—Jurisdiction—Leave to Answer Over.*—The legal propositions which have been decided in a former appeal, whether correctly decided or not, are the law of the case, and will not be re-examined on a subsequent appeal in that case. It is not properly within the appellate jurisdiction of the supreme court, if it sustains a demurrer, to give leave to answer over. In case, therefore, this court makes no final disposition of the case, but remands it to the court below, it will be open for that court to determine, in the first instance, whether the defendant shall be permitted to answer or not. *Powell v. Willamette etc. Co.*, S. C. Oreg., Oct. 20, 1886; 12 Pac. Rep. 88.

15. *EVIDENCE—Deposition—Witness—Refreshing Memory—Contemporaneous Paper—Trial—Submission—Jury—Question of Fact.*—It is not a valid objection to a deposition that the witness, in his testimony, refers to a contemporaneous paper, book, or memorandum made by himself, and not in evidence, if the reference be made as a means of refreshing his memory, or as enabling him to speak with accuracy, on the subject-matter under investigation. It is error to submit to the jury a question of fact which is conclusive in the case, upon mere conjecture, where there is no evidence from which the jury could have inferred the fact. *First Nat. Bank of Du Bois City v. First Nat. Bank of Williamsport*, S. C. Penn., Oct. 4, 1886; 6 Atl. Rep. 366.

16. — *Action for Money Collected by Bank—Protest and Non-Payment of Drafts — Drafts must be Produced—Banks and Banking—Collection of Drafts—Responsibility for Correspondent—Drafts Paid to Correspondent — Failure of Correspondent.*—In an action against a bank for moneys received by it to plaintiff's credit, where the defense is made that drafts drawn to defendant's order by another bank for the money had been protested and were unpaid, held, that it was error to admit evidence of the protest, non-payment, and return of the drafts without first producing the drafts, or accounting for their absence. In an action against a bank for moneys received to plaintiff's credit, where it is shown that the defendant bank was employed to collect certain drafts, and it is shown that the money was paid to its correspondent, a bank in the town where the drawee lived, and the correspondent forwarded a draft for the money to the defendant, it devolves upon the defendant to show that, through no fault

or want of diligence on its part, the draft was not paid. Where a bank is employed to collect drafts drawn upon a party at a distance, it is responsible for the failure or dishonesty of its correspondent, a bank selected by itself, to whom the draft had been paid by the drawee. *Simpson v. Waldby*, S. C. Mich. Nov. 4, 1886; 80 N. W. Rep. 199.

17. — *Intoxicating Liquors—Application for License—Handwriting—Competency of Witness—Weight of Evidence—Lease Signed by Defendant—Comparison.*—Upon the trial of a complaint charging the defendant with the sale of intoxicating liquors upon certain premises, applications by the defendant for leave to sell intoxicating liquor at the premises described in the complaint are competent, as tending to show that he kept and maintained the premises at the date of the applications, and at the time of the complaint, if the jury are satisfied that there has been no change in the meantime. If a witness is familiar with the handwriting of the defendant, and testifies that he thinks that certain signatures are those of the defendant, the fact that on cross-examination, he states that he cannot swear that they are those of the defendant, goes to the weight, and not to competency, of his evidence. Where it is sought to be proved that certain signatures are those of the defendant, it is competent to introduce, for the purposes of comparison, a lease, the signature to which the defendant admits was signed by him. *Commonwealth v. Andrews*, S. Jud. C. Mass., Nov. 4, 1886; 8 N. E. Rep. 643.

18. — *Railroad Accident—Defect in Road—Trial—Judge Commenting on Facts to Jury—United States Courts—Instruction of Court—Misleading Jury—Life and Annuity Tables in Actions For Personal Injury—Measure of Damages.*—In an action against a railroad corporation for personal injuries, there being evidence tending to show that the accident was caused by a worn-out rail, evidence as to the condition of the track, and that the rails had been in use a great many years, is admissible as tending to show that a worn-out rail was the cause of the accident, and that defendant had neglected to repair the defect. In the courts of the United States, as in those of England, the judge, in submitting a case to the jury, may, in his discretion, comment upon the evidence, call their attention to parts of it which he deems important, and express his opinion upon the facts; the statutes of the State forbidding judges to express any opinion upon the facts, not controlling the powers of the United States court. Where, in an action for personal injuries, it is a controverted question whether the injury is temporary or permanent, it is error to instruct the jury on the assumption that the injury will be permanent. In an action for personal injuries, while standard life and annuity tables, showing, at any age, the probable duration of life and present value of a life annuity, are competent evidence, the rules derived therefrom are not the absolute guides of the judgment and conscience of the jury; and an instruction directing the jury to ascertain the loss of income by the use of such rules, the charge nowhere suggesting that the jury are at liberty to ascertain such loss according to their own judgment, is erroneous. *Vicksburg, etc. Co. v. Putnam*, S. C. U. S., Oct. 25, 1886; 7 S. C. Rep. 1.

19. FRAUDULENT CONVEYANCE—Action to Set

Aside—Pleading—Requisites of Complaint—Injunction—Procedure—Dissolution—Injunction Denied—Receiver.—The holder of a second chattel mortgage, seeking to set aside a prior mortgage, must show that he has been defrauded by the taking of his security, relying on the fact that no prior lien existed upon the goods, and a further showing of the fraudulent character of such mortgage, and that he did not receive his mortgage as a second incumbrance, with actual knowledge of the first. Where an injunction has been granted on a complaint on information and belief, if it is fully denied in the answer, and the defendant is responsible, the injunction must be dissolved. The fact that a portion of the debt secured by a chattel mortgage which a complainant seeks to set aside as fraudulent is for the individual debt of one of the firm giving the chattel mortgage, will not support an injunction, or the appointment of a receiver, the alleged fraud not being otherwise shown. *Caulfield v. Curry*, S. C. Mich., Nov. 11, 1886; 30 N. W. Rep. 191.

20. — *No Participation in by Grantor—Whether Grantor Indebted or in Failing Circumstances Immaterial—Valid Against Subsequent Purchaser With Knowledge of Former Conveyance.*—In an action of ejectment, where it is shown that the defendant has received his conveyance by general warranty deed, and who assumed the payment of the grantor's debts, with full knowledge, at the time of the existence of other recorded deeds of the same property to the plaintiffs, though it appears that the purpose of which conveyances, on the part of the grantor, was to hinder and delay his existing creditors but not subsequent ones, yet, in the absence of evidence that the plaintiffs were parties or privies to any fraud in the execution of the deeds to them, it is immaterial whether at the time of the execution of their deeds, the grantor was indebted or in failing circumstances, and the plaintiffs are entitled to recover possession of the lands. *Bonney v. Taylor*. S. C. Mo., Nov. 15, 1886.

21. *INSURANCE—Life Insurance—Representations—Previous Occupation of Assured—Equivocal Question in Application—Instruction to Jury—Trial—Policy—Breach of Warranty—Directing Verdict—Preponderance of Proof.*—In an action upon a life insurance policy it appeared that the assured, in his application, to the question whether he had been engaged in or connected with the manufacture or sale of any beer, wine, or intoxicating liquors, had answered, "No," and the uncontradicted evidence showed that he had kept a hotel, and sold wines and liquors in bottles to such of his guests as desired, but kept no bar, held, that it was error to leave it to the jury to say whether the sales of liquors made were sales at all within the meaning of the contract, and that a nonsuit should have been granted for breach of warranty by the assured. In an application for life insurance the applicant was required to answer the question: "Is he now or has he been engaged in or connected with the manufacture or sale of any beer, wines, or other intoxicating liquors?" In an action upon the policy the jury were impliedly authorized to find that the question was equivocal, because not capable of a direct and positive answer. Held, that the instruction of the court was misleading; the question not being equivocal. Held, further, that it was error for the court to refuse to charge

that the question could have been truthfully answered in the affirmative, if the assured had been connected with the sale of liquor. In an action upon a life insurance policy, where it appeared that the assured, in his application for insurance, in response to questions by the company, had falsely represented his business and occupation, *Acid*, that it was error for the court to refuse to direct a verdict for the defendant. If the proof of a fact is so preponderating that a verdict against it would be set aside by the court as contrary to the evidence, it is the duty of the court to direct a verdict, and not to leave the question for the jury, merely because there is a *scintilla* of evidence in support of a proposition. *Dwight v. Germania, etc. Co.*, N. Y., Ct. App. Oct. 12, 1886; 8 N. E. Rep. 654.

22. LANDLORD AND TENANT—*Contract for Use of Store — Rent — Occupancy.*—Where A, by an agreement in writing, sells to B a stock of goods, and agrees to let him have the possession of the building in which they are situated until the store owned by him, in process of construction, is completed and ready for business, for a certain rental, payable at a specified time, B is entitled, by virtue of the contract, to the possession and use of the building, until the store is completed, for no more rent than the amount mentioned in the agreement, without reference to the time of occupancy. *D'Arcy v. Martyn*, S. C. Mich., Nov. 11, 1886; 30 N. W. Rep. 194.

23. MARRIAGE—*Divorce—Extreme Cruelty—Cruel and Abusive Treatment—False Charges of Infidelity — Libel — Demurrer.*—“Extreme cruelty,” as the cause for divorce in the act of 1883, means “personal violence,” intentionally inflicted, so serious as to endanger “life, limb or health,” or to create reasonable apprehensions of such danger. Whatever treatment is proved, in each particular case, to seriously impair, or to seriously threaten to impair, either body or mind, endangers “life, limb or health,” and constitutes “cruel and abusive treatment” the sixth cause for divorce in that act. The false charge of infidelity is not legal cruelty, but in a given case may be proved to so operate. A libel for divorce, charging specific acts of extreme cruelty, or cruel and abusive treatment, averred to seriously impair, or to seriously threaten to impair, “life, limb or health,” is sufficient on demurrer. The averment in a libel for divorce, that the conduct specifically charged impaired or seriously threatened to impair, health, is sufficient on general demurrer, without particularly stating how the health was impaired. *Holyoke v. Holyoke*, S. C. Me., Oct. 14, 1886; 7 East. Rep. 546.

24. MASTER AND SERVANT—*Injuries on Machine—Corporation not Obligated to Fence Machine—Exceptions—Instructions—Contributory Negligence—Trial—Charge upon Facts—Peculiarly Dangerous Machine—The Risks of His Employment.*—A manufacturing corporation is not bound to fence in a machine used in their business, where the machine is not of a peculiarly dangerous character, and is not liable for personal injuries caused by the machine to an employee who was obliged to pass the machine in going to his work, and to whom suitable instructions had been given, having reference to his age and capacity, so as to enable him to understand the dangers of the employment in which he was engaged. Neither is the corpora-

tion liable for injuries because the machine might have been placed in a different or less dangerous position. Evidence that a gate might have been placed in front of the machine at slight expense is immaterial. Exceptions to the judge's charge will not be sustained, unless it is made to appear that there is some substantial error in the charge which misled the jury; and where there was evidence that the plaintiff was playing about the machine on which he was injured, a statement in the charge that, if the jury found that to be the fact, the plaintiff was guilty of contributory negligence, which would prevent him from recovering, is not open to objection. It is not charged upon the facts for a judge to state in his charge that a machine, on which the plaintiff was injured, was not a peculiarly dangerous one, the fact being self-apparent. An employee of a manufacturing corporation, who has been properly instructed as to the use of a machine upon which he is set to work, is supposed to undertake the risk of his employment, and cannot recover for injuries resulting from use of the machine, and the company is not obliged either to fence the machine, or place it in a less dangerous part of the room. Where exceptions are taken to a judge's charge, but the exceptions are not defined, and the errors claimed to exist are not pointed out to the judge, that he may have an opportunity to correct any inaccuracies in his expression, they cannot be sustained. *Rock v. Indian Orchard Mills*, S. J. C. Mass., Oct. 22, 1886; 8 N. E. Rep. 401.

25. — *Liability of Master for Negligence of Fellow-Servant — Negligent Habits — Pleading.*—Where a servant has knowledge of the negligent habits of a fellow-servant, and enters the employment of the common master with such knowledge, or continues therein after he has acquired such knowledge, he cannot recover against the common master for injuries resulting from the negligence of such fellow-servant; and if the complaint in such an action fails to negative the existence of knowledge, it will be bad on demurrer, though it alleges the common master had knowledge or notice of such negligent habits. *Lake Shore, etc. Co. v. Stupak*, S. C. Ind., Oct. 12, 1886; 8 N. E. Rep. 630.

26. MORTGAGE—*Assignment of Notes to Different Parties—Priority of Lien.*—Where several mortgage notes are executed to the same person, the assignment of them to different persons operates as an assignment, *pro tanto*, of the mortgage, and the holders have priority of lien in the order in which their different notes become due, the notes standing as so many successive mortgages. Although the lien of the assignor, where he retains the note first falling due, is postponed to that of the assignees holding under indorsements made at the same time, this does not change the rule as among themselves, nor entitle them to share *pro rata* in the mortgage fund. *Parkhurst v. Watertown, etc. Co.*, S. C. Ind., Oct. 14, 1886; 8 N. E. Rep. 635.

27. NEGLIGENCE—*Action Against Property Owner for Damages for Causing Death of Three-Year Old Child — Duty of Property-Owner.*—The owner of property is under no obligation to keep it in a condition which will insure the safety of persons who go upon it without his license, or invitation. 68 Mo. 325; 71 Mo. 596, distinguishing *Nagle v. Mo. Pac. R. R.*, 75 Mo. 653. In an action against a distilling company to recover

damages for the death of a three-year old child caused by hot water, or from defendant's pipes, a cause of action is not stated unless the petition avers either that the place where the child lost its life was attractive to children, or that children in the neighborhood were in the habit of resorting there to play or to witness the escape of the water and steam from the pipe, thus tending to show that defendant was not properly exercising dominion over his property. *Schmidt v. Kansas City Distilling Co.*, S. C. Mo. Nov. 15, 1886.

28. **NUISANCE—Permanent — But One Action Can be Maintained — Damages—Right of Action—Against Whom.**—In an action for damages to real property, caused by the overflow of water backing up from a dam, where the injury is permanent in its nature, but one action can be maintained, and the amount recovered is for all damages, past and prospective. The right of action in such case accrues wholly against the party doing the injury, and a subsequent purchaser of the land will not be liable. *Bizer v. Ottumwa, etc. Co.*, S. C. Iowa, Oct. 29, 1886; 30 N. W. Rep. 172.

29. **PARTNERSHIP—Evidence of—Finding of Jury—Dissolution—Notice—Incorporation—Witness—Incompetency by Reason of Interest—Co-partners—Trial—Introduction of Evidence—Order—Debt Against Partnership—Removal of Causes—United States Court—Waiver of Right—Change of Venue—When Right Must be Claimed.**—Where a firm styled "A," at Wausau, sold a half interest in their quarry and business to a firm styled "B," at Chicago, and it is alleged B became a partner in A's business under the style of "A," which allegation is denied by B, who claims each firm's business was distinct, in an action by plaintiff, a bank at Wausau, on a promissory note executed, after the purchase above mentioned, in the firm name of "A," the positive testimony of a member of A that the two firms were partners in A's business; that A sold B a half interest in their quarry; that the two members of B visited the quarry at three different times, and one for two weeks acted as boss of the works, helped in quarrying, employed and discharged laborers, and paid them by order on the firm of A, and sent laborers up from Chicago, and that the pay-rolls were sent to B, in Chicago, and said member of B was with plaintiff in Wausau, and all checks on plaintiff were drawn in the firm name; and the testimony of plaintiff that he met one member of B in Wausau, and afterwards a member of A introduced the other member of B to plaintiff as "our Chicago partner," before the note was signed, and plaintiff made a large loan to A the year after, is evidence which will warrant the jury in finding a partnership between A and B if it is believed by them. The organization of a partnership into a corporation is not evidence or notice to third parties, *per se*, that the partnership is dissolved, unless it be impossible for any purposes connected with the business that the partnership can be continued and co-exist with the corporation. In the trial of the fact of the existence of a partnership, an exception to the admission of the testimony of one of the partners is not well taken; such evidence being admissible, and his interest going only to his credibility. In an action for a debt against a partnership, an exception to admitting proof of the indebtedness before proving the partnership is not well taken, it being an objection to the order of proof, which is in the discretion of the court. Where, in an action before a State circuit court, the defendant petitions

for a removal to the United States circuit court, and the petition is denied, and he afterwards applies for and obtains a change of venue to another State circuit court on the ground of prejudice of the judge, the latter application amounts to a waiver of his application to remove the case to the federal court. Where a defendant's petition for removal of a cause pending in a State court to a federal court is denied, and defendant afterwards obtains a change of venue to the court of another county, and there renews his application, such application is too late, for the reason that the cause could have been tried in the circuit court of the county where the action was commenced at the term in which the first application for removal was made. *First Nat. Bank of Wausau v. Conway*, S. C. Wis., Nov. 3, 1886; 30 N. W. Rep. 215.

30. **RAILROAD COMPANIES—Appropriation of Land—Damages Fixed at Time of Construction—Subsequent Vendee—Subsequent Change in Construction.**—The measure of damages for lands taken in eminent domain proceedings is the cash market value of the land, and for lands damaged is the difference between the value of the lands before and after the construction of the improvement. Such damages become fixed at the time of the construction of the road, and belongs to the owner of the property at that time, and are not recoverable by his subsequent vendee. When, subsequent to the construction and to the sale of the property affected, the character of the construction is changed, and fresh damage is caused, such damages injure the person then owning the property, and are recoverable by him in an eminent domain proceeding. But *semble* the rule is otherwise as to the nature of the remedy when the first damage is caused, not by a change in the construction, but by a negligent maintenance of the original construction. *Wabash, etc. v. McDougal*, S. C. Ill., Oct. 6, 1886; 8 N. E. Rep. 678.

31. **Appropriation of Land—Damages—Excessive Verdict—Value of Land.**—In an action against a railway company for taking the plaintiff's land, and constructing its road thereon, when it is found that defendant was not a trespasser, the damage to the plaintiff is the value of the land taken, and a verdict for more than such value as shown by the evidence is excessive. *Kitterman v. Chicago, etc. Co.*, S. C. Iowa, Oct. 7, 1886; 30 N. W. Rep. 172.

32. **Eminent Domain—Damages—Tenant for Years—Measure of Damages—Difference of Value.**—A tenant for years is the owner of an estate in the land, and is entitled to compensation for an injury done by a railroad or turnpike company in the construction of the road. The advantage which the owner of any other estate in the land may derive from the road cannot be deducted from the claim of the tenant for years. In condemnation proceedings, whether the assessment of damages be to the tenant in fee, for life, or for years, the rule as to the measure of damages is precisely the same. What was the value of the property, *i. e.*, the tenant's interest therein, unaffected by the injury? What was its value as affected by the injury? The difference is the true measure of compensation. *Philadelphia, etc. Co. v. Getz*, S. C. Penn., Oct. 1886; 6 Atl. Rep. 356.

33. **REMOVAL OF CAUSE—Co-conspirators—Severals Ground of Removal—Collusive Conveyance to Give Jurisdiction—Supp. Rev. St. U. S. 175—**

Courts—Appeal to United States Supreme Court—Stipulation as to Decision of Issue of Another Case—Question Reviewable on Appeal.—In a suit to quiet title against several defendants, some of whom are citizens of the same State with complainants, charging defendants to be co-conspirators in a scheme to raise a cloud on complainant's title and to defraud them out of their property, one of the defendants cannot segregate himself from the others, and thus entitle himself to a removal of the case to the United States court, by denying any joint interest or liability, and settling up in his petition for removal a case inconsistent with the allegations of the bill. Where a firm of attorneys who had received a deed to certain valuable property from parties desiring to contest the title of other claimants thereto, in turn conveyed the same to the father-in-law of one of the members of the firm, a poor farmer living in another State, who knew nothing about the property, and who afterwards, as defendant in a suit to quiet title to it, had the cause removed to the United States court, on the ground of his citizenship, in such other State, and it appeared, upon all the evidence, that the conveyance was made to him collusively, for the mere purpose of giving the United States circuit court jurisdiction, *held*, that that court should refuse to entertain jurisdiction under the act of 1875 (Supp. Rev. St. U. S. 175), authorizing the dismissal or removal of cases not really and substantially involving a dispute or controversy properly within the jurisdiction of said court. A stipulation that the decisions of an issue in a case pending at law shall be taken and entered of record as the decision of the same issue in a suit in equity in the United States circuit court involving the same question, makes the decision in the law case equivalent to the decree of the United States circuit court, and nothing more; and the evidence taken on the trial of the issue being incorporated in the record on appeal to the United States supreme court, the question can be reviewed there. *Little v. Giles*, S. C. U. S., Nov. 1, 1886; 7 S. C. Rep. 32.

34. SET-OFF AND COUNTER-CLAIM—Judgment—Opening of—Terms—Duty of Defendant—Proof—Time—Day—Fractional Part of.—A judgment against A was opened to enable him to prove that he had a set-off to plaintiff's claim, of the following character; that he had, on the day that plaintiff made an assignment for the benefit of his creditors, become the *bona fide* holder of a certificate of deposit issued by plaintiff which amounted to more than plaintiff's judgment. *Held*, that he was bound to prove that he became the owner of the certificate of deposit before the time of the assignment, and that he had given a valuable consideration therefor. In this case, A having obtained the certificate of deposit upon the same day that plaintiff made an assignment for the benefit of his creditors, *held*, that it was competent for A to prove that he had become the owner of the certificate earlier in the day than the execution of the assignment. *Collins v. McKee*, S. C. Penn., Oct. 25, 1886; 6 Atl. Rep. 396.

35. TROVER AND CONVERSION—Pleading—Proof.—A plaintiff can only recover *secundum allegata et probata*; and, under a complaint for the wrongful seizure and conversion of property, there can be no recovery for a misapplication of the proceeds of the sale of such property, where it appears that the possession of the property was obtained, and the

sale made, by the defendant with plaintiff's consent. *Bizel v. Bizel*, S. C. Ind., Oct. 5, 1886; 8 N. E. Rep. 614.

36. USURY—Usury as a Defense—Pleading—Evadon of Local Laws—Foreign Statute—What Constitutes—Mortgage—Foreclosure—Costs and Fees—Stipulation for Attorney's Fee—Void as Unconscionable.—An allegation that the note was made payable in S F, in another State, for the purpose of fraudulently evading the local usury laws, is bad, as not alleging any agreement between the parties to make it payable where it was made payable for any fraudulent purpose. To sustain an allegation of usury under the laws of a foreign State, the foreign statute must be pleaded as a fact, and such facts must be alleged as bring the case within the law. Four things are essential to a usurious contract: (1) A loan, express or implied; (2) an understanding between the parties that the money lent shall be or may be returned; (3) that for such loan a greater rate of interest than is allowed by law shall be paid, or agreed to be paid; and (4) a corrupt intent to take more than the legal rate for the use of the sum loaned. The court will not enforce an unconscionable allowance for attorney's fees in a mortgage, and, being unauthorized to make a new contract for the parties, will make no allowance therefor. *Balfour v. Davis*, S. C. Oreg., Oct. 28, 1886; 12 Pac. Rep. 89.

37. VENDOR AND VENDEE—Actual Notice—Mortgage—Bond for Deed—Equitable Effect of.—Where an obligor of a bond for a deed of land, conditioned upon the payment of a promissory note executed to him by the purchaser, mortgages the land (with other land) for an amount greatly exceeding its value, and the note having been dishonored, he, subsequently to the execution of the mortgage, but prior to its being recorded, assigns said promissory note for value to another, he takes the note, and the rights incident thereto, subject to the mortgage, and the fact of the note being past due puts him on notice. The effect of a bond for a deed of land is to transfer the title in equity to the land to the purchaser, and the obligor holds the title merely as a security for the payment of the purchase money, and the assignee of a promissory note given by the purchaser is entitled to the benefit of the security. He can hold, then, against an assignment by the obligor of the land for the benefit of his creditors, made subsequent to the transfer of the note to him, and against a judgment not docketed prior thereto. *Buckhart v. Howard*, S. C. Oreg., Oct. 26, 1886; 12 Pac. Rep. 79.

38. WAYS—Road—Award of Damages—Return—Amendment—Caveat—Review.—A return of the laying out of a public road by surveyors of the highways was amended by striking out an award of damages, for lands taken, to "the heirs of A, B," and inserting in the lieu thereof a specific award to each individual owner. *Held*, that such owners had a right to caveat and procure a review of the necessity and utility of the road by chosen freeholders, after the original return was received by the county clerk, by taking the steps required by the statute within the time prescribed, and that such right was not revived or renewed by such an amendment to the return. *State v. Craig*, S. C. N. J., Nov. 5, 1886; 6 Atl. Rep. 430.

39. WILLS—Gift of "Share" in Estate, with Alter-

native Gift.—Where a will devises and bequeaths an estate, real and personal, as a whole, in specified shares to certain persons named, and makes another disposition in case of their decease, before distribution, and appoints an executor to carry the will into effect, the title vests in the executor under the will, and the persons named have no vested interest before distribution. *Banta v. Boyd*, S. C. Ill., Oct. 6, 1886; 8 N. E. Rep. 671.

40. WITNESS — *Accomplice* — *Corroboration* — *Criminal Law*—*Trial*—*Instructions*—*Evidence of Accomplice*—*Credibility*.—In a trial under an indictment, the evidence of an accomplice may be corroborated, as to any material fact, even though that fact does not necessarily connect the prisoner with the offense. Where the court, in charging the jury, instructed them that they have the right to return a verdict of guilty upon the naked testimony of an accomplice, if they find such evidence sufficient to remove every reasonable doubt of the accused's guilt, such instruction is to be taken, in connection with a caution previously given, that an accomplice's evidence is to be received with great caution, and that it is generally unsafe to convict upon his uncorroborated testimony, and the verdict will not be reversed, on appeal, on the ground that the court, in effect, directed the jury to give the same credence to an accomplice's evidence as to that of any other person. *State v. Maney*, S. C. Conn. Sept. 11, 1886; 6 Atl. Rep. 401.

QUERIES AND ANSWERS.*

[Correspondents are requested to draw up their answers in the form in which we print them, and not in the form of letters to the editor. They are also admonished to make their answers as brief as may be.—Ed.]

QUERIES.

Query 33. A private corporation advertises for bids on an important work, in the usual form, "reserving the right to reject any and all bids," but opens the bids privately, no bidders being present, refuses to announce the respective bids, and awards the contract to a bidder who agrees with the company not to make public the contract price. Under such circumstances, has the lowest bidder any remedy at law by which he can recover his expenses and expected profits, or is the case one of *damnum absque injuria*?

INQUIRER.

RECENT PUBLICATIONS.

THE LAW AND PRACTICE IN PROCEEDINGS SUPPLEMENTARY TO EXECUTION under the New York Code, and adapted to all the other States having similar practice, including Decisions to July, 1886. With Forms. Third Edition, Revised and Enlarged. By Daniel S. Riddle, and E. Fitch Bullard. New York: L. K. Strouse & Co., Publishers, 95 Nassau street, 1886.

This is a local work which we may fairly infer from the fact that it is in its third edition, has received the approval of the profession in the State of New York.

It is well arranged, divided conveniently into chapters, sections and sub-sections, has evidently been prepared with much care and labor, and furnished with a profusion of forms, which occupy but little less than one hundred pages of the volume. We have no doubt that it will be very favorably received by the profession in the State of New York and prove very useful in practice in that State. We must be permitted to doubt, however, whether it can carry out the promise embodied in its title-page, "adapted to all other States having similar practice." We hardly think it possible to frame a work of this character, and bring it within reasonable dimensions, which shall be sufficiently exhaustive of the law and procedure of the principal State, and yet afford anything valuable or reliable to practitioners in other States, the codes of which vary in many minute but material particulars from that of the principal State. We think such works, however useful in their appropriate region, will prove unsatisfactory and misleading to the outsider.

JETSAM AND FLOTSAM.

AN Indiana justice of the peace, who had twenty-seven of his twenty-eight decisions reversed by the higher court, has resigned in disgust and opened a meat market. He says that the professional courtesy which used to be a distinguished feature of the bench and bar has entirely petered out, and that a justice of the peace to-day is of no account.

AN amusing incident, illustrating the free and easy manner of conducting proceedings in the courts of California, years ago, occurred during the trial of a case in Sacramento, before Judge Clark, (who weighed 364 lbs.), while pleading on the part of a young lawyer was going on, who was so tediously dull as to be uninteresting, one of the jurors fell asleep, whereupon the clerk wrote on a slip "one of the jurors is asleep," and passed it up to the judge, who wrote in reply, "let him sleep, I would do the same thing, if I were in his place."

AN ALMANAC AS A WITNESS.—John Philpot Curran, when a young attorney, defended a poor devil who was charged with robbing a nobleman. On trial the victim positively identified the thief, saying, though the robbery occurred at night, the moon was bright enough to allow him to see the face of his assailant. The driver and footman both gave similar testimony. Curran addressed the court and the jury. He pleaded that his client was not guilty—had been at home, fifteen miles away from the scene of the robbery at the time of its occurrence. He could not prove an alibi, for a wife could not testify for her husband, and his child was not old enough to know the import of an oath; but he could introduce the only witness the prosecution had depended on for identification—the moon. "The driver and footman testified as they did because their master did so." There Curran called for the almanacs. Several of the red-bound pamphlets were brought in. The judge took one. Turning to the date of the robbery, which occurred at eleven o'clock, it was discovered that no moon arose that night, and the prisoner was acquitted. He talked to Curran about it afterwards and the attorney said: "You gave me £20 to defend you. Well, I only got about £2 of that. It cost £18 to get those almanacs printed!"

The Central Law Journal.*ST. LOUIS, DECEMBER 17, 1886.***CURRENT EVENTS.**

COMMERCE AMONG THE STATES.—The decision of the supreme court of the United States, in the case of *The Wabash etc. Co. v. Illinois*, which we published in our last number,¹ seems to render indispensable an early exercise by congress of the exclusive power conferred by the constitution of the United States to "regulate commerce * * * * among the several States." The decision, as we understand it, abrogates the supposed right of the States to regulate, within their respective jurisdictions, commerce among the States, until congress shall see fit to exercise the authority over the subject conferred upon it by the constitution. Upon this supposed right the Illinois statute was founded, and similar statutes exist in other States. All these statutes are shorn of their efficacy, except in matters of strictly local and domestic concern, and commerce among the States, or inter-state commerce as it is usually called, is wholly unregulated and carriers engaged in it may, throughout the United States discriminate for or against any shipper or the shippers of any city or region, either directly or by means of special rates, rebates, drawbacks or other devices. As we understand the decision, the power of the State to legislate on these subjects is limited to contracts for carriage, which begin and end within the State lines; if the contract includes a mile or a foot beyond the boundary; the State law becomes a dead letter for the whole route to be traversed. The enormous volume of transportation of goods and passengers, from one State into another, and across one or two or more States, imperatively requires some sort of regulation, some settlement of the questions which have grown out of the traffic, and some adjustment, upon, equitable principles, of the various interests of owners and passengers on the one hand, and carriers and corporations on the other.

RECEIVERS.—A decision of some importance was made a few days ago by U. S. District Judge Gresham, in relation to the affairs of the Wabash Railroad Company, its receivers, its bondholders and its stockholders. The matter is entirely too intricate to be sketched, even in the most cursory manner in an article of this kind, and we only mentioned it because it is a new evidence of the necessity of legislation which will render the receivership system that has grown up in the federal courts less cumbrous and more equitable. The receiver in his normal state is a useful, very convenient and quite harmless part of the machinery of courts of equity. Under the practice of the circuit and district courts this officer has grown to such importance as to dwarf even the court itself. The duty of the receiver, under the original design upon which the office was created, was to take charge of the property committed to his care by the court, sell it as soon as he can, with due regard to the interests of all concerned, pay the proceeds to the parties entitled, report to the court and be denuded of his trust. The receiver in his present state, fully developed, is well described by Mr. Justice Miller in his dissenting opinion, in the case of *Barton v. Barbour*.² He says: "If these receivers had been appointed to sell the roads, collect the means of the companies and pay their debts, it might be well enough. But this was hardly ever done. It is never done now. It is not the purpose for which a receiver is appointed. He generally takes the property out of the hands of the owner, operates the road in his own way, with an occasional suggestion from the court which he recognizes as a sort of partner in the business; sometimes but rarely pays some money on the debts of the corporation, but quite as often adds to them, and injures prior creditors by creating a new and superior lien on the property pledged to them. During all this time he is in the use of the road and rolling stock, and performing the functions of a common carrier of goods and passengers. He makes contracts and incurs obligations, many of which he fails to perform."

The perversion of the office of receiver, which Mr. Justice Miller so well describes in the foregoing extract, is too firmly fixed in

¹ 23 Cent. L. J. 561.

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² 104 U. S. 126.

the practice of the federal courts to be easily uprooted. It is based upon the reasonable idea that, in spite of all manner of financial storms, the cars must run, passengers must ride and freight be carried. Therefore, the receiver must operate the road. But it does not follow that he shall operate it forevermore, or that the foreclosure proceedings shall be indefinitely prolonged, in order that he may so operate it. We do not attempt to indicate in what manner congress can best remedy the abuses which the federal courts have permitted to grow up around the receivership system, but we think that the interests of the public and justice to stockholders and creditors imperatively demand that such a reform shall be effected as will remedy these evils, and to that end the powers of subordinate federal courts over matters of this character and many other like subjects shall be distinctly defined and rigidly circumscribed.

NOTES OF RECENT DECISIONS.

MARRIAGE — DIVORCE — THE SEBRIGHT CASE.—The reports of divorce trials are never dainty, by no means adapted to the use of schools, nor at all suitable for the domestic fireside. English divorce cases are particularly malodorous, and after the stale fumes of the Crawford-Dilke case and the fresh and pungent odor of the current Lord Colin Campbell scandal, it is comparatively like a breeze from Araby the blest, to get a whiff of a divorce suit of which the *gravamen* is not a breach of the seventh commandment.

Such a case is the Sebright-Scott case, of which, we are sorry to say, we have not seen a full report. The facts, however, seem to be that the lady in the case having considerable property, had also an unfortunate propensity to run into debt, and the alleged husband being a ready-money man contrived to become her creditor, and presumably made profits out of the transactions. Not content with paring off slips and bits from her fortune in this slow way, he resolved to take it all in at one fell swoop by marrying her, peaceably if he could, or forcibly if he must. Accordingly the lady was inveigled into a meeting with him at a public office where there was a

person authorized by law to solemnize the rites of matrimony and then there, as she alleged, in fear for her life and her liberty, and against her protest, they were married. The marriage was never consummated, and, within a reasonable time, we presume, she commenced proceedings to have the marriage declared a nullity. This was done by the court after a full hearing and much hesitation, and the London law journals are much exercised about the matter. The *Law Journal* of Nov. 20 fears that the ruling will "tend to confirm the popular fallacy that a marriage is no marriage if it has not been consummated." In another article the same journal says:

"Mr. Justice Butt says that 'the validity of a contract of marriage must be tested and determined in precisely the same manner as that of any other contract. For example, an ordinary contract may be set aside on the ground of fraud, and Mr. Justice Butt is of opinion that a marriage may be set aside on that ground. But a contract obtained by fraud is voidable, not void. Therefore, a lady or a man who has married under pressure may elect to ratify or repudiate the contract. The result of this appears to be to introduce a new status into the law—namely, that of half-married. * * * * It is difficult to put the finger on the precise ground on which the present marriage was set aside. There was a little fraud, a little intimidation, and a little weakness of mind. There was not enough of each to make a case, but all taken together were considered enough. Yet twenty white rabbits will not make a black rabbit.'"

The *Solicitors' Journal* of the same date says:

"To the delight of the impressionable part of the public, and, we think, rather to the surprise of the majority of the legal profession, Mr. Justice Butt has seen his way to granting a decree of nullity in *Scott v. Sebright*, on the ground that the petitioner was, at the time of her marriage, incapable of consenting to the marriage contract. * * * * It may perhaps be questioned whether the case does not bear on the face of it something like the judicial sanction of the dissolution of a marriage by mutual consent, although, as Lord Penzance eloquently points out in *Mordaunt v. Mordaunt*,¹ the feature of non-recis-

¹ 2 P. D., at p. 196.

sion by consent is a feature which belongs to marriage contracts alone among contracts. As to the authorities, although no cases are cited in the judgment, it is well to point out that the books contain at least three cases,² in which a marriage has been declared void on the ground of incapacity to consent, not amounting to insanity. Of the three cases, *Wilkinson v. Wilkinson* is the strongest. There a rich infant, incurably imbecile, but whose friends had failed to procure her to be declared lunatic, had been inveigled into a marriage with a cousin "in concert with other parties." The ceremony was hurried, and the bride, when required to say 'I will' said 'No,' till prompted by the clerk and told to use the former words; moreover, when in the vestry, she 'took off the ring and threw it down, saying she was not married.' "

The London *Law Times* of the same date also comments upon the ruling thus: "The decision of Mr. Justice Butt in the Sebright nullity case seems, in some quarters, to be considered as a bold endeavor to do justice by straining the law, and as laying down principles inconsistent with the old strict views as to marriage. By the canon law from which our marriage laws are mainly derived,³ not merely the 'consent' of the parties was essential, but 'sincerity' of consent was required. And it is clear that in English law a marriage by force is void:⁴ The liberty of divorces in the Roman law rendered less necessary any very definite disposition regarding marriages contracted by force. The modern law, under which divorces became very difficult, made this omission a real defect. The canon law fills up that lacuna by making such marriages void. This may be shown by many authorities.⁵ At the same time, it was held that voluntary cohabitation after marriage waived the right to have the marriage set aside, though it is clear that the mere fact of consummation did not. The idea that the amount of fear, needful to invalidate the marriage, should be sufficient 'to constrain a brave man' seems to be derived

from a constitution of Pope Honorius III., and will be found in the *Corpus Juris*, in *Decret. Greg. lib. 4, tit. 1, c. 28 p. 545*, and this Pope also considers early repudiation before consummation needful. The canonist Engel, p. 942, however, reasonably points out that a woman is more easily terrified, and that terror sufficient to daunt a brave woman will suffice. We are glad that Mr. Justice Butt has laid down a more liberal and rational doctrine, that the test of bravery has nothing to do with the matter. The question is rather the condition of mind of the contracting party."

We are fully persuaded that Mr. Justice Butt was in every point of view quite right. The test of every contract is consent, and sincerity is of the very essence of consent. Sincerity is always presumed when the party in question is competent to contract, and under no legal disability or duress. By the way, when judges and learned editors speak so confidently of marriage as a contract, what becomes of the *dictum* of the English judge, who, in *Morduant v. Moncliffe*,⁶ so positively denied that marriage was a contract at all.⁷

⁶ 43 L. J. Rep. H. of L. Prob. and Matr. 49.

⁷ 28 Cent. L. J. 288.

SUBSTITUTION OF MORTGAGES.

This question, along with the rights of intervening lien holders, is one that is scarcely mentioned by text-writers, though one that may be at times of vast importance. It would appear upon a casual observation that the establishment of liens should run from record date of instrument in force; but upon a careful consideration it will be seen that an equitable rule enters into the merits of this subject, and that the conclusion should be different from the one above suggested.

It may be stated, as a generally well established rule of law, that the taking of a new note and mortgage, to secure an indebtedness already existing by note and secured by mortgage, will not discharge the lien of the first mortgage.¹ In *Packard v. King-*

² *Harford v. Morris*, 2 Hagg. Con. 423; *Portsmouth v. Portsmouth*, 1 Hagg. 356; and *Wilkinson v. Wilkinson*, 4 Notes of Ecclesiastical Cases, 295.

³ *Sherwood v. Kay*, 1 Moore P. Q. C. 397; *Reg. v. Mills*, 10 Cl. & F. 534; 8 Jurist, 717.

⁴ *Harford v. Morris*, 2 Hagg. Conslst. 427, 436.

⁵ *Greg. IX. Decretals*, iv., 2, 9; *Corp. Jur. Canonici* edit. 1730, p. 548; *Decret. iv.*, 1, 6; *Ib.* 538

¹ *Pounder v. Ritzinger*, 1 N. E. Rep. 44; s. c., 102 Ind. 571; *Packard v. Kingman*, 11 Iowa, 219; *Swift v. Kraemer* 13 Cal. 526; *Walters v. Walters*, 73 Ind. 42; *Burns v. Thayer*, 101 Mass. 426. At least not unless

man,³ Smith and Kingman executed a mortgage on personal property to one Horner. On December 22, 1858, Smith and Kingman moved into a hotel property, and by statute a landlord's lien attached upon the effects of Smith and Kingman. On December 24, the plaintiff took a new note and mortgage for the balance unpaid of the debt, and at the same time released the old mortgage. The appellate court, in passing upon the cause takes occasion to say, that "the taking of a new note and mortgage on personal property, to secure an indebtedness already evidenced by a note and mortgage on the same property, does not, even when the first note and mortgage are cancelled, operate to discharge the lien of such first mortgage." It is a proposition well established that the giving of one's note does not pay or extinguish the debt; so accepting the mortgageor's note for interest due on a mortgage does not pay that portion of the debt, nor discharge the lien of the mortgage to that extent.³

In an action to reform a mortgage, the facts were shown to be as follows: A executed a mortgage to B, but made a mistake in description of property. He, (A), made a second mortgage on same property to C, to secure a note given in payment of several long past due notes. Action by B to reform mortgage against C, who had no notice of mistake in first mortgage: *Held*, that action would lie, as second mortgage was given to secure a prior debt and no new consideration passed.⁴ The right of restoration is allowed where the holder of a first mortgage, in ignorance of the existence of a subsequent recorded one, releases his mortgage and takes a new one; and under such circum-

stances the first mortgagee would be entitled to have the mortgage restored and given the original priority.⁵

stances the first mortgagee would be entitled to have the mortgage restored and given the original priority.⁵

The surrender of unpaid notes, secured by mortgage, and the taking of new notes and mortgage for the balance, does not of itself discharge the lien of the first mortgage.⁶ But this would be otherwise if the indebtedness secured by the second mortgage was created by the parties getting together and having a settlement of mutual running accounts and other debts, among which was the first mortgage debt, and a balance is found due the plaintiff. This balance being put in a new note and mortgage would form a new consideration, and the lien of the first mortgage be divested.⁷ But where there is an express agreement that the mortgage, under such circumstances, shall continue as a security, the lien of the first mortgage is not destroyed.⁸

In *Burns v. Thayer*,⁹ it was held, that where a husband gave a mortgage for the purchase money of real estate, and this mortgage was afterwards discharged, and at the same time and as a part of the same transaction a new note and mortgage were given for the same purchase-money debt, the instantaneous seisin of the husband did not operate to give the wife a homestead in the premises.¹⁰

A mortgage secures a debt or obligation and not the evidence of it, and no change in its form will discharge the mortgage.¹¹ Whether a new mortgage, given in the place of an old one, shall be treated as a payment

creditor accept the mortgage with that understanding: See *Gregory v. Thomas*, 20 Wend. 17; *Hamilton v. Callender*, 1 Dall. 420; *Hutchinson v. Swartsweller*, 8 N. J. Eq. 205. And in that event the burden is upon the mortgageor to show that the mortgage lien was to be released upon the execution of the new instruments; *Sloan v. Rice*, 41 Iowa, 465.

³ 11 Iowa, 219 (1880).

⁴ *Hutchinson v. Swartswellers*, 31 N. J. Eq. 205; *Shipman v. Cook*, 1 C. E. Green, 251; *Rogers v. Traders' Insurance Co.*, 6 Paige, 595; *Dunham v. Dey*, 13 Johns. 40. The taking up of old notes and the giving of new ones for the same indebtedness, or the payment of part and new notes for the balance, the old mortgage remaining, will not destroy the lien of such mortgage: *Chase v. Abbott*, 20 Iowa, 154; *Tucker v. Alger*, 30 Mich. 67; *Huginin v. Starkweather*, 10 Ill. 492.

⁵ *Busenbarke v. Ramey*, 58 Ind. 499; *Bowen v. Wood*, 35 Ind. 398.

⁶ *Bruce v. Nelson*, 35 Iowa, 157; *Stimpson v. Pease*, 58 Iowa, 572; *Lambert v. Leland* 2 Sweeny, 218; *Shaver v. Williams*, 87 Ill. 489; *Hutchinson v. Swartsweller*, 81 N. J. Eq. 205.

⁷ *Walters v. Walters*, 73 Ind. 425.

⁸ *Walters v. Walters*, *supra*.

⁹ *Port v. Robbins*, 35 Iowa, 208; *Goenen v. Schroeder* 18 Minn. 66; *De Cottes v. Jeffers*, 7 Fla. 284; *Elsworth v. Mitchel*, 31 Me. 247.

¹⁰ 101 Mass. 426.

¹¹ *Gregory v. Thomas*, 20 Wend. 17; *Dillon v. Byrne*, 5 Cal. 455.

¹² *Swan v. Yaples*, 35 Iowa, 248; *Morse v. Clayton*, 15 S. & M. (Miss.) 375; *Seymore v. Darrow*, 31 Vt. 123; *Flower v. Elwood*, 66 Ill. 438; *Moses v. Trice*, 21 Gratt. 556; *Nightingale v. Chaffee*, 11 R. I. 609; *Brown v. Duncel*, 46 Mich. 20; *Swain v. Frazier*, 35 N. J. Eq. 326; *Vick v. Smith*, 83 N. C. 80; *Smith v. Stanley*, 37 Me. 11; *Oliphant v. Eckerley*, 36 Ark. 69; *Helmetog v. Frank*, 61 Ala. 67; *Bodkin v. Ment*, 86 Ind. 560; *Williams v. Starr*, 5 Wis. 534; *Franklin v. Cannon*, 1 Root (Conn.), 500; *Elliot v. Sleeper*, 2 N. H. 525; *Christian v. Newberry*, 61 Mo. 448.

of the one for which it was substituted, will depend upon the purpose and understanding of the parties to the transaction. But not only will the intention of the parties be determined by the express agreements, but, in the absence of such, by the circumstances attending the transaction, from which such intention may be inferred.¹² The court, in *Swift v. Kraemer*,¹³ say: "We regard the cancellation of the old mortgage and the substitution of the new as cotemporance acts. It was not creating a new incumbrance, but simply changing the form of the old. A court of equity looking to the substance of such a transaction would not permit a release intended to be effectual only by force of, and for the purpose of giving effect to the last mortgage, to be set up, even if the last mortgage were inoperative."¹⁴

A mortgagee who takes a new mortgage from the grantee of his mortgageor in the place of the old one, does not lose his priority over judgment liens existing subsequent to the date of the old mortgage.¹⁵ If a mortgagee release his mortgage and accept a new mortgage, without knowing of the existence of a second mortgage, the second mortgagee will not be allowed to avail himself of the advantage thus gained;¹⁶ and the law will uphold a mortgage lien in favor of a mortgage against an intervening title, even where the parties had undertaken to discharge the mortgage, unless injustice would be done thereby.¹⁷ And thus a mortgagee lien, purchased by the owner of the equity of redemption, will, in the absence of a contrary intention manifest to the court, be kept alive in equity for the purchaser's protection against an intervening incumbrance.¹⁸

In *Rump v. Gerkens*,¹⁹ the plaintiff released his mortgage, not knowing of a junior

mortgagee, and the court say, that such did not extinguish the lien of the first mortgage, so that he (the plaintiff) could not use it as a protection to his right against the subsequent mortgage. "In other words, a court of equity will regard it as still existing as a lien and not having merged, so as to protect him against the subsequent mortgage. * * * In law a merger always takes place when a greater estate and a less coincide and meet in the same person, in one and in the same right, without any intermediate estate. The lesser estate is said to be annihilated or merged in the greater; but a court of equity is not guided in this matter by the rules of law. It will sometimes hold a charge extinguished where it would exist at law, and sometimes preserve it where at law it would be merged. The question is one of intention, actual or presumed, of the person in whom the interests are united."²⁰

A mortgageor, for his own advantage, yet in good faith, procures satisfaction pieces from his mortgagee and cancels the mortgages without paying the mortgage money, and does so upon an understanding to give new mortgage, but dies without accomplishing it, and his heirs after him give such new mortgage: *held*, that the new mortgage executed by the heirs should have the same effect as the old securities.²¹

Contrary Doctrine.—A rule contrary to the one above maintained is steadily followed by the court of Maryland, and, as far as we are able to discover, that State is alone in its position. It is there said that the release of one mortgage and the giving of another on the same property, for the same debt to the same mortgage, does not avoid the loss of the first mortgage lien by the release,²² and although the only consideration for the release is the simultaneous execution of another mortgage to the same tenor and effect as the released mortgage.²³

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²⁰ See also *Forbes v. Moffatt*, 18 Ves. 384; *Carpenter v. Brenham*, 40 Cal. 235.

²¹ *United States v. Crookhank*, 1 Ed'g. Ch. (N. Y.) 233.

²² *Woolen v. Hillen*, 9 Gill. 185; s. c., 52 Am. Dec. 690.

²³ *Alderson v. Day*, 6 Md. 57; *Neldig v. Whitford* 29 Md. 183; *Hill v. West*, 31 Am. Dec. 442. And for further citation of cases on this, see note to *Woolen v. Hillen*, 52 Am. Dec. 690.

¹² *McDonald v. Halse*, 16 Mo. 503; *Berrell v. Schie*, 9 Cal. 104; *Flower v. Elwood*, 86 Ill. 438; *Grimes v. Kimball*, 3 Allen (Mass.), 518.

¹³ 13 Cal. 526.

¹⁴ *Randall v. White*, 84 Ind. 509.

¹⁵ *Fisher v. Spahn*, 4 Can. L. T. 446; s. c., 19 Cent. L. J. 256; *Gregory v. Thomas*, 20 Wend. 17.

¹⁶ *Farmers' Insurance Co. v. German Insurance Co.*, 14 C. L. J. 57; s. c., 79 Ky. 598; *Rumpp v. Gerkin*, 59 Cal. 496; *Tucker v. Alger*, 30 Mich. 67.

¹⁷ *Boone on Mort.*, sec. 142; *Stantons v. Thompson*, 49 N. H. 272; *Webb v. Meloy*, 32 Wis. 319; *Woodward v. Davis*, 53 Iowa, 694.

¹⁸ *Duffy v. McGuinness*, 13 R. I. 595; s. c., 15 Rep. (N. S.) 250.

¹⁹ 59 Cal. 496.

DISTRIBUTION OF ASSETS ON MISTAKEN CONSTRUCTION OF WILL.

In a recent text-book, Mr. Walker's very able and instructive "Compendium of the Law Relating to Executors and Administrators," we find it laid down that, "where an executor or administrator, without any judicial decision, authority, or investigation, pays over the estate to those whom he supposes to be, but who in fact are not, entitled thereto, he must replace it with interest at four per cent.;"¹ but, where an executor, under a *bona fide* belief that they were entitled thereto, himself retained a third of the residue, and paid two-thirds to his co-executors, on being ordered to refund it, he was only held liable to pay interest on the third retained by himself." *Saltmarsh v. Barrett*,² is the authority cited for the latter position, and true it is that Sir John Romilly there held that an executor who paid money under a mistake was not liable, though liable to refund the principal, to pay interest on it. But is that sound law? "Generally speaking," as Lord Cranworth said, in *Attorney-General v. Alfred*,³ "every executor and trustee who holds money in his hands is bound to have that money forthcoming; he is, therefore, chargeable with interest, and is almost always to be charged with interest at four per cent. It is presumed that he must have made interest, and four per cent. is that rate of interest which this court has usually treated it as right to charge." And dealing with the case, not of willful default, but merely of an executor or trustee who has received the trust fund, in respect of which the demand for interest is made, he observed: "What the court ought to do, I think, is to charge him only with the interest which he has received, or which he is justly entitled to say he ought to have received, or which it is fairly to be presumed that he did receive, and that he is estopped from saying that he did not receive it. I do not think there is any other intelligible ground for charging an executor with more interest than he has made than one of those I have mentioned." On the other hand, in the case of willful default, in which an executor, of course, would be more hardly dealt with by the court, the rea-

son he assigned was "because it might fairly infer that he used the money in speculation, by which he either did make five per cent., or ought to be estopped from saying that he did not. The court would not inquire what had been the actual proceeds, but in application of the principle in *odium spoliatoris omnia presumuntur*, would assume that he did make the higher rate—that is, if that were a reasonable presumption." And see *Jones v. Searle*.⁴ Thus, it is not on a mere punitive principle that the court proceeds; and as Lord Hatherley said, in *Burdick v. Garrard*,⁵ "the principle laid down in the case of *Attorney-General v. Alfred* appears to be the sound principle, namely, that the court does not proceed against an accounting party by way of punishing him for making use of the plaintiff's money, by directing rests, or payment of compound interest, but proceeds upon this principle, that either he has made, or has put himself into such a position that he is presumed to have made five per cent., or compound interest, as the case may be." And so observed Lord Justice James, in *Vyse v. Foister*:⁶ "This court is not a court of penal jurisdiction. It compels restitution of property unconscientiously withheld; it gives full compensation for any loss or damage through failure of some equitable duty; but it has no power of punishing anyone. In fact, it is not by way of punishment that the court ever charges a trustee with more than he actually received or ought to have received, and the appropriate interest thereon."⁷

The latter sentence was quoted with acquiescence by Mr. Justice Chitty in *Re Hulkes*, *Powell v. Hulkes*, reported in last Saturday's *Law Times*; and we find the learned Judge referring, also, to another case, *Att.-Gen. v. Kohler*,⁸ where the question was whether an administrator who had wrongly paid over the estate under the intestacy was liable, when he had to account to the next of kin for the principal of the estate, to pay interest. Lord Cranworth, after showing that the administrator had paid away the money in error, and under a mistake of fact, stated his opinion that the administra-

¹ *Turner v. Maule*, 3 De G. & Sm. 497.

² 31 Beav. 349.

³ 4 D. M. & G. 851.

⁴ 49 L. T. N. S. 91.

⁵ L. R. 5 Ch. 333.

⁶ L. R. 8 Ch. 309, aff. L. R. 7 H. L. 318.

⁷ Cf. *Ex. p. Ogle*, L. R. 8 Ch. 717.

⁸ 9 H. L. Cas. 645.

tor was liable to pay interest as a matter of course: "I can discover no ground," he said, "for relieving him from the payment of interest more than from payment of principal. His liability would have arisen from his having improperly paid over to the crown money belonging to the next of kin." The administrator there had been the nominee of the crown, but this was altogether immaterial on the point, and we may add that it had been held before, in *Turner v. Maule*,⁹ that if the solicitor to the treasury, having taken out administration, pays the fund into the treasury, no next of kin appearing, he must, on their appearance, replace the fund with interest at four per cent. Proceeding, then, in reference to the case of payment made by an administrator in a mistaken view of the law or facts, apart from my sinister intent, Lord Cranworth added: "Principle and authority both require that in such a case he should be dealt with as if he had improperly retained the money in his own hands, and his liability to pay interest as well as principal is clear." "The other members of the House of Lords who advise the House in their speeches," continued Mr. Justice Chitty in *Powell v. Hulkes*, "came to the same conclusion, and the judgment of the House of Lords went not simply for the principal, but for the interest. The circumstance that Lord Campbell, who had died before the judgment was given, had formed an adverse opinion is a circumstance, of course, that can have no weight with me. What I have stated is the judgment of the House of Lords, and it is put simply on the ground by Lord Cranworth that the administrator who has improperly paid money away is deemed by a court of equity still to have the money in his own hands. The judgment of Lord Hatherley, in *Middleton v. Chichester*,¹⁰ strongly illustrates what I have been saying. The case was one under the Debtors' Act, 1869. The trustee, who had been ordered to pay by a court of equity any sums in his possession or under his control, was liable to be attached for default of payment, and the question was as to the meaning of the words 'any sums in his possession or under his control.' In expounding the statute Lord Hatherley stated a general proposition of equity upon which he founded

himself, in order to arrive at the true meaning of the words 'in his possession or under his control,' as used in the statutes, and he said: 'But there is a sensible and intelligible construction to be put upon the clause, if you read it as pointing to a person who, in respect of his having held trust funds for which he is accountable, is treated by a court of equity as having them in his possession until he has properly discharged himself.' A payment to a wrong person obviously is no discharge. I think that there Lord Hatherley was correctly stating the view which the court of equity, at least in modern times, has always taken. In order to avoid misapprehension, I would say, that in this case there is no question of willful default. A trustee is liable to be charged with interest on balances in his hands, and I am sorry to say it often happens that trustees are so charged on the further consideration of administration actions. The court never inquires whether the trustee has spent them or what he has done with them, but finds in taking the account that there was a balance remaining in his hands. Where he has received the fund and retained it he is held liable for interest at four per cent., being at the same time at liberty to excuse or justify himself where he shows the exigencies of the trust required that he should retain the money in question in his hands for the purpose of the administration of the estate. What I have stated I consider to be the general law on the subject, and the only exception, as far as decision goes, that I know in modern times, is the decision of Sir John Romilly, in *Saltmarsh v. Barrett*, where he held that an executor who paid the money under a mistake was not liable, though liable to refund the principal, to pay interest on it. If that had been the true view of the law I should have been very glad to follow it, because I am satisfied that cases may occur in which trustees are somewhat severely treated in a court of equity, and have been so. But, in comparing his decision with the higher authorities that I have mentioned, it appears to me the decision cannot be maintained. At least it is one on which I cannot venture to act. If a trustee were excused payment of interest where he acted *bona fide*, according to the decision of Sir John Romilly, I should have a difficulty in dealing with that not uncommon case which

⁹ *Supra*.

¹⁰ 24 L. T. Rep. (N. S.) 178; L. Rep. 6 Ch. 152.

occurs where the trustee, in perfect innocence and good faith, makes an investment which turns out not to be authorized. He is ordered then to replace the fund, and to replace the fund with interest from the time the investment was made. I need not go into the details of such a case as that. Of 'course, if the interest made by the fund is equivalent to four per cent., no question arises; but a question only arises where, as sometimes happens, the investment turns out wholly unprofitable and produces no income whatever. For these reasons, in stating the general principle of the law, I think I am not at liberty to adopt Sir John Romilly's decision."

The learned judge, however, while thus manifesting his construction of the general principle was enabled, on the particular facts of the case, to absolve the executor from payment of the interest. Those facts were very special, and there would not be much practical use in here entering into the details. It will suffice to say that the doctrine applied to them was that an executor will not be charged with interest on payments wrongly made, where the residuary legatee has had the accounts furnished to him, and has been fully aware of the circumstances, and has acquiesced in the erroneous payments. The executor, in fact, appears to have concealed nothing from the person really entitled, who on his part seems to have been fully cognizant of the whole matter. So that there was no resemblance, in this respect, to *Attorney-General v. Alford*, where we find Lord Cranworth saying: "I observe that one of the grounds of misconduct relied upon by the vice-chancellor is, that the defendant did not communicate the matter to the rector and church-wardens (the *cestui que trusts*). This was extremely improper conduct, no doubt, but not in itself such conduct as enables me to make any alteration in the mode in which he is to be dealt with in point of interest. It is not misconduct that has benefited him, unless indeed it can be taken as evidence that he kept the money fraudulently in his hand, meaning to appropriate it." — *Irish Law Times*.

MANDAMUS—PROCEDURE—PRIVATE CORPORATION—INSPECTION OF BOOKS.

PHOENIX IRON CO. V. COMMONWEALTH *ex rel.*

Supreme Court of Pennsylvania, October 4, 1886.

1. *Mandamus — Proper Procedure.*—In Pennsylvania the proper procedure upon a petition for a *mandamus* to be directed to the officers of a private corporation, is to require by an alternative writ of *mandamus* the officer to whom the writ is directed, to show cause, if he can, why the prayer of the petition should not be granted and the peremptory *mandamus* issued.

2. *Return of Writ—Traverse of.*—Upon his return to such writ, the plaintiff may demur to the return, or traverse the allegations of fact therein made, and upon the trial of the issue thus made, the peremptory *mandamus* will be issued, or the prayer of the petition be denied.

3. *Stockholders' Rights—Inspection of Books.*—A stockholder in a private corporation has no right to an inspection of the books of the corporation upon considerations of speculation or for mere curiosity, but if he can, in good faith, show to the satisfaction of the court a *prima facie* case of fraud upon the part of the officers of the corporation, operating to his damage or disadvantage, he will be held entitled, upon proper procedure, to a peremptory *mandamus* requiring the officers of such corporation to submit to his inspection the books and papers of the corporation, or so much of the same as are necessary to furnish the information to which he is entitled under the *prima facie* case made out by him upon the trial of the issue made upon the return to the alternative writ of *mandamus*, so that he can use such information in ulterior proceedings at law or in equity.

Petition for *mandamus ex relatione* George H. Sellers against the Phoenix Iron Company and its officers and directors.

The facts appear sufficiently in the opinion of the court.

CLARK, J., delivered the opinion of the court:

This proceeding originated in an application by George H. Sellers for a writ of alternative *mandamus* against the Phoenix Iron Company, a manufacturing corporation, to compel the company to produce for inspection their books and papers, to enable him to prepare a stockholders' bill in equity, in respect of certain grievances, which the relator alleges he has sustained by the fraudulent mismanagement of the affairs of the company. On the hearing of the rule to show cause, the defendants resisted the application on two grounds: *First*, that there was no right to relief in this form—that the remedy was in equity; and, *second*, if there was such right, the relator was not entitled under the facts. Affidavits were filed in the court below as to the facts, on part of the defendants, and upon argument the writ was refused. The record having been removed to this court, and the refusal of the writ assigned

for error, upon due consideration here the judgment was reversed and the alternative writ allowed. *Com. v. Phoenix Iron Co.*, 105 Pa. St. 111. The plaintiff's case was presented in his petition. The special facts upon which the writ was allowed were fully stated by our brother Trunkey, who delivered the opinion of the court. In some of the States, we believe, the practice is, when the application is by formal petition, setting forth the grounds in detail, to determine the case upon the traverse of the petition, instead of the traverse of the return to the alternative writ (*State v. Union Tp.*, 9 Ohio St. 599); but the practice in Pennsylvania, especially since our statute of June 14, 1836 (*Purd. Dig.* 990), is to hear the case upon the matters alleged in the return.

The 19th, 20th and 21st sections provide as follows:

"Sec. 19. The jurisdiction aforesaid shall be exercised in the manner and according to the rules hitherto observed and practiced in the supreme court of this commonwealth, except so far as the same shall be altered by this act.

"Sec. 20. Whenever any writ of *mandamus* shall issue out of the supreme court, or out of any court of common pleas, the person or persons who, by the laws of this commonwealth, ought to make a return to such [writ] shall make his or their return to the first writ of *mandamus* so issued.

"Sec. 21. It shall be lawful for the person suing or prosecuting any such writ to demur or to plead to or traverse all or any of the material facts contained in such return; and the person or persons making such return shall reply, take issue, or demur; and such other and further proceeding may be had thereon, except as hereinafter provided, as might be had if the person suing such writ had brought his action for a false return."

Upon the rule to show cause the question was upon the sufficiency of the relator's suggestion—his right to the relief prayed for upon the footing of the facts therein stated; and, notwithstanding the latitude allowed in the argument, the opinion filed, and the judgment awarding an alternative writ clearly show that the case was so considered by this court. "Has the relator shown such facts as entitle him to an alternative *mandamus*?" is the inquiry of the learned judge delivering the opinion of the court, and then follows a statement of the facts relied upon, as set forth by the relator.

The proper practice in cases of *mandamus* is very succinctly stated in *Treasurer of Jefferson Co. v. Shannon*, 51 Pa. St. 221, as follows:

"The act of the assembly plainly points out the course to be pursued when a proper suggestion is filed. If it contain the substance of a case for a *mandamus*, the course is to issue an alternative writ commanding the defendant to perform the act required, or return his reason for not doing it. Upon this writ the act provides that the court shall allow the persons suing or defending, such

convenient time to make return, plead, reply, rejoin, or demur as shall be just and reasonable."

If, after issue and trial, the return be adjudged insufficient, then a peremptory *mandamus* will issue to compel the performance of the duty required. The act contemplates regular issues of fact and law, as in other cases. *Barker v. Beeber*, 112 Pa. St. 218; *Keyser's Appeal*, 57 Pa. St. 237. See also *Childs v. Com.*, 3 Brewst. 194. Or, as stated in *Keasy v. Bricker*, 60 Pa. St. 9:

"The ordinary practice is to direct an alternative *mandamus* to issue when the court is satisfied, on affidavits, that the writ should be issued as a matter of justice and right to compel the performance of an act or duty for which otherwise there would be no adequate remedy. This gives the party to whom it is directed an opportunity to do the act, or to show good reason, at the return of the writ, why he should not do it. He does this by making a return to the writ. It is at this point the pleadings in the cause begin. The return may traverse the facts alleged in the writ, or, admitting them, may avoid performance by stating sufficient facts in excuse. The relator may then demur, plead to, or traverse the facts set forth in the return. Such is the ordinary practice recognized by the act relating to *mandamus*."

The alternative writ having been issued and served, the defendants entered of record their return, and the sufficiency of that return is, by the demurrer, made the specific question for determination now. *Com. v. Commissioners Allegheny Co.*, 32 Pa. St. 221. In *mandamus* the relator must in all cases establish a specific legal right, as well as the want of a specific legal remedy. *Com. v. Rosseter*, 2 Binn. 362.

When this cause was here before we held that, in the absence of any restriction in the charter, the right of a stockholder in a trading corporation to an inspection of the books, papers, and accounts was, in certain cases and under certain limitations, incident to the relation of a stockholder to the company. Of course, a stockholder is bound by the corporate articles. Where the right of inspection of the corporate books and papers is qualified by express stipulation, those who become members are subject to the qualification. But the doctrine of the law, as we then said, "is that the books and papers of the corporation, though of necessity left in some one hand, are the common property of the stockholders," and, "unless the charter provides otherwise, a shareholder has the right to inspect them, and to take minutes from them for a definite and proper purpose, at reasonable times." The facts set forth in the writ are by the return in part denied, in part qualified, and in part admitted; but assuming the correctness of the return as far as it goes, and the facts set forth in the petition not traversed thereby, the following facts may, we think, for the purposes of this case, be deemed admitted:

The Phoenix Iron Company was incorporated April 27, 1855, for the purpose of engaging in

mining and manufacturing iron, etc., with a capital stock of \$500,000, divided into 5,000 shares of \$100 each. The relator, on the twenty-ninth November, 1866, became the owner of 238 shares of said stock, paying therefor \$38,500, and he still owns 235 of the said shares. David Reeves and William H. Reeves, at the time of the filing of the petition, either individually or jointly, and as trustees, were, and for several years had been, the holders of and controlled nearly all of the remaining shares. The number of shares held in trust was 2,875. These shares were held for the children of Samuel J. Reeves, deceased, viz., Elizabeth H. Carson, Clara R. Tyson, Jennie J. Reeves and the said David and William H. Reeves, each being entitled to one-fifth of 2,875 shares, or 575 shares. Since these proceedings were instituted, these trust shares have been divided, and transferred to the several persons entitled. David Reeves and William H. Reeves, however, severally and jointly, are still the owners of 2,033 of said shares. The board of directors consists of five persons: David Reeves, president, William H. Reeves, Carroll S. Tyson, John Griffin, and George Gerry White, the last three named being each the owner of but a single share of stock.

The works of the company are among the most extensive in the country, and the business, during the whole period of its existence, has been in a highly prosperous condition. The business of the company from 1870 to 1880 averaged \$2,000,000 per annum. In 1879 it amounted to \$2,705,036.11, and in 1880 to \$2,448,668, and the average profit upon this trade is estimated to be at least 15 per cent. The charter of the company provides for dividends of the actual net profits, to be declared at the discretion of the directors, but no dividends have been declared for a period of nine years. The capital stock represents an investment of about six times its par value, but the real estate of the corporation is still subject to a mortgage of \$1,150,000, while a portion has been recently conveyed to secure an alleged indebtedness of \$322,000, in which the said David and William H. Reeves are themselves interested. The business of the Phoenix Iron Company, prior to 1868, had been engaged, not only in the manufacture of iron materials for bridges, viaducts, etc., but for the erection of such structures.

The firm of Clark, Reeves & Co., consisting of Thomas C. Clarke, David Reeves, Jr., John Griffin, and others, was engaged, as engineers and contractors, in designing and erecting structures made partially or wholly from iron materials, such as the Phoenix Iron Company made. In the year 1868, the Phoenix Iron Company ceased to act as iron builders, and, excepting in one or two instances, confined its operations to the manufacture of iron building materials. In October, 1870, the Phoenix Iron Company entered into an agreement with Clark, Reeves & Co., by the terms of which the company agreed and became bound permanently to withdraw from the business of construction, and to confine their operations to the manu-

facture of materials alone. Clarke, Reeves & Co., on the other hand, agreed and became bound to pursue the business of construction; to purchase, at certain rates, their materials wholly from the Phoenix Iron Company, and at the completion of each contract to pay to the Phoenix Iron Company one-half of the net amount which they might receive by reason of the contract. This contract, originally in parol, took effect from October 22, 1870, but was not reduced to writing until May 21, 1871. At the time it was originally agreed upon, no member of the firm of Clarke, Reeves & Co. had any interest in the corporation. The shares were then held as follows: David Reeves, the elder, 2,500; Samuel J. Reeves, 2,262; George H. Sellers, 238. Nor did the relator, who was then consulted in the matter, make any objection to it. Since that time, however, he has not been at any time consulted as to the renewal of the contracts from year to year. David Reeves, the elder, died in March, 1871, however, and David Reeves, the younger, who was of the firm of Clarke, Reeves & Co., became entitled, as legatee, to 50 shares. Until December, 1878, none of the firm of Clarke, Reeves & Co. had any of the corporate shares of the Phoenix Iron Company, excepting David Reeves, who had the 50 shares mentioned, and John Griffin, who, at the request of David and Samuel J. Reeves, held one share each.

In December, 1878, Thomas J. Reeves died, and thereafter David Reeves and W. H. Reeves, his sons, held the controlling interest in the company, and it is charged that through their votes, and those of the other directors whom they elect, and who have but a merely nominal interest in the corporation, they have and exercise absolute control over all the affairs of the corporation, and that they unjustly and intentionally manage it in such a way as to advance their own personal interests, to the injury of the relator; that the officers and directors of the corporation have abused the discretion conferred upon them in refusing to declare dividends of the profits, as contemplated in the charter; that the profits and estate of the corporation are illegally absorbed by the individuals who control it—in part through the instrumentality of the contract with Clarke, Reeves & Co., in part by voting themselves large salaries, in part by the conveyance to themselves in trust, with power of sale, of a large portion of the real estate of said corporation to secure indebtedness in which they are themselves immediately interested, and otherwise. At a meeting of the stockholders, Sellers asked for information as to the affairs of the company, and the directors refused either to permit the minutes to be read, or the papers to be examined. His request to the president that a time and place might be named for such an examination of the books as would give him the information proper to a stockholder was refused, and a similar demand, made of the officers and directors at the office of the corporation, during business hours, was in like manner

refused. The relator states that his purpose is to file a bill in equity to obtain relief against the abuses complained of.

Under the circumstances mentioned, and for the purposes stated, we are of the opinion that, according to our ruling when the case was here before, the relator is clearly entitled to an examination of the books and papers of the company. Such a right is, of course, not to be exercised to gratify curiosity, or for speculative purposes, but in good faith, and for a specific, honest purpose, and where there is a particular matter in dispute involving and affecting seriously the rights of the relator as a stockholder.

We cannot say that the matters involved have already been adjudicated in the decree of the circuit court of the United States. We cannot anticipate the bill which the relator may bring. What specific relief he may seek can now only be the subject of conjecture. It will be time enough to determine the question of *res adjudicata* when the case is presented. The question now is as to the relator's right to inspect the books. He avers that he proposes filing a bill in equity against the corporation and its officers, and that it is necessary that he see the books and papers in order that he may correctly state the facts now concealed from him. As we said in the former opinion of this court, upon learning the facts, he may abandon his purpose for want of matter of complaint. He desires "to inspect and see whether he can raise a particular case in his favor by examining the books." He is a stockholder, to a very considerable amount, in what appears to be a prosperous and highly profitable trading corporation. For nine years, although large profits have admittedly accrued, no dividends have been declared. The profits are in no way accounted for. He is denied all access to the books and papers for information. At a regular stockholders' meeting the minutes, because of his presence, were suppressed, the examination of papers prevented, and the meeting adjourned while the relator held the floor asking for information. A stockholder in a trading corporation must certainly have some rights which a board of directors should respect. Sellers was not bound to accept the mere statement of the board, whether under oath or otherwise, as to the contents of the books, etc. He had a right to a reasonable personal inspection of them, and with the aid of a disinterested expert, might make such extracts as were reasonably required in the preparation of the bill he proposed to bring.

The relator, we think, has a clear right, under the writ and return, to the relief he asks; and it is plain he has no specific legal remedy for the enforcement of that right, and the existence of a supposed equitable remedy is not a ground for refusing the *mandamus*. *Com. v. Commissioners Allegheny Co.*, 32 Pa. St. 223. The requirements of the writ, of course, can cover only such books and papers as are actually in exist-

ence, and only such of those as may contain information upon the subjects specified.

The judgment is affirmed.

NOTE.—Right of Stockholders to Inspect Books and Papers.—Although the cases on this interesting topic are few in number, yet they are entirely harmonious in their rulings, and have settled the general rule in such a manner that its application to any given case must be a matter of easy deduction. The principle is, that a shareholder in a trading corporation has the right to inspect its books and papers, and to take minutes from them, for a definite and proper purpose, at any reasonable time; and that if he is denied this privilege, the courts will lend him their authority by the process of *mandamus*. This right is not a statutory one; it rests on the common law. The doctrine of the law is, that the books and papers of the corporation, though of necessity kept in some one hand, are the common property of all the stockholders. At the same time, the right may be limited or restricted by the charter of the company, to which every shareholder assents, or by statute.¹ Mr. Morawetz says: "In the United States the prevailing doctrine appears to be that the individual shareholders in a corporation have the same right as the members of an ordinary partnership to examine their company's books, although they have no power to interfere with the company's management."² But still there must be a proper *motive for the inspection*. It must not be for the purpose of gratifying mere curiosity, nor because of a general dissatisfaction with the management of the concern, nor to use the information for improper or fraudulent ends, nor to see if some complaint or charge cannot be trumped up against the corporate body. "It is necessary that there should be some particular matter in dispute between the members, or between the corporation and individuals in it, in which the applicant is entitled, and in respect of which the examination becomes necessary."³ Thus, in *Rex v. Merchant Tailors' Co.*,⁴ decided half a century ago, it was held that the court will not grant an application by members of a corporate body for a *mandamus* to inspect the documents of the corporation, unless it be shown that such inspection is necessary with reference to some specific dispute or question depending, in which the parties applying are interested; and the inspection then will only be granted to such extent as may be necessary for the particular occasion; and the writ was refused, because the applicants merely alleged grounds on which they believed the affairs of the corporation were improperly conducted, and the officers unduly chosen, and complained of mismanagement in some particular instances not affecting themselves or any matter then in dispute."⁵ In *Martin v. Oil Works*,⁶ it was ruled that a stockholder of a corporation has a right to know how its affairs are conducted; that the board of directors, authorized by the charter to exercise all the powers of the corporation, could not rightfully deprive him of personal inspection of

¹ See *Com. v. Phoenix Iron Co.*, 105 Pa. St. 117; *Union Bank v. Knapp*, 3 Pick. 96, 106; *People v. Throop*, 12 Wend. 183; *Deaderick v. Wilson*, 8 Baxt. 108; *State v. Einstein*, 46 N. J. L. 479; *Union Bank v. Hunt*, 76 Mo. 489; *Wannell v. Kern*, 57 Mo. 478; *Angell & Ames on Corp.*, § 681; *Redfield on Railw.* 227; *Grant on Corp.* 311; 2 Phillips on Ev. 313; 1 Whart on Ev., § 746.

² 1 Morawetz on Priv. Corp., § 478.

³ 2 Addison on Torts, § 1496.

⁴ 2 B. & Ad. 115.

⁵ *Com. v. Phoenix Iron Co.*, 105 Pa. St. 117. And see *Rex v. Hostmen*, 2 Stra. 1228; *Re Burton*, 31 L. J., Q. B. 63.

⁶ 23 La. Ann. 204.

the books and papers, that he might learn the condition and affairs of the company, so that he could vote understandingly at a meeting of the stockholders. But it may be questioned whether this case does not overstep the rule. A shareholder in a joint-stock company is not entitled to an inspection of the books for the purpose of proving a plea of justification in an action against him for libel, imputing insolvency to the company.⁷

Right to Take Copies.—Where a statute gives a stockholder the right to inspect the books in which the transfers of stock are registered, and the books containing the names of the stockholders, within thirty days previous to an election of directors, this gives him also the right to take a copy or memorandum of the names of the stockholders, this being necessary to make the information to which he is entitled available for his use.⁸

What Books and Papers.—The right only extends to such documents as are necessary to the stockholder's particular purpose. A demand of an inspection of all the books, records and papers of the company is too broad.⁹ But, under a statute providing that the stock and transfer books of incorporated companies shall be open to examination of stockholders, a stockholder cannot be denied the right to inspect them because they are kept in a particular way, nor because they contain, besides the information to which he is entitled, other information which he has no right to demand; and if the corporation does not keep the books which the statute prescribes, it is its duty to permit an inspection of such as it does keep for the purpose of recording the transactions which the statutes give the stockholders the right to know.¹⁰ Unless restricted by the charter, or by rules or by-laws passed in conformity thereto, a stockholder in a banking company has a right to inspect the "discount book" of the bank, within proper and reasonable hours.¹¹

Proper Demand.—To entitle the stockholder to the aid of the court, he must show a proper demand made by him upon the custodian of the corporate records and documents, at a proper time and place and for a proper reason, which has been refused; the application must be shown to have been made at the office of the company during proper business hours, or a reason for its not having been made there must be shown.¹² In an action against a corporation to recover the penalty provided by statute for refusing an inspection of the stock-book of the company, the complaint must show that the officer upon whom the demand for inspection was made, had notice that the person making the demand was entitled to the inspection.¹³

⁷ Metropolitan, etc. Co. v. Hawkins, 4 Hurl. & N. 146.

⁸ Cotheal v. Browner, 5 N. Y. 562; 10 Barb. 216.

⁹ People v. Walker, 9 Mich. 323. And see Regina v. Maraquita Co., 1 Ellis & E. 289.

¹⁰ People v. Pacific Mail Co., 50 Barb. 280.

¹¹ Cockburn v. Union Bank, 13 La. Ann. 289.

¹² People v. Walker, 9 Mich. 323.

¹³ Williams v. College, 45 Ind. 170.

CRIMINAL LAW—SUMMONING AND SELECTION OF JURY—SHERIFF DISQUALIFIED—DEFENDANT'S PRESENCE NECESSARY.

STATE V. CROCKET AND SMITH.

Supreme Court of Missouri, Nov. 15, 1886.

1. *Coroner to Summon Jury When Sheriff Disqualified*.—When the sheriff of the county is disqualified from acting in summoning the jury by reason of his prejudice against defendant, the court errs in selecting another person, other than the coroner, to summon the jury, where it is not suggested that the latter is disqualified.

2. *Defendant Must be Present When Jury is Impaneled*.—Upon a trial for a felony, it is error to permit the jury to be impaneled in absence of the defendant, although his counsel was present, and although the defendant was voluntarily absent, being out on bail, and although, when the trial was called, the court gave defendant an opportunity to further examine the jurors.

3. *Defendant Must be Present at Each Step, Except Voluntarily Absent at Time of Receiving and Entering Verdict*.—§ 1891 R. S. Mo.—Under § 1891, R. S. Mo., 1879, in all cases of felony it is necessary that the defendant should be personally present in court at each and every material step taken during the trial up to the time the verdict is to be received, when the verdict may be received and entered in his absence if the same is willful or voluntary.

Appeal from Audrain county.

George Robertson, for appellant; B. G. Boone, attorney-general, for the State.

The facts appear sufficiently in the opinion of the court:

RAY, J., delivered the opinion of the court:

Defendant Ann Crocket was indicted at the June term, 1883, of the Audrain circuit court for arson, and the other defendants, Smith, Redman and Glover, were jointly indicted with her for inciting, etc., her to commit the offense. At said term the prosecuting attorney entered a *nolle* as to the defendant Ann Crocket. A severance was taken, and a separate trial of the defendant Smith at the October term resulted in the failure of the jury to agree.

At said first trial, defendant made affidavit against the sheriff and his deputy charging them with prejudice against him, and the court thereupon appointed one Dobyns to summon the special venire, and said Dobyns acted in that behalf at the first trial of the cause. At the January term (when the second trial occurred and this conviction was obtained), said Dobyns declined to further act, and the court thereupon (against the objection of the defendant) appointed one Joseph James, who was not the coroner of the county, to act in this behalf. Defendant renewed his said objection to the appointment of said James, and his authority to summon the jury, by filing his motion to quash the panel upon said ground, among others, that the court having found the sheriff disqualified to act in summoning the jury,

by reason of prejudice against the defendant, the coroner of the county was the only officer designated by the statute to act in this behalf in the place of said Sheriff. Secs. 3893, 3894, 3895, Rev. Stat. 1879.

This motion was overruled, and this action of the court is assigned and urged here as error.

At common law, the coroner was authorized to perform the duties devolved on the sheriff in summoning a jury, whenever the sheriff was incompetent to act, and in this event the process of the court was directed to the coroner instead of the sheriff. If it was suggested or made to appear that the coroner was also disqualified, then the court appointed persons of its own nomination, called *elisors*, to act in that behalf.

Said *elisors* were particular officers of the court, acting under its special authority.

Sec. 3894, Rev. Stat., provides that "every coroner within the county for which he is elected or appointed shall serve and execute all writs and precepts and perform all other duties of the sheriff, when the sheriff shall be a party, or when it shall appear to the court out of which process shall issue, or to the clerk thereof in vacation, that the sheriff is interested in the suit related to or prejudiced against any party thereto, or in any wise disqualified from action."

Sec. 3895 authorizes the coroner to perform the duties of the office of sheriff whenever the same shall be vacant by death or otherwise, until another sheriff shall be appointed and qualified.

In the case at bar, it was not made to appear, or even suggested, that the coroner of said county was under any disability to act in the matter of summoning the jury, and, under this state of facts, the sheriff being thus disqualified and removed, the coroner was the proper officer, both at common law and under the statute, to act in that behalf.

We have been referred to a class of cases holding, in effect, that the capacity of an officer, such as a sheriff, duly commissioned and acting as such cannot be inquired into collaterally upon a motion to quash the venire; but these cases are, we think, not applicable.

The plain purport of the statute is to substitute the coroner for the sheriff, in respect to the duties of such officer, whenever the contingencies contemplated arise; and where the law thus devolves the performance of such duties upon a designated officer, they are not authorized to be performed by another officer, or any different person, without, at least, some suggestion of disability on his part, except in the cases and upon the terms provided in section 3893, Rev. Stat.

In executing the special venire, the officer exercises the power of selection confided to the sheriff at common law, and the character of the officer performing this duty is important and material, and if such duty is performed by an officer not authorized, this is, we think, a good ground of challenge to the array. *Thompson and Merriam on Juries*, p 115; *State v. Newhouse*, 29 La. p 824.

As one of the contingencies contemplated by the statute had arisen, and the court upon that ground had removed the sheriff, the special venire should, we think, have been directed to the coroner of the county, as provided by the statute, in the absence at least of any suggestion of inability on his part for any cause to act in that behalf. Another error complained of is, that the defendant was not present in court whilst the jury was being impaneled and examined as to their qualifications to sit as jurors in the cause. The facts in this behalf, as the same appear in the record before us, are as follows:

The defendant was not in court, except by his counsel, when the *venire facias* was issued, nor when it was returned by said James, nor when the jury was examined on the *voir dire*, nor at any time during the proceedings in said cause, till the jury was called to try the same on the 8th, day of February 1884, at one o'clock p. m., which was four days after the venire was issued, and forty-eight hours after said jury was examined on the *voir dire*; but at the expiration of the forty-eight hours from the time the copy of the list of jurors was served on the defendant, and before the State or the defendant was required to make challenges, the said panel of jurors being present in the court, and the defendant in person also being present, and his attorney also, the court then informed defendant and his counsel that they now had an opportunity to make such further examination of the jurors as they might deem proper; whereupon defendant's attorney said they would then demand an additional forty-eight hours before making their challenges, which the court refused to give, and defendant's counsel thereupon declined to make such further examination of the jurors. Before exercising his right of peremptory challenges defendant filed his motion to quash the panel upon said ground of his absence as aforesaid, which the court overruled, and defendant excepted. The question thus presented involves a construction, in connection with this state of facts, of section 1891, Rev. Stat., which provides that: "No person indicted for a felony can be tried unless he be personally present during the trial, * * * that in all cases the verdict of the jury may be received by the court and entered upon the records thereof in the absence of the defendant, when such absence on his part is willful and voluntary; * * * and that when the record in the appellate court shows that defendant was present at the commencement or any other stage of the trial, it should be presumed, in the absence of all evidence in the record to the contrary, that he was present during the whole trial."

At common law, if the accused was in such cases absent, either in person or by escape, there was, by reason of his said absence, a want of jurisdiction over the person, and the court could not proceed with the trial or receive the verdict or give judgment. *Cooleys Const. Lim.* p. 390.

But, under the statute, if the absence of the de-

fendant is willful and voluntary, the court is authorized to receive and enter the verdict, and this by the express terms of the statute, the only action the court is authorized to take "during the trial," where the same is for a felony, unless the accused is "personally present."

In other words, the statute means, we think, that in all cases of felony it is necessary that the defendant should be personally present in court at each and every material step taken during the trial up to the time when the verdict is to be received, when the particular steps mentioned in the statute, of receiving and entering the verdict may be taken during his absence, if the same is willful and voluntary.

Impanelling and examining the jury is, we think, manifestly a material, substantive and important step "during the trial," within the meaning of this section. As was said in the case of *Hopt v. People*, 18 Cent. L. J. p. 271, which involves, we think, the same principle and question as the one at bar, "the prisoner is entitled to an impartial jury composed of persons not disqualified by the statute, and his life and liberty may depend upon aid which by his presence he may give to counsel and court in the selection of jurors. The necessity of defense may not be met by the presence of his counsel only. For every purpose involved in the requirement that defendant shall be personally present where the indictment is for a felony, the trial commences at least from the time when the work of impanelling a jury begins."

In the case at bar, the accused was out on bond and not in prison or custody; but this, we think, under the statute, makes no difference, even if we must infer, as suggested by counsel, that his said absence was voluntary on his part. As already said, if his absence is willful and voluntary the verdict may be received and entered of record, for the reason that these steps during the trial are expressly authorized by the statute, but the expression of authority thereon to do these particular acts must be held to exclude all authority to take any other step "during the trial," unless the accused is personally present. This requirement of the statute is one he cannot waive. It is not made for his benefit only, and his rights are not all that is involved or contemplated in said enactment. In the case already cited, the court further says: "We are of the opinion that it is not within the power of the accused or his counsel to dispense with the statutory requirements as to his personal presence. The argument to the contrary proceeds upon the ground, that he alone is concerned as to which he may be deprived of, life or liberty, and that the chief object of the prosecution is to punish him for the crime charged. But this is a mistaken view, as well of the relation which the accused holds to the public as of the end of human punishment * * *. The public has an interest in his life and liberty. Neither can be lawfully taken except in the mode prescribed by law. That which the law makes essential in pro-

ceedings involving the deprivation of life or liberty can not be dispensed with or affected by his consent of the accused, much less by his mere failure when on trial and in custody to object to unauthorized methods. * * * Such being the relation which the citizen holds to the public and the object of punishment for public wrongs, the legislature has deemed it essential to the protection of one whose life is involved in a prosecution for felony that he shall be personally present at the trial, that is, at every stage of the trial when his substantial rights may be affected by the proceedings against him. If he be deprived of his life or liberty without being so present, such deprivation would be without that due process of law required by the constitution."

To the same effect is the line of cases to which we have been referred, decided in the supreme court of Arkansas. See *Osborne v. State*, 24 Ark. 629; *Brown v. State*, 24 Ark. 620; and earlier cases in same court cited in cases just mentioned. But it is contended for the State that this omission is cured by the subsequent offer of the trial court when the case was called for the purpose of making peremptory challenges and proceeding with the trial, to allow the accused to then examine the jury as to their qualifications, and that as he declined to do so at this time none of his substantial rights were affected prejudicially.

But this view is, we think, not satisfactory for a variety of reasons. In the first place, examine the jurors when the accused was not personally present, was not merely an irregularity in the mode and process of impanelling the jury, as to which a large discretion is allowed the trial court, and whose action it is said will not as to such irregularities be reviewed, unless some actual prejudice to the defendant is made to appear; but on the contrary, the examination conducted in his absence, as we have seen, was a breach and infringement of the statute requiring the accused to be personally present at this step during the trial, and this in and of itself, and as a matter of law, sufficiently shows the prejudice, or, in other words, prejudice to the rights of the accused, is under such circumstances, presumed, without any showing in that behalf.

The court upon discovering the absence of the accused during said examination, doubtless thought it could give the defendant the full benefit of his substantial rights by permitting him to then and there examine the jurors as to their qualifications, without discharging the entire panel, or without allowing any further period of time as demanded by defendant, before requiring the exercise by the parties of their peremptory challenges.

But the examinations of jurors as to their qualifications as such does not, we think, consist altogether or exclusively in their examination in said respect by the accused, or his counsel, which is the extent of said offer so made by the court. Their examination by the prosecution attorney, or by the court, or both, as to their qualifications

under the statute, and such further examination, if any, became necessary or proper in the examination of the case, as to other cause of disqualification than those mentioned in the statute, and such other examination made by the State's attorney, if any, with a view to the exercise of his peremptory challenges, all constitute a part, or may do so, of the examination and trial of the jurors in this behalf. The opportunities for observing the conduct and bearing and manner of the juror throughout the whole examination, as well that by the State as that on his own behalf, may be of great value to the accused.

The accused has opportunities thus afforded for inquiry and for comparison, and for inspection of the jurors personally as they thus undergo the examination as a whole. The practice at common law required the examination of the jurors singly, so that the accused should not be confused "by looking upon a multitude of faces at once," but might have opportunity to scan the countenance and observe the demeanor of each separately. But whether this practice prevails or not, it is the intention and aim of the law to provide liberal facilities and opportunities for securing a fair and impartial jury.

Even if the time and facilities intended to be provided by the law for the selection of the jury were not in fact abridged by this action of the court, there has been an infringement of the statutory requirement that the accused should be personally present during the trial, for the jury had been in part examined touching their qualification during his absence. This was, we think, a ground of challenge to the array, and as the defendant was insisting upon his right under the statute to be personally present during this part of the trial, his said motion should have been sustained upon this ground.

For the reasons above stated, we are of the opinion that the trial court erred in overruling defendant's motion, above complained of, and for that reason its judgment is reversed and the cause remanded for further proceedings, in conformity thereto.

All concur, except HENRY, C. J. not sitting.

NOTE.—The proper practice in summoning juries in case of the incompetency of the sheriff, duly ascertained by the court, is at common law very clearly settled, and the Missouri statute in effect merely reproduces and restates the rule. The only ministerial duty of the coroner is to act in proper cases as the substitute, not the deputy, of the sheriff, and to execute all such process as it would have been the duty of the sheriff to execute if he were competent to do so. The coroner cannot execute process directed to the sheriff.¹ Upon the same principle an ex-sheriff cannot act upon a writ directed generally to "the sheriff,"² or by name to his successor,³ although the subject-matter and the character of the process be such that it might well have been directed to the ex-officer,

who could have lawfully executed it. The rule is very clear that it is essential not only that legal process shall be issued by competent authority and for a lawful purpose, but must also be directed to the proper official person who alone can perform the duty either himself or in proper cases by his lawful deputy. And the rule applies to every variety of precept or process issuing from a court in civil, and *a fortiori*, in criminal cases.

In the principal case, therefore, it is very obvious that the trial court exceeded its authority in passing over the coroner and issuing its precept to a private person, it not appearing that the coroner was disqualified or unable to discharge the duty which devolved upon him by reason of the disqualification of the sheriff.

If, therefore, the trial court erred in issuing the *venue* to an unsuitable person, it is manifest that the panel should have been quashed in accordance with the motion of the defendant, and that the jury so summoned by that private person in accordance with the void process so issued was simply no jury at all.

The law of Missouri provides⁴ that no person indicted for a felony can be tried unless he is personally present during the trial. To this rule some exceptions are made by the statute as where his absence is willful, but the rule itself is in full accord with the general law prevalent elsewhere. The prisoner must be present at the arraignment, and indeed throughout the trial.⁵ "In indictments and informations," said Eyre, J., "no judgment can be given unless the defendant appears."⁶ In cases of misdemeanor, it is true, the rule is less rigid, but in felony cases the personal presence of the defendant is required, even when minor and incidental matters are under consideration. A motion for a change of venue may be made and decided in the defendant's absence, in Missouri;⁷ in Alabama such an order cannot be made unless the defendant is present.⁸ The court says: "This right" (to be heard by himself and counsel) "is without any limit and without any exception when the step is not one of mere discretion in the court, such as a motion for a continuance, when the accused fails to be present, and orders of a like character. This is a constitutional provision in his favor and cannot be disregarded by the court."⁹ And, in Mississippi, it has been held that upon a motion to quash an indictment for felony, the record must show affirmatively the personal presence of the defendant.¹⁰

In some States it has been held that the counsel of the defendant cannot waive his right to be present during his trial or at the rendition of the verdict for a felony;¹¹ and, further, that the right of the defendant to be present on the occasion is "inherent and inalienable," or, in other words, that he himself cannot waive that right. There is a similar ruling in Alabama.¹² In a Virginia case, the language is very positive on this subject: "No principle is supposed to be better settled, and, in all criminal trials of the grade of felony, more rigidly adhered to than in all such trials the prisoner has a right to be present in every stage from the arraignment to the rendition of the verdict. It is held to be a right of which he cannot be deprived and which

¹ 1 Rev. Stat. Mo. (1879) § 1891.

² Younger v. State, 2 W. Va. 579.

³ Reg. v. Simpson, 10 Mod. 248, 250.

⁴ State v. Elkins, 68 Mo. 159.

⁵ Ex parte Bryson, 44 Ala. 401.

⁶ State v. Hughes, 2 Ala. 102; Henry v. State, 33 Ala. 102; Hall v. State, 40 Ala. 698.

⁷ Long v. State, 52 Miss. 23. See also Stubbs v. State, 49 Miss. 724; Scaggs' Case, 8 Smed. & U. 726; Price's Case, 36 Miss. 542.

⁸ Price v. Commonwealth, 18 Penn. St. 106.

⁹ Waller v. State, 40 Ala. 325.

¹ Weston v. Coulson, 1 W. Blackst. 506; Brown v. Barker, 10 Hump. 346.

² Tarkington v. Alexander, 2 Dev. & Batt. L. 91.

³ Sprull v. Bateman, 4 Dev. & Batt. L. 489.

he cannot waive. So imperative is the rule that no part of the trial can proceed without him."¹² In Tennessee,¹⁴ the court says: "In criminal cases of the grade of felony * * * he (the accused) has the right to be present, and *must* be present during the trial and until the final judgment." In Georgia, it is said that it is the legal right and privilege of the defendant to be present in court, and he must be considered as "standing on all his legal rights, waiving none of them."¹⁵ In Wisconsin, the rule is somewhat less rigid than heretofore stated. It is conceded that the defendant in felony cases has a *right* to be present throughout the trial, but it is held that he may waive that right, either explicitly or by his willful absence. The court argues, that as he may waive any trial at all by pleading guilty he may waive, as well as the greater, any minor right that he may possess.¹⁶ In Ohio, it is held that it is not error to permit a verdict to be rendered in the absence of defendant, unless that absence is caused by imprisonment or other improper means.¹⁷ And in Indiana the court decides that the constitutional and legal right of the prisoner to be present throughout the trial confers a privilege which he may waive. The court says: "He can waive a trial altogether, and plead guilty. He can waive the constitutional and legal privileges of trial by jury."¹⁸

Upon a review of the whole subject, it is manifest to us that the weight of authority is with the supreme court of Missouri in the principal case.—[EDITOR CENT. L. J.]

¹² Jackson v. Commonwealth, 19 Gratt. 656, 668, 664.

¹⁴ Andrews v. State, 2 Sneed, 550. See also Witt v. State, 5 Cold. 11.

¹⁵ Wade v. State, 12 Ga. 26. See also People v. Perkins, 1 Wend. 91; Rex v. Streek, 2 Carr. & P. 413.

¹⁶ Hill v. State, 17 Wis. 675.

¹⁷ Wilson v. State, 2 Ohio St. 319. See also Rose v. Ohio, 20 Ohio, 53.

¹⁸ McCorkle v. State, 14 Ind. 30.

USURY — BROKER — COMMISSIONS — FEES FOR SERVICES.

MACKEY V. WINKLER.

Supreme Court of Minnesota, September, 30, 1886.

An agent or broker who undertakes to procure a loan for a borrower of money, may charge and receive from him a reasonable sum for commissions, as well as for services in the examination of the property by which the debt was secured, and, although such broker be also the agent of the lender to lend the money, the commissions, etc., so received by the agent cannot be regarded, as against the lender, as an usurious addition to the interest, unless it appears that the sum so charged was paid to him by such broker.

BERRY, J., delivered the opinion of the court: The plaintiff, Safford Mackey, who resides in Wisconsin, was in the habit of sending money to F. J. Mackey, a loan broker doing business in St. Paul and Minneapolis, to be loaned out by him, and under his direction, at ten per cent. interest. The loans were made in plaintiff's name, and for him, but plaintiff paid F. J. Mackey

nothing for his services. On December 9, 1884, defendant made to F. J. Mackey a written application, which, so far as here important, is as follows: "I * * * hereby apply to F. J. Mackey to act as my agent to procure for me a loan of \$367.50, for one month, with interest at ten per cent. per annum, to be secured by chattel mortgage on personal property owned by me, * * * and described in a certain chattel mortgage executed by me, and bearing even date herewith; and I agree to pay same F. J. Mackey, for acting as my agent in procuring such loan, and for examining said property, and drawing the necessary papers to perfect such loan, if he is able to procure the same, the sum of \$17.50. He is to charge me nothing for examining said property, or for his services of any kind, unless he procures said loan for me."

Pursuant of the application, F. J. Mackey made a loan to defendant, taking his note, payable to plaintiff, for \$367.50, and as security for the same a chattel mortgage upon furniture and fixtures belonging, as we infer, mostly, if not altogether, to a Turkish bath establishment; handing to plaintiff \$350 of said sum in cash, and retaining for his own personal benefit \$17.50. The court finds that "the said F. J. Mackey charged the defendant a commission of \$17.50 for procuring the loan, examining the property on which the security was to be given, drawing papers and the like, which commission it was agreed was to go to, and which did go to, the said F. J. Mackey personally, and none of it went to plaintiff; nor did he (the plaintiff) know anything about it, or how the said F. J. Mackey remunerated himself for expense and time in his business as a loan broker, the said plaintiff never at any time receiving over 10 per cent. on his loans."

Upon the foregoing state of facts we agree with the trial court that the note and mortgage are not shown to be usurious. The sum of \$17.50 does not appear to have been taken for the loan and forbearance of the \$350, but as a commission for services performed for the borrower. There is no evidence and no finding by the trial court that the commission was an excessive or unreasonable charge for the services performed for the borrower. See *Bonus v. Trefz*, 2 Atl. Rep. 369. No part of it went to the plaintiff—the lender of the money—but it was not contracted for, charged, and taken by F. J. Mackey for his own exclusive use. These facts appear to bring the case within *Acheson v. Chase*, 28 Minn. 211, s. c., 9 N. W. Rep. 734, and to distinguish it from *Avery v. Creigh*, ante, 154, (April term, 1886).

VANDEBURGH, J. (concurring): I agree that, upon the facts found, the case may fall within the rule laid down in *Acheson v. Chase*. At the same time it seems to me that it leaves the door open for a practical evasion of the usury law in many cases. But it would be better, undoubtedly, that a rule which has been recognized and acted on should be changed by legislation, which would, of course, relate to future contracts only, than

that an attempt should now be made to change it by the courts. I therefore concur in the opinion.

NOTE.—Where one person authorizes another to act as his agent in securing a loan and contracts to pay such agent for his services what they are reasonably worth, or a bonus in addition thereto, and such person, acting solely as the agent of the borrower, secures the loan and exacts from the borrower a sum sufficient to make the total rate of interest paid more than the highest legal rate, the contract with the lender is not usurious when the amount to be received by him is within the legal rate, and he does not share in the amount paid the agent.¹

A contract by which the borrower is to pay his agent for his services what they are reasonably worth, though in addition to the highest legal rate of interest to be paid the lender, is not usurious.² And that the borrower's agent divides his commission with the lender's agent will not, it has been said, taint the lender's contract with usury.³ In one case it was held that the fact of the borrower's agent having divided his commission with the lender would not necessarily have such an effect.⁴

It has been held that, where the lender or his agent is put to expense in collecting the means for making the loan or in traveling to examine the security, and the borrower agrees to pay for such services in addition to the highest legal rate of interest on the loan, the taking of a fee for such services, when reasonable, will not render the contract usurious.⁵

Whether the taking from the borrower by the lender's agent of a commission or bonus in addition to the highest legal rate of interest to be paid the lender will taint the transaction with usury, is not very well settled. If, at the time of making the loan, the lender has knowledge of the bonus paid his agent, doubtless the transaction should be declared usurious.⁶ But it is in cases where the lender's agent, without the knowledge or authority of his principal, receives such a bonus, of which the lender receives no part, that the greatest contrariety of opinion prevails. In *Palmer v. Call*,⁷ McCrary, J., said: "It is well settled that to make a loan usurious there must be an intent on the part of the lender to take more than the legal rate of interest. * * * Doubtless in general the intent of an agent, acting within the scope of his authority, may be imputed to the principal. But it is settled beyond question, that if any agent in good faith makes a loan for another and without the knowledge or authority of his principal and for the agent's own benefit exacts more than legal interest, the loan is not thereby rendered usurious. In such case the law does not impute the knowledge and the intent of the agent to the principal."

The above opinion seems to be the one prevailing.⁸

On the other hand, the supreme court of Nebraska, in *New England Mtge. Security Co. v. Hendrickson*,⁹ said: "It is said, however, that the principal is not bound by the acts of the agent when he exceeds his authority—that is, when he charges more than lawful interest or retains a portion of the principal, as in the case as a bonus. It is a sufficient answer to this objection to say that the agent is selected by the principal for the purpose of loaning its funds. The principal may require such security and impose such conditions upon such agent as it sees fit, and has the means at hand to protect itself from the illegal acts of its own employer."

And, again, in *Cheney v. Eberhardt*,¹⁰ the same court declared: "We hold it to be a salutary rule, and one that should be rigidly applied in all proper cases, that where one who is intrusted with the business of loaning money exacts for its use, either directly or indirectly, by whatsoever shift or device, interest in excess of the rate permitted by statute, the transaction is usurious, and will be judged accordingly."

The latter doctrine appears to have found favor with other courts, though it cannot be said to prevail.¹¹

Where it is the duty of the agent to examine the security and title, and he is intrusted with the interests of the lender in the transaction, and is responsible to the lender for mistakes, he is the agent of the lender; and when he secures for his principal the highest legal rate of interest with the understanding that he is to look elsewhere for compensation, the lender should be held bound to know of the acceptance by his agent of a bonus and the loan be declared usurious;¹² and a mere recital in the application for a loan that the agent acts as the agent of the borrower, and not of the lender, will not change the real character of the transaction.¹³

In applying the doctrine that a lender is bound to know whether his agent accepts a bonus in addition to legal interest, a distinction has been made in some cases between a special agent engaged in making a particular loan, for whose action outside his authority the principal is not liable, and a general agent for the purpose of making loans, for whose actions in taking more than a legal rate of interest the loan will be declared usurious.¹⁴

CHAS. A. ROBBINS.

LINCOLN, NEB.

¹ *Rogers v. Buckingham*, 38 Conn., 81; *Payne v. Newcomb*, 100 Ill. 611; *Smith v. Wolf*, 55 Iowa, 555; *Gokey v. Knapp*, 44 Id. 82; *Brigham v. Myers*, 51 Id. 397; *Acheson v. Chase*, 28 Minn. 211; *Strait v. Frary*, 33 Id. 194; *Jordan v. Humphrey*, 31 Id. 496; *Mulr v. Newark Savings Inst.*, 16 N. J. Eq., 587; *Conover v. Van Mater*, 18 Id. 481; *Condit v. Baldwin*, 21 N. Y. 219; *Bell v. Day*, 32 Id. 165; *Esteves v. Purdy*, 66 Id. 447; *Guardian Mut. Life Ins. Co. v. Kashaw*, Id. 544; *Van Wyck v. Waters*, 81 Id. 385; *Algur v. Gardner*, 54 Id. 360; *Barretto v. Snowden*, 5 Wend., 181; *North v. Sergeant*, 33 Barb. 350; *Fellows v. Commissioners*, 36 Id. 665; *Elmer v. Oakley*, 3; *Lansing* 34; *Coster v. Dilworth*, 8 Cow., 299; *Hopkins v. Baker*, 2 P. & H., (Va.) 110; *Dagnell v. Wigley* 11, East. 48; *Solarte v. Melville*, 7 B. & C., 429; *Tyler on Usury*, 156 *et seq.*

² 18 Neb. 157.

³ 98 Neb. 423.

⁴ *Austin v. Harrington*, 28 Vt., 130; *Philo v. Butterfield*, 3 Neb. 256; *Cheney v. White*, 5 Id. 261; *Cheney v. Woodruff*, 6 Id. 151; *Courtney v. Price*, 12 Id. 188; *Olmstead v. New England Mtge. Security Co.*, 11 Id. 487. And see *Payne v. Newcomb*, 100, Ill. 611.

⁵ *Payne v. Newcomb*, 100, Ill. 611.

⁶ *Olmstead v. New England Mtge. Security Co.*, 11 Neb. 487.

⁷ *Baxter v. Buck*, 10 Vt. 548; *Austin v. Harrington*, 28 Id. 130. And see *Rogers v. Buckingham*, 38, Conn. 81.

¹ *Beadle v. Munson*, 30 Conn. 175; *Hutchinson v. Homer*, 2 Id. 341; *Eddy v. Badger*, 8 Bissell, 238; *Wyllis v. Ault*, 46 Ia. 46; *Dickey v. Brown*, 56 Id. 426; *Ballinger v. Bowland*, 87 Ill. 518; *Philo v. Butterfield*, 3 Neb. 256; *Cheney v. Woodruff*, 6 Id. 151; *Gray v. Blareom*, 29 N. J. Eq. 454; *Nichols v. Osborn*, 8 Atl. Rep. 155; *Fisher v. Porter*, 23 Fed. Rep. 162.

² *Wyllis v. Ault*, 46 Ia. 46.

³ *Dickey v. Brown*, 56 Ia. 426; *Jordan v. Humphrey*, 31 Minn. 495.

⁴ *Eslava v. Crampton*, 61 Ala. 507.

⁵ *Smith v. Wolf*, 55 Ia. 555; *Acheson v. Chase*, 28 Minn. 211; *Thurston v. Cornell*, 38 N. Y. 281; *Eaton v. Alger*, 2 Keyes, 41; *Kent v. Phelps*, 2 Day, 483.

⁶ *Payne v. Newcomb*, 100 Ill. 611; *Gokey v. Knapp*, 44 Ia. 82; *Demarest v. VanDenberg*, Atl. Rep. 69 Bonus v. Trefz, 2 Id. 369.

⁷ *McCrary C. C. 522*; s. c., 7 Fed. Rep. 737.

WEEKLY DIGEST OF RECENT CASES.

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1. AGENCY — *Principal and Agent — Liability of Principal for Act of Agent—Private Instructions.*

—A principal is bound for the acts of his agent, done within the scope of his authority, and the principal will also be responsible for the unauthorized acts of the agent where the conduct of the principal justifies a party dealing with the agent in believing that such agent was acting within, and not in excess of, the authority conferred on him. Where an agent is held out to the world as one having the authority of a general agent, any private instructions or limitations not communicated to the persons dealing with such agent will not affect them, nor relieve the principal from liability, where the agent oversteps such limitations. *Bank v. Everest*, 8. C. Kans. Nov. 5, 1886; 12 Pac. Reps. 141.

2. BANKS AND BANKING — *National Banks — Increase of Stock—Change of Increase—Rights and Liabilities of Shareholders — Subscription—Payment under Section 5205, Rev. St. U. S., not Discharge of Liability under Section 5151.*

—Where a national bank undertakes to increase its capital stock a certain amount, and a smaller amount is actually paid in, it can reduce the amount of the increase to the amount actually paid; the amount of increase within the maximum being always subject to the discretion of the bank. Where a shareholder of a national bank subscribes to a certain increase of stock, and pays his subscription, and the bank afterwards reduces the amount of the increase, he waives all right to deny that his agreement binds him as a subscription to the reduced amount, when he pays on his new stock an assessment declared by the bank, after it has become insolvent, to prevent its business from being closed under the notice of the comptroller of the currency provided for in section 5205, Rev. St. U. S. The payment of an assessment imposed by a bank on its shareholders under section 5205, Rev. St. U. S., in order to continue business and avoid liquidation, is not a discharge of a shareholder's liability under section 5151, Rev. St. U. S., for the obligations of the bank to the extent of the amount of his stock at par value in addition to the amount invested in his shares. *Delano v. Butler*, 8. C. U. S., Nov. 1, 1886; 7 S. C. Rep. 39.

3. CARRIERS — *Limitation of Liability by Contract — Free Pass—New Trial—Special Verdict Setting Aside Findings — Negligence — Degrees — Special Findings — Causing Death — Evidence — Support — Damages — Appeal — Harmle*

Error — Introduction of Evidence — Verdict — Special Verdict—Instructions of Jury—Misstatement of Law Corrected—Excessive Damages.—Where the acceptor of a gratuitous pass from a railroad company "assumes all risks of accident, and especially agrees that the company shall not be liable, under any circumstances, whether of negligence of their agents or otherwise, for any injury to his person," the contract relieves the company from liability for damage to him by reason of a want of ordinary care of its servants, unless the same is expressly made a crime. Where a special finding in a special verdict is set aside, a new trial should be ordered, unless it clearly appears that the finding is wholly immaterial, and can have no effect upon the judgment. Where a rescuing engine approached a stalled train in a snow storm without stopping or slackening speed, the fact that the jury made an erroneous special finding that the engineer of the rescuing engine could have seen the train in time to have stopped before running into it is no ground for setting aside a special finding that the negligence of the engineer was gross. In an action for damages for negligence causing the death of plaintiff's husband, it is material for her to show that she had no means of support except what he furnished her, as tending to prove that his death had caused her a pecuniary loss. The admission of incompetent evidence, which a special finding of the jury shows to have had no weight with them, is not a prejudicial error. The special verdict in this case is held definite and certain, and sufficient to sustain the judgment. In the charge to the jury a misstatement of the law, made apparently by mistake, and not in ignorance of the law, and followed by a correct statement of the law on the subject, is not a prejudicial error as having misled the jury. In an action for damages for death of plaintiff's husband, where deceased was 55 years old, in fair health, and capable of earning \$2.25 per day of 10 hours, and his family were, to a large extent, dependent on his labor for their support, a judgment of \$2,500 will not be disturbed as excessive. *Annes v. Milwaukee, etc. Co.*, 8. C. Wis. Nov. 3, 1886; 30 N. W. Rep. 282.

4. COMMERCIAL LAW—*Promissory Note—Indorsement—Accommodation—Usury — Affidavit of Defense—Sufficiency of.*—A having received a promissory note in the regular course of trade, indorsed it in blank, and handed it to B, without receiving any consideration therefor. B did not indorse it, but handed it to C, who indorsed it to D, the latter bringing suit thereon against A. A filed an affidavit of defense, alleging that the note, though in the possession of D, belonged to C, who knew that A had received no consideration, but that it had been indorsed for the accommodation B, and B was entitled to a credit on said note for C's failure to deliver a certain order, and for another amount, exacted by C as usurious interest. Held, that this was a substantial defense to a part of the note, and that the court erred in entering judgment for want of a sufficient affidavit of defense. *Gunnis v. Weigley*, 8. C. Penn. Oct. 4, 1886; 6 Atl. Rep. 463.

5. CONFLICT OF LAW.—*Promissory Note Governed by Laws of State Where Made—Defenses—Statute of State may Change Operation of Law—Merchant.*—Where promissory notes are made in Kentucky, and mailed to the payees, doing business in Boston, and made payable at the Kentucky Nat-

ional Bank, they are contracts of that state, and are to be governed by its laws. The statute of a State which gives the maker of a note the right to set up in defense any discount or offset that the defendant has and might have used against the original payee, or any intermediate assignee, before notice of the assignment, is constitutional and valid, although it changes absolutely the operations of the law-merchant, so far as it affects contracts made and to be performed within the State. *Shoe, etc. Bk. v. Wood*, S. J. C. Mass., Oct. 23, 1886; 8 N. E. Rep. 753.

6. CONSTITUTIONAL LAW—*Title of Statute—Subject Embraced*.—The Michigan act of 1883 (page 191), entitled "An act to provide for the incorporation of merchants' mutual insurance companies, and to regulate the business of insurance by merchants' and manufacturers' mutual insurance companies," is obnoxious to the constitutional provision that "no law shall embrace more than one object, which shall be expressed in its title." The first object, the incorporation of merchants' mutual insurance companies, and the second, the regulation of the business of insurance by merchants' and manufacturers' mutual insurance companies, have no necessary connection with each other. Such a statute cannot be supported by maintaining it as to one of its objects, and rejecting it as to the other. *Skinner v. Wilhelm*, S. C. Mich. Nov. 11, 1886; 30 N. W. Rep. 311.

7. CORPORATION — *Corporate Stock — Transfers — Lien of Corporation—Additional Security—Corporate Liabilities—For Acts of Agents*.—Where the charter of a corporation provides that no stockholder indebted to the corporation shall be permitted to make any transfer of his stock, or receive any dividend, until such debt is paid, or secured to the satisfaction of the president and board of directors, the corporation has a legal lien upon the stock held by its stockholders to secure the payment of any debt that such stockholders may owe it. Where a corporation which, by its charter, has a lien upon the stock of its stockholders for the payment of their indebtedness to it, takes from such debtors other security, it does not thereby, without affirmative evidence to the contrary, waive its lien upon the stock. An employee of a corporation who has no power to transact the general business of the corporation with third persons, and who is well known to have no such power, cannot, by any act of his, waive for the corporation the lien which its charter gives it on the stock of its stockholders for the payment of their indebtedness to it. *Kenton, etc. Co., v. Bowman*, Ky. Ct. App. Nov. 11, 1886; 1 S. W. Rep. 717.

8. CRIMINAL LAW—*Homicide—Justification—Self-Defense—Killing Through Fear of Life—Insanity — Who Capable of Committing*.—Where the accused leaves the stable where the quarrel arose, and, having obtained a shot-gun at the family residence, returns, and shoots the deceased, the court will not reverse a verdict of manslaughter, the right of self-defense not authorizing one to hunt up his adversary, and slay him under the idea that it is necessary to save his own life. Where the defense of insanity is interposed, the burden of proof is on the defendant; and, where the accused did the killing in a state of mind bordering on imbecility, an instruction to the jury that if defendant's mind was so feeble as not to enable him to distinguish right from wrong, or

had not sufficient power of control to govern his action by reason of mental weakness, they should acquit, is not error. *Farris v. Commonwealth*, Ky., Ct. App., Nov. 14, 1886; 1 S. W. Rep. 729.

9. — *Murder — Evidence — Examination of Witness — Confession — Character of Deceased*.—On trial for murder, the court, in its discretion, may permit the district attorney to call the attention of witnesses to particular facts after they have gone through the story of the crime without interruption. In a trial for murder, testimony of a witness as to the confession of a prisoner after arrest is admissible, where such confession is not made under the influence of fear produced by threats, nor upon any promise of immunity from prosecution. On a trial for murder the court may properly exclude defendant's offer of evidence to show in support of a plea of justifiable homicide, that the deceased had treated his domestic animals with cruelty. The testimony must be to general reputation, and evidence of specific acts is inadmissible. Testimony to general reputation, in support of a plea of justifiable homicide, to show that deceased robbed his father of his grave clothes, when in his coffin, and wore them at his funeral, is wholly irrelevant. *People v. Druse*, N. Y. Ct. App., Oct. 26, 1886; 8 N. E. Rep. 735.

10. — *Threats, Effect of, to be Considered by Jury—Admissibility of Dying Declarations—Res Gestæ*.—One against whom threats are made is not justifiable in assaulting the one who makes such threats, unless the latter makes some attempt to execute his threats. A mere intent to commit a crime is not a crime—an attempt to perpetrate it is necessary to constitute guilt in law. In an indictment where the plea of self-defense is interposed for murder, the jury are to consider threats made by the deceased, and his character as a turbulent and dangerous man, in determining the question as to who was the assailant, and whether the defendant had reasonable grounds to apprehend and did apprehend that he was in imminent danger of sustaining great bodily harm, and an instinct which ignores the considerations is improperly given. Declarations made by the deceased to his wife, very soon after he had been shot by the defendant, after he had gone about two hundred yards from the place where he had been shot, and after his wife had gone more than one hundred yards to join him, to either, "Oh, hun, he has shot me," or "Oh hun, he has killed me," (the wife not being clear as to which expression was used,) are not admissible as part of the *res gestæ* (1 Green, Ev. § 108), nor as dying declarations. If the deceased had said "Oh, hun, he has killed me," which, taken in connection with the nature of his wound, and the short time after the shot before he died, would tend to show that he was impressed with the fact that the wound would be fatal, thus bringing it within the rule that it was made "under a sense of impending death," and hence rendering it admissible within the meaning of the rule of dying declarations. *State v. Rider*, S. C. Mo., Nov. 15, 1886.

11. — *Receiving Stolen Property—Presumption From Possession—Defendant Witness in His Own Behalf—Impeachment of—Cross-Examination—Testimony as to Character—Single Acts of Moral Delinquency Inadmissible—Possession of Stolen Property—Defendant Charged with Receiving—No Presumption of Guilt*.—When a defendant be-

comes a witness in his own behalf he is subject to the same rules and may be impeached as any other witness, except that upon his cross-examination he can only be inquired of concerning matters he has testified to in his examination-in-chief. Witness as to character should not be permitted to give evidence as to single acts of moral delinquency. The possession by a defendant of stolen property recently after the theft raises a presumption that he stole it, but such possession by a person who is charged with receiving stolen property, "knowing it to be stolen," does not raise a presumption that he had knowledge that it was stolen. *State v. Bulla*, S. C. Mo., Nov. 15, 1886.

12. DAMAGES—Penalty or Liquidated Damages—Breach of Contract—Fixed Sum, When a Penalty.

—Where H sells his business and good-will to G, and, as a part of the same transaction, executes a written instrument, in which he says: "I * * * bind myself in the sum of \$500" that I will not engage in such business, at the same place, for the period of five years: held, that the sum named in the instrument is a penalty, and not liquidated damages; and, for a breach of the agreement by H, G may recover only his actual damages. Whenever a party binds himself in a fixed sum for the performance or non-performance of something, without stating whether such fixed sum is intended as a penalty or as liquidated damages, and without regard to the magnitude or the number of any breaches that might occur, or the amount of damages that might ensue, and the contract is such that it may be partially performed and partially violated, such fixed sum must be considered as a penalty, and not as liquidated damages. *Heatwole v. Gorrell*, S. C. Kans., Nov. 5, 1886; 12 Pac. Rep. 129.

13. DRAINS—Notice—Estoppel—Signing Petition.

—Where land-owners are parties to a petition to establish a ditch of which some notice, although insufficient, is given, and they have actual knowledge of such petition, and the proceedings thereunder, they will, in case they permit without objection, money to be expended on the faith that such proceedings were valid, be precluded from afterwards questioning the sufficiency of the notice. *Peters v. Griffee*, S. C. Ind. Oct., 30, 1886; 8 N. E. Rep. 727.

14. EJECTMENT—Pleading—General Denial—Evidence—Equitable Defense—Defense of Equitable Title in Stranger.—Under a statutory general denial in an action for recovery of real estate, any facts which show that according to the principles of equity, as applied by courts of chancery, the plaintiff ought not to recover possession of the land in controversy, may be given in evidence to defeat a recovery. In an action to recover possession of real estate, the defendant in possession cannot defend on the ground that a stranger, with whom he is not in privity, is the equitable owner thereof, and entitled thereto by reason of a mistake in a deed by which it was intended to convey the real estate in controversy to such stranger, but under which the defendant makes no claim. *East v. Pedin*, S. C. Ind., Oct. 27, 1886; 8 N. E. Rep. 722.

15. EQUITABLE ACTION TO REDEEM—Absence of Tender Unimportant—Laches, When it Has Rights—Limitation, Analogous Rule to Law Not Followed, When—Purchaser of Equity of Redemption, When—Permitted to Redeem.—In an equitable proceeding having for its object the setting

aside of a sale made under a deed of trust and for permission to redeem the property, for an accounting of rents and profits, and that the title be decreed to vest in plaintiffs on payment by them of the balance found to be due defendant, and for general relief, the fact that no tender of money due was made in the petition is not important. Where the suit is not brought for nearly three years after the sale, and where it appears that in the meantime defendant had repaired the premises, paid taxes and effected insurance, and the plaintiff being fully cognizant of all that had occurred, such laches will bar plaintiffs' suit. 63 Mo. 56; 2 Wall. 94; 94 U. S. 807; 91 U. S. 591; 67 Mo. 181. Courts of equity when enforcing legal or analogous rights, as in administering remedial justice, will generally adopt that limit of time prescribed by the statute of limitations (*Adams Eq.*, 227), but when the relief sought is based upon a right purely equitable, where it is cognizable alone in a court of conscience, that court acts solely upon its own inherent rules, altogether outside of and independent of the statute of limitations. Where a plaintiff is a mere purchaser of the equity of redemption he can not prevail in the suit without paying off the debt, principal and interest, taxes, repairs, etc. *Kline v. Vogel*, S. C. Mo. Nov. 15, 1886.

16. EQUITY—Sale by Order of Court—Confirmation—Lands Held in Fee-Simple.—In an equitable proceeding, under the Kentucky Civil Code, § 491, by the owner of a life-estate against the owners of the remainder, for the sale of the lands, where it appears that two tracts of land are directed to be sold, and that one of these tracts is held by the petitioner in fee-simple, and the court had no power to direct a sale of it, the order confirming the sale cannot stand; but, before setting it aside, the court will give the petitioner a reasonable time within which to tender a deed of conveyance sufficient to pass the title of the tract held in fee-simple, and if such deed be tendered, will confirm the sale, but if not tendered, will set it aside *in toto*. *Munnell v. Orear*, Ky. Ct. App., Nov. 13, 1886; 1 S. W. Rep. 725.

17. EVIDENCE—Dying Declarations—Homicide—Appeal—Absence of Notice—Conduct of Trial—Relative of Deceased Advising the Prosecuting Attorney—Criminal Law—Prosecution Calling Witness After Closing—New Trial—Newly-Discovered Evidence—Cumulative—Ignorance of, Not Explained.—Repeated declarations of deceased that the accused was his murderer, made in full knowledge that he would have to die in a few hours, are admissible. Where the question is whether it was the accused who committed the offense, and the evidence points with almost unerring certainty to him as the guilty party, a verdict of guilty will not be disturbed because no motive appeared or is suggested for the act. Permitting a witness who is a kinsman of the deceased, to be present at the trial, and advise with the prosecuting attorney, is not error. Where the prosecution, after it has closed, is permitted to call another witness, whose testimony proves to be stronger for the accused than against him, and there is no error of which he can complain. When newly-discovered evidence, on which a motion for a new trial is based, is only cumulative testimony, and that of intimate friends of the accused, and no reason is assigned why their testimony was not made known to him and his attorney during the trial, the motion will

be denied. *Marcum v. Commonwealth*, Ky. Ct. Appis., Nov. 13, 1886; 1 S. W. Rep. 727.

18. EXECUTORS AND ADMINISTRATORS—*Action Against, in Regard to Settlement of Estates—Heirs and Distributees—Surcharge and Falsification—Limitation of Action Against—Exceptions.*—The heirs and distributees of the estate of a father or a mother cannot maintain a suit to surcharge the accounts of the administrator of their grandfather's estate. The grandfather's distributees, or, after their death, their personal representatives, are the proper parties plaintiff for that purpose. Where an administrator has made a final settlement of his accounts, and twelve years afterwards a suit for surcharge and falsification is brought by plaintiffs without showing themselves, by allegation or proof, to be within the exception of the statute of limitations, the statute will be a bar to the suit, and no relief will be granted. *Hordage v. Hordage*, S. C. Ark., Oct. 23, 1886; 1 S. W. Rep. 707.

19. — *Bill to Set Aside Fraudulent Conveyance—Parties—Purchaser—Knowledge of or Participation in Fraud.*—Where a bill is filed by an administrator, under the Michigan statute, against several grantees holding by conveyance from one to the other, to set aside a deed made by his decedent as fraudulent as to creditors, and to subject the property to the payment of his debts, if the first grantee who disposes of the same by a warranty deed is not also made a party, the bill will be dismissed. To render a conveyance void for fraud upon creditors, it is necessary that the grantee should have a knowledge of, and in some way participate in, the fraud. *Fraser v. Passage*, S. C. Mich., Nov. 11, 1886; 30 N. W. Rep. 324.

20. — *Insolvent Estates—Recognizance in Partition Not Satisfactory by Fact of Insolvency.*—The fact that a decedent's estate is insolvent does not, by operation of law, satisfy a recognizance given by one of the heirs to the others upon partition proceedings in the course of administration. *Appeal of Gabler*, S. C. Penn., Oct. 18, 1886; 6 Atl. Rep. 449.

21. FRAUDULENT CONVEYANCES—*Presumption of Fraud—Creditor's Bill.*—Where a creditor takes a chattel mortgage on the goods of a trader to secure a debt subject to a prior mortgage, but omits to file his mortgage for five months, and subsequently purchases the prior chattel mortgage, and a further debt for which the owners had attached the goods, and holds possession by virtue of such purchase till the debtor has given him a mortgage covering all the debts, and the debtor then transfers his business and goods to his wife, who assumes his debts, such transactions do not raise such an irresistible presumption of fraud as will entitle a judgment creditor (who had sold the debtor goods during the interval between the execution and filing of the first-mentioned mortgage) to subject the property to his judgment; the fraud being denied, and such judgment creditor having obtained no lien upon the property. *Krolik v. Root*, S. C. Mich., Nov. 11, 1886; 30 N. W. Rep. 339.

22. FRAUD—*Statute of Frauds—Pleading—Suit for Specific Performance—Part Performance—Exchange of Lands—Witness—Transactions With Deceased Persons—"Interested Witness" Defined.* In a suit for specific performance of a contract to

convey lands, defendant cannot avail himself of the statute of frauds as a defense, unless the want of compliance with the statute appears upon the face of the pleadings. Where, in pursuance of an agreement for the exchange of lands, one party has conveyed, this is such part performance as will take the case out of the operation of the statute of frauds. In determining who is an interested witness, and therefore incompetent, under the statute, as to transactions with deceased persons, as against representatives, the test is whether the witness will either gain or lose by the direct legal operation and effect of the judgment, or whether the record will be legal evidence for or against him in some other action. *McClure v. Otrich*, S. C. Ill., Oct. 7, 1886; 8 N. E. Rep. 784.

23. INSOLVENCY—*Liability of Assignee—Omission from Dividend of Accounts Properly Filed, but Misplaced.*—The assignee of an insolvent estate is responsible for the exercise of good faith and reasonable diligence in the administration of his trust, and such is the measure of his liability. Accordingly, where an assignee used reasonable diligence in searching for and in endeavoring to ascertain what releases of their claims against an insolvent had been filed by creditors with the clerk in pursuance of the statute, and the releases of certain creditors which had been actually filed, but had been, by mistake, misplaced among the files in another case, and of the filing of which no notice was given him, were not found, and did not come to the knowledge of the assignee till after the distribution by him in good faith, upon an order of the court, of the assets among the other creditors who had filed releases, held, that such assignee was not personally liable for the amount of the dividends claimed by the creditors so omitted in such distribution. *In re Robbins*, S. C. Minn., Nov. 9, 1886; 30 N. W. Rep. 304.

24. INSURANCE—*Fire Insurance—Action—Evidence—Opinion—Value of Horses.*—Where the question, whether the defendant had an insurance on certain property or not, arises incidentally in the case, and the plaintiff proves that he had, and the defendant afterwards, by his own testimony, shows that he had, it is immaterial whether the evidence showing in the first instance that he had such an insurance is competent or not. Where a witness is shown to have been a farmer and a livery-stable keeper, and that he has dealt in horses, and has some knowledge of the value thereof, he may testify with regard to the value of particular horses which he has known and owned; and it will generally be presumed, in the absence of evidence to the contrary, that a dealer in any particular kind of articles has sufficient knowledge of the value of such articles that he may testify with regard thereto. *Reed v. New*, S. C. Kan., Nov. 5, 1886; 12 Pac. Rep. 139.

25. — *Authority of Agent—Alteration of Policy—Application for Alteration in Policy.*—An agent or broker of a fire insurance company who has been authorized to deliver a policy issued by it, and to receive the premium therefor, has no power or authority, unless expressly conferred, to bind the company, by subsequently altering the contract of insurance, by the insertion of a clause binding the company to pay the loss to one other than the assured, though such policy was written upon the application of the agent for the assured. An agent receiving from the assured an application for a change in a policy of insur-

ance, and undertaking to procure such change, is to be treated as the agent of the assured, and not of the company.—*Duluth, etc. Bank v. Knoxville, etc. Co.*, S. C. Tenn., Oct. 30, 1886; 1 S. W. Rep. 689.

26. JUDGMENT—Court of General Jurisdiction—Presumption—Lapse of Time—Execution—Sale—Sheriff's Return—Amendment—Confirmation of Sale—Trusts—Resulting and Secret Trusts—Infants—Disaffirmance of Contract—Reasonable Time—Statute of Limitations—Retroactive Laws—Deeds—Execution in Foreign State—Evidence—Certification.—Where a court of general jurisdiction has rendered judgment in a case, under which the real estate of one of the defendants has been levied upon and sold, and the sale confirmed, and a deed made to the purchaser, the court will not, upon slight evidence, after a great lapse of time, hold that it was without jurisdiction. The court, in furtherance of justice, may, after a sale of real estate upon execution and a return of the officer, permit the officer to amend the return to conform to the facts; and, where it is clear that the amendment should be made, the lapse of eight or nine years will not bar the right, but in such case care must be exercised by the court to prevent an abuse of power. In this State the confirmation of the sale covers all irregularities in the proceedings. Lands conveyed by a warranty deed are not subject to a secret trust in favor of the grantor; and particularly is this true where the lands are afterwards sold at judicial sale as the property of the grantee, and conveyed to an innocent purchaser. A minor who has conveyed his real estate must disaffirm his deed within a reasonable time after he comes of age, or be barred of the right. The act of 1869, which reduced the period of limitation in which an action to recover real estate could be brought from 21 years to 10 years, and gave a reasonable time in which to bring actions before it took effect, applies to causes of action existing before the passage of the statute. A deed of real estate executed in another State before an officer having no seal, to be admissible in evidence, must be certified in the manner provided in the statute.—*O'Brien v. Gaslin*, S. C. Neb., Nov. 4, 1886; 30 N. W. Rep. 274.

27. NEGLIGENCE—Contributory Negligence—Employment on Railroad Track.—Where the engineer of a railroad company on an overdue train describes a man on the defendant's track three-quarters of a mile ahead, going in the same direction, on a straight track, in broad daylight and blows his whistle and rings the bell, but, the man apparently taking no notice thereof, and continuing to walk on the track, the engineer knocks down and kills him, there is no excuse shown for running the engine over him, even if the man had turned and faced the train; and the deceased, being an employee, and rightfully on the track, will not be held guilty of contributory negligence that would prevent a recovery of damages by his administrator.—*Baumelster v. Grand Rapids, etc. Co.*, S. C. Mich., Nov. 11, 1886; 30 N. W. Rep. 337.

28. NUISANCE—Overflowed Land—Trespass—Continuing Nuisance—Notice—Evidence—Pennsylvania Act May 2, 1876—Special Damage Claimed—Nominal Damages Recovered—Damages to Time of Trial.—The object of the Pennsylvania Act of May 2, 1876 (P. L. 95), is to avoid multiplicity of suits, and in an action of case by the owner of land overflowed by the unlawful

erection and maintenance of a dam, the plaintiff, who has given the notice required by that act, may introduce evidence tending to show that after suit brought the defendants persisted in continuing and strengthening the dam, which constituted the alleged nuisance. In an action for overflowing the plaintiff's land by the erection of a dam on the defendant's land, where the nature and extent of the alleged injury are specially described in the declaration, the failure to prove the damages as alleged, does not prevent the recovery of nominal damages. Where the plaintiff in an action of trespass on the case for a continuing nuisance gives 15 days' notice, under the Pennsylvania act of May 2, 1876 (P. L. 95), he is entitled to recover such damages, not barred by the statute of limitations, as he has suffered up to the time of trial. This act is to avoid a multiplicity of suits, and the damages suffered between the bringing of the suit and the trial, do not constitute a new cause of action.—*Humphrey v. Irvin*, S. C. Penn., Oct. 4, 1886; 6 Atl. Rep. 479.

29. POST-OFFICE—Railroad Companies—Land Grant—Postal Service Contracts—Contract Implied From Service—Government Mail Contracts—Postal Regulations.—Where, in the condition for the carrying of the United States mails, attendant upon the land grant to a railroad corporation, the postmaster-general is empowered to establish the price until fixed by congress, such power includes the power to prescribe the period of its duration which is in his discretion, unless collateral stipulations, which could not be enforced without consent of the company, are annexed to the agreement with him. In that case a contract is created which cannot be disregarded by the government without a breach of good faith. The plaintiff, a railroad company, carried the United States mails for four years under a written contract with the postmaster-general. It was bound to carry the mails, under the terms of its land grant, at such prices as congress should, by law, direct. After the expiration of the written contract the company continued to perform the same services for four years more, receiving pay for some months at the old rate, then at a reduced rate fixed by the postmaster-general, and then at rates reduced twice successively by acts of congress, of which the plaintiff received notice. Held, on action to recover the difference between the rates as reduced by congress, and the rate fixed by the postmaster-general, no right could be implied against the government from the continuance of the services, nor was plaintiff bound by the terms of its written contract. A regulation of the post-office department that contracts in a section of the country are to be let for four years, cannot be held to impose any obligation on the postmaster-general so that a contract, to be implied from services rendered after the expiration of a written contract, should be construed to last four years, but is merely designed to further the administration of business.—*Jacksonville, etc. Co. v. United States*, S. C. U. S., Nov. 1, 1886; 7 S. C. Rep. 48.

30. Railroad Company—Master and Servant—Action to Recover for Personal Injuries Sustained by Servant—Pleadings—Allegations of Negligence in Petition—Evidence Supports Action—Contributory Negligence—Danger of Risk to Servant by Continuing the Employment—When Question for Jury.—In an action against a railroad company by its former servant to recover damages for personal

injuries, the petition charges a failure of duty on the part of defendant to furnish a sufficient number of servants in conjunction with plaintiff to carry on the business, that defendant was duly notified of the insufficient help, and by reason thereof plaintiff was injured without contributory negligence on his part, it states a cause of action. The rule stated in Thompson on Neg. p. 1050, *held* to be supported by cases not in accord with the Missouri rule. *Petty v. H. & St. J. R. R.* Evidence examined and held to support substantially the allegations in the petition that plaintiff's hand was injured by the collision of the cars, that the help was insufficient, that the testimony establishes a legal connection between the injury to the plaintiff and defendant's negligence. Where a plaintiff remains at work with insufficient help to properly discharge the duties imposed upon him and his co-laborers, as where engaged in switching cars with only three men, when four should have been provided, he is not thereby, chargeable with negligence, if the danger or risk is not such that as a prudent man he was bound not to assume it, and refuse to continue in the service: *Shearm. & Red. Neg.* (3d ed.) p. 125; *Wood's Ry. Law* p. 1460; *Wood's Master and Servant*, p. 761; *Snow v. Housatonic R. R.*, 8 Allen, 450; *Patterson v. R. R.*, 76 Pa. St. 118; *Tiler v. R. R.*, 49 N. Y. 60; *Clarke, v. Holmes*, 7 H. & N. 942. If the defect and insufficiency in the appliances is so great that obviously with the use of great caution the danger was imminent, then, as a matter of law, the servant who incurs the risk is guilty of contributory negligence and cannot recover; but if upon this question there is substantial doubt it is one of fact for the jury, and a nonsuit or demurrer to the evidence is not permissible. * *Wood's Ry. Law* p. 1460; *Wood's Master and Servant*, p. 761; *Conroy v. Vulcan Iron Works*, 62 Mo. 39. *Thorpe v. Mo. Pac. R. R. Co.*, S. C. Mo. Nov. 15, 1886.

31. **SALE—Purchaser's Rights and Remedies—Damages—Recoupment.**—When an article is sold, accompanied with a warranty, direct or implied, and it proves defective or unfit for the use intended, the purchaser may, without returning or offering to return it, and without notifying the vendor of the defects, bring his action for the recovery of damages; or, if sued for the price, may set up and have such damages allowed him by way of recoupment from the sum stipulated to be paid. *Buffalo, etc. Co. v. Phillips*, S. C. Wis., Nov. 8, 1886; 30 N. W. Rep. 296.

32. **SHERIFF—Action Against for Failure to Serve Writ of Attachment—Defense that Assignment had been Made—Bond of Assignee.**—In an action against a sheriff for damages on account of his failure and neglect to serve a writ of attachment, when the defense is set up that the property upon which he was directed to levy had been transferred to an assignee by assignment for the benefit of creditors, it is incumbent upon the defendant to show that a bond had been filed by the assignee within the time required by statute, or that creditors had intervened to enforce the assignment. *Beard v. Clippert*, S. C. Mich., Nov. 17, 1886; 30 N. W. Rep. 823.

33. — **Partition Sale—Failure to Pay Over Proceeds—Record—Prima Facie Evidence.**—Where the record showed in a partition suit that the property was ordered to be sold by the sheriff, and the proceeds divided among the parties, according to their interests, and the sheriff's

report showed he did sell the land, and received the cash payment, and it appears that his report was duly approved by the court, *held*, in an action on the bond of the sheriff against him and his sureties therein, brought by the plaintiff, who the record showed had a certain interest in the property, that he thereby established a *prima facie* case against the sheriff and his sureties, and is entitled to recover from them his portion of the cash payment, though no further order of distribution has been made by the court after the sale. *State ex rel. v. Frazier*, S. C. Mo., Nov. 15, 1886; 1 S. W. Rep. 739.

34. — **Writ of Execution—Informality—Failure to Sell and Make Return—Liability—Failure to Return Process—Instructions from Plaintiff's Attorney.**—When a sheriff has accepted a writ of execution, and levied upon it, but has failed to make a sale and return within the time specified by law, it is no defense to an action against him for such failure that the clerk of the court had affixed a name other than his own to the writ, the error being matter of form, and amendable. If a sheriff is misled by the advice of plaintiff's attorney, so that he postpones the date of sale beyond the lifetime of a writ of execution, this, although it may furnish a satisfactory reason for not selling, and for not having the money to tender to the plaintiff, is no defense to an action by plaintiff for his failure to return the process within the time limited by law. *Jett v. Shinn*, S. C. Ark., Oct. 16, 1886; 1 S. W. Rep. 693.

35. **STATUTES—Repeal—New Provisions—Implication—Substitute—Criminal Law—Indictment—Statutory Offense—Words of Equivalent Import—Construction.**—Where an act contains no repealing clause, and makes no reference to an earlier one, but covers the whole subject and embraces new provisions, it will be held to be intended as a substitute for the first, and to operate as an implied repeal. An indictment upon a statute must state all the circumstances which constitute the statutory offense; no case being brought by construction within a statute unless it is completely within its words, or words of equivalent import. *Wood v. State*, S. C. Ark., Oct. 30, 1886; 1 S. W. Rep. 709.

36. **TRUSTS—Constructive Trust—Purchase at Mortgage Foreclosure.**—The only question in this case being one of fact, as to whether the defendant, a creditor of an estate under administration, purchased certain property of the estate sold under a mortgage, as trustee, and for the exclusive benefit of the widow and heirs of decedent, or for his own benefit, to satisfy his claim against the estate, and defendant having testified denying any such understanding, or personal acquaintance with defendants, and it appearing from the report of the commissioners that the profit he had made out of the land did not amount to his claim against the estate, and a balance was still owing to him, and on the evidence generally, *held*, that defendant was in no way proved to have acted as trustee for the widow and heirs. *Ball v. Gaff*, Ky. Ct. App., Nov. 13, 1886; 1 S. W. Rep. 724.

37. **VENDOR AND VENDEE—Lien—Payment in Personal Services—Bill to Enforce—Answer—Reply—Set-Off and Counter-Claim—Decree—Pleading—Practice.**—Where land is sold for a specific price in money, which it is agreed may be paid in personal services, the lien may be enforced if the services are not rendered. Where a bill was filed

for the foreclosure of a vendor's lien, and the answer contained a set-off and counter-claim, to which no reply was filed, the defendant may move for judgment upon the undenied plea; and if he fails to do so, and goes to trial as if the issue was made up, he cannot afterwards object that the decree against him was wrong, on the ground that the failure of the plaintiff to reply was a practical confession of the set-off and counter-claim which he had pleaded and claimed in the answer. Where P executed a note to F for a certain sum of money payable on a specified day, but to be discharged in fees as attorney, provided F's business amounted to so much, otherwise to be paid in currency, *held*, on bill in equity to collect the note, that as F had paid P for services already rendered, and had not withdrawn his business until after the maturity of the note, P could not plead, as a set-off, claims in his hands for collection, on which his fees would have amounted to so much if F had not withdrawn them. *Winters v. Fain*, S. C. Ark., Oct. 30, 1886; 1 S. W. Rep. 711.

38. **WAYS—Public Highway—Uses—Vacant Land—Prescription—Possession by Public Authorities.**—Where land is vacant and unoccupied, the mere fact that individuals travel over it and use it as a road for more than fifteen years, is not sufficient to constitute it a public highway. Where a road has been traveled for more than fifteen years, but has not been established under the statutes of the State, and has not been expressly dedicated nor impliedly dedicated, unless by prescription or limitation, and the land over which it runs was for several of the first years vacant and unoccupied, *held*, that such road is not a public highway by prescription or limitation, unless the public by its constituted authorities, took the possession of the road, and used it and maintained it as a public highway for at least fifteen years. *State v. Horn*, S. C. Kans., Nov. 6, 1886; 12 Pac. Rep. 148.

QUERIES AND ANSWERS.*

[Correspondents are requested to draw up their answers in the form in which we print them, and not in the form of letters to the editor. They are also admonished to make their answers as brief as may be.—Ed.]

QUERIES.

Query No. 34. Sec. 458, Rev. Stat. Mo. (attachment act) says, in all cases where property, etc., shall be attached the defendant may file a plea in the nature of a plea in abatement, verified by affidavit, putting in issue the truth of the facts alleged in the affidavit on which the attachment was sued out. Section 3521 (practice in civil cases) provides the answer for the defendant shall contain, first: A general or special denial of each material allegation of the petition controverted by defendant, or any knowledge or information thereof sufficient to form a belief, etc. On this state of the law, ought a plea in abatement, which "denies each and every allegation contained in the affidavit for the attachment," verified by affidavit, be held sufficient on a motion in arrest? S.

RECENT PUBLICATIONS.

A TREATISE ON THE LAW OF COMMERCIAL PAPER, containing a full statement of existing American and Foreign Statutes, together with the Text of the Commercial Codes of Great Britain, France, Germany and Spain. By Joseph F. Randolph, of the New Jersey Bar. In Three Volumes, with Appendix. Jersey City, N. J. Frederick D. Linn & Co. Law Publishers and Booksellers, 1886.

We have received the first and second volumes of this work (the third will, we learn, be issued within a month or two), and have examined them with much care and interest. In the first place, we may say that the arrangement and orderly division and subdivision of the subject leave nothing to be desired; the typography is excellent; each volume is complete in itself, with tables of cases and index, the latter of which is unusually large and exhaustive. In short, the book, as law book, is perfect.

As to matters of substance, this book bears unmistakable evidence of great labor and research, faithfully performed. As its title page indicates, it includes not only the law, controlling the subject, of the United States, but also the "commercial codes of Great Britain, France, Germany and Spain," and is, therefore, practically cosmopolitan, a compendium of the law relating the commercial paper of nearly the whole civilized world. The effort is certainly ambitious, but it is only fair to say that the performance is commensurate with the dignity of the undertaking. Of the magnitude of the subject some idea may be obtained by reflecting that, from the necessity of the case, the writer must treat of commercial paper, as affected by the relations and disabilities of parties, as alien, enemies, lunatics, drunkards, infants, *femes covert*, corporations, principals and agents, partners, executors, etc., to say nothing of the infinite variety of the irregular modes of transferring the title from one holder to another, and the effect and operation of insolvency and bankrupt laws.

All these subjects the author has treated with great care and in a singularly lucid style. Returning to matters of arrangement, we are impressed by several improvements upon the usual style of getting up law books. The index refers to the number of the sections, and that fact appears in the head-line of each page of the index; the citations of State codes, revised statutes, etc., bear the date of the publication of the volume, and in all citations of American cases appears the year of the Lord in which the decision was rendered. These may seem at first blush, to be small matters, but a little reflection will demonstrate that they are worthy of consideration, especially when applied to a subject, of which time is so much of the essence. In no branch of the law is the "modern instance" more potent than in that relating to commercial paper.

Take it altogether, we think the work before us is a very valuable addition to the literature of commercial law, and well worthy of a favorable reception by the profession.

JETSAM AND FLOTSAM.

SCENE IN CIRCUIT COURT.—Counsel—"What was the number of the locomotive engine?" Witness—"616." "How do you know?" "I saw it." "How?" "What are my eyes for?" "Where was the number?" "On the engine." "On what side of the engine?" "On the outside." And being fully answered, we presume the counsel had no more to say.

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